

Challenges and prospects to the realisation of gender justice in Africa

by

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DECLARATION

I declare that this thesis, which I hereby submit for the degree of Doctor of Laws at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

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DEDICATION

- To my son, Kachisieme, and
- To the memory of my father, Chief Isaac Ngozika Agwu, the Akuluo-uno 1 of Mgbowo, an Administrator and Justice of Peace (JP) for being the inspiration to be in the legal profession.

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SUMMARY

Advancing gender justice in countries such as Nigeria, South Africa and Zambia and in other countries in Africa is critical to the growth and development of the African society. Inheritance to property from the estate of a deceased father and/ or husband remains a critical resource to the development of the socio-economic conditions of many women in Africa. Unfortunately many are still disinherited, their property being forcefully grabbed and taken away by in-laws. Facing accusations of killing their husbands; many of these women are mandated to engage in demeaning cleansing ceremonies or widowhood practises.

This study established that there is an immediate need for a paradigm shift requiring a re-engineering of society, the law and systems of justice in order to change the manifestation of attitudes and conducts that viciously create and recreate the unequal status of gender insubordination that has been declared invalid through a variety of national and international standards.

Breaking new ground, this thesis calls for improved and more progressive yet sensitive means of accessing justice by way of Expanded Justice System (EJS). As a *sui generis* model to be established within the states, EJS should include all other forms of norm, rule-making and access mechanisms with the aim to creating that positive cultural context envisaged by Africa-based international human rights law for all persons; both women and men.

The continent through international human rights law such as the Protocol on the Rights of Women in Africa has created normative standard that ensures that women and men are equal before the

law with equal benefits of the law thereby guaranteeing various rights including the right to inheritance for women and children.

In Nigeria, South Africa and Zambia, many women, despite admirable normative developments continue to face discrimination, dispossession and loss of their dignity. The study establishes that there is a huge gap between the law, policy and what actually happens in practice. The challenge lies in the laws that are inadequate and ineffective for the majority who have limitations in having full and equal benefit of the law. For many women, the resources available to them in accessing justice for appropriate redress are inadequate thereby sustaining their inequality and discrimination.

The study reaffirms the importance of key role players in matters of culture such as the traditional leaders and their institutions and the prospects that such institutions bring towards ensuring gender justice. They are usually the first contact at the grassroots and so must be engaged with as the critical interface in dealing with the clash of culture and human rights for the benefit of all persons; men and women living within their various domains.

Keywords: gender justice, women, inheritance, succession, human rights, equality, customary law, culture, tradition, access to justice, courts, citizenship, development, traditional institutions.

List of Acronyms

AU	African Union
ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Court on Human and peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ATS	Alien Torts Statute
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
BCLR	Butterworths Constitutional Law Reports
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CILSA	Comparative and International Law of Southern Africa
COHRE	Centre on Housing Rights and Evictions
COSATU	Congress of South African Trade Union
ECCJ	Ecowas Community Court of Justice
EJS	Expanded Justice System
GC	General Comments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRW	International Centre for Research on Women
IDRC	International Development for Research Council

LFN	Laws of Federation of Nigeria
HRC	Human Rights Council
HSRC	Human Sciences Research Council
HRIs	Human Rights Institutions
HDI-R	Human Development Index-Report
MDGs	Millennium Development Goals
NWLR	Nigerian Weekly Law Report
NILR	Nigerian Internet Law Report
RTD	Right to Development
SALJ	South African Law Journal
SADC-T	Southern Africa Development Community, Tribunal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TCB	Traditional Courts Bill
UDHR	Universal Declaration of Human Rights
UN	United Nations
U.S.C	United States Constitution
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Social and Cultural Organisation
UNRISD	United Nations Research on International and Social Development
VSU	Victims Support Unit
WILSA	Women in Law in Southern Africa

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Constitution of the Republic of South African, Act 108 of 1996

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Chapter One

Introduction

1.1 Background to the study

The majority of women in many African countries are without status. Although they live in families but in ways that matter most in the development of their socio-economic conditions such as in inheritance; they are largely dispossessed and discriminated against. Several factors that could be responsible for this state of affairs include the patriarchal nature of African societies with different conceptions of rights on the basis of tradition and religion and those rights espoused by international human rights.¹ The consequence therefore becomes the constant clash between the two systems of law particularly in the area of equality of status between men and women. Further, the relationship between African traditional practices and culture and the status of women is at best to be described as hugely complicated on many levels with as much complexities.² The resultant effect is gender inequality and gender injustice for many women under customary law.³ For the most part, women are the victims and this study approaches the issues from that perspective.

¹ In most post-colonial Africa, there is received law and customary law which sometimes comprise indigenous and Islamic laws. See also, GJ Van Niekerk 'Legal Pluralism' in JC Bekker, C Rautenbach & NMI Goolam (eds) *Introduction to Legal Pluralism in South Africa* 2nd edition (2006) Butterworths, 5.

² TW Bennett 'The Compatibility of African Customary Law and Human Rights' (1991) *Acta Juridica* 18, TR Nhlapo 'The African Family and Women's Rights: Friends or Foes?' (1991) *Acta Juridica* 135; Anne Hellum Women's Human Rights and Legal Pluralism: Mixed Norms and Identities in Infertility Management in Zimbabwe in Cynthia Grant Bowman and Akua Kuenyehia (eds) *Women and Law in Sub-Saharan Africa* (2003) Sedco Publishers, Ghana 308; Niamh Reilly *Women's Human Rights: Seeking Gender Justice in a Globalizing Age* (2009) Polity Press, Cambridge.

³ The following terms depict the cause and effect of clash of culture and human rights. Gender Inequality results from systemic discrimination that particularly favours a superior treatment for men, thereby treating women differently based on

Across many countries of sub-Saharan Africa, gender inequalities exist under customary law in marriage relationship where women struggle with unequal power relations; in succession where they cannot 'fall into the shoes' of their fathers, and in inheritance where women's rights in land and property are hugely limited, and other gender-based actions that particularly undermine the rights of women.⁴ Issues of family, marriage, succession and inheritance fall under personal law and, as a result of public/ private divide majority of the concerns of women are most times excluded from the general guarantee of discrimination. Unfortunately, it is at this juncture that women suffer all kinds of discrimination.⁵

The issue of gender justice⁶ in this study is raised against the backdrop of the decisions of the courts in South Africa⁷ and Nigeria⁸

the notion of patriarchy. Gender Injustice then arises when occasions for differentiation demands that men and women be so treated to achieve equal result and it fails. In other words, substantive equality is where the process and outcome should be favourable to the particular gender requiring it in most cases; women. See also, Mulela Munalula Women, *Gender Discrimination and the Law: Cases and materials* (2005) University of Zambia Press, 15.

⁴ Customary law as used in this study indicates customs, traditional practices and culture that are practiced in a variety of forms in many communities across sub-Saharan Africa. See also, Karen Stefiszyn 'The African Union: Challenges and Opportunities for Women' (2005) 1 *African Journal of Human Rights* 358.

⁵ TR Nhlapo 'The African Family and Women's Rights Friends or Foes?' (1991) *Acta Juridica* 135; The case of *Nwanya v Nwanya* (1987) 3 NWLR (pt. 62) 697 depicts the extent of the problems faced by women under customary law.

⁶ Gender Justice is a preferred term in this study to refer to the coming together of legal and social justice as key ingredients in achieving substantive rights and justice for women. Gender issues are multi-disciplinary and it is rarely used in law to determine the extent of law in reaching areas that affect men and women

regarding succession and inheritance.⁹ In the *Mojekwu case*, the Supreme Court dealt with the issue of inheritance under Nnewi customary law (*oli-ekpe*) in which it held that this custom is 'repugnant to natural justice, equity and good conscience' because it discriminates against women in property inheritance.¹⁰ *Oliekpe* in

particularly women in social contexts that adversely affect them. So, there is need to expand the frontiers of gender and justice to include the diversity of need.

⁷ *Shilubana and Others v Nwamtiwa* 2009 (2) SA 66 at 75D, In this case, the Valoyi Traditional Authority decided to appoint a woman (the daughter of their late Hosi) to be the Hosi. Although this particular community of the Pedi tribe came to this decision; it remains to be seen how this decision impacts other traditional institutions or authorities in South Africa for example the Zulus.

⁸ *Mojekwu v Mojekwu* (2004) SC Pt 11 (Supreme court decision of the 1997 Court of Appeal case in Nigeria) in which the issue was the right of a daughter to inherit under particular sets of Nnewi custom of South Eastern Nigeria.

⁹ In this study, inheritance refers to the transfer of and coming into the possessions of a dead person by a living person, majority of the time a blood relation of the deceased whilst succession is the transmission of the status, duties and rights of dead person to a living person. In most sub-Saharan Africa, inheritance issues are most common because of the critical importance it has for socio-economic development. In this study however, Succession is engaged with as the other side of the coin because both concepts have direct implications for women. The extent to which any woman inherits anything from her marriage determines how far she has the control of her children, house and land. See generally, Centre on Housing Rights and Evictions (COHRE) in *Bringing Equality Home: Promoting and Protecting the Inheritance of Women; A survey of Law and Practice in Sub-Saharan Africa* (2004) Centre on Housing Rights and Evictions, Geneva, Switzerland, at 10.

¹⁰ [1997] NWLR (pt 512) 283; See generally, Mudiaga Odje 'The Repugnancy Doctrine and the Proper Development of Customary Law in Nigeria' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 25; compare the recent case of *Chukwuemeka Ojiogu v Leonard Ojiogu and Others* 2010 (3) NILR 52 involving inheritance for a man born after the death of his mother's husband, in which the court struck down the custom

Nnewi custom confers only to the male descendant of a deceased man the authority to take charge of his estate which includes land, houses and other property. In this instance it is generally taken that the 'oliekpe' has stepped into the shoes of the deceased man. Other variants of the same kind of custom are found in many other communities of the Igbo people in South Eastern part of Nigeria. In declaring 'oliekpe' as 'repugnant to natural justice, equity and good conscience' for only recognising the male descendants, Justice Niki Tobi relied on fairness as a notion that must be used to combat gender discrimination.¹¹ The Repugnancy clause is a principle of Nigerian law that emanated from Supreme Court Ordinance NO 4 of 1876 applicable to the Colony of Lagos under the British Colonial rule. Since then, this doctrine has been part of the law in Nigeria and in fact is universal to all former British colonies. The implication of the repugnancy clause becomes the relegation of customary law to an inferior status; in that where the application of customary law was against public policy or natural justice, it could not be applied and received common law would be applied in its stead.¹² The consequence in Nigeria and other

of 'itugha nkwu' and 'inye mma' under Nnewi customary law as being 'repugnant to natural justice, equity and good conscience'.

¹¹ Contrast this decision with other cases such as *Onwuchekwe v Onwuchekwe* (1991) 5 NWLR 197, p 739 in which the Court of Appeal held that a wife is owned as a property by her husband; in *Nzekwu v Nzekwu* (1989) 2 NWLR 373 where it was held that a widow cannot with the passage of time own the property she occupies with her deceased husband and so has no authority to dispose of it. So what is noteworthy is that application of the repugnancy rule is based on the discretion of the judge wherein one judge may protect one woman and not the other. The human rights of women or their right to inherit on the other hand is binding on courts and so does not depend of the discretion of the judge.

¹² I P Maithufi 'Adapting or Reforming Customary Family Law in a Democratic Constitutional Dispensation: The South African Experience' in Manfred O. Hinz (ed) in

countries in sub-Saharan Africa with dual or plural legal systems is that customary family law has become westernised through decisions of the court and in some instances by legislation.¹³ The relevance of customary law as a dynamic system in a constitutional dispensation is therefore called into question. Consequently, it also creates within customary law of succession and inheritance challenges in law and practice as well as disharmony amongst heirs and descendants.

Within the context of African customary law, succession involves two aspects. On the one hand is stepping into the duties and responsibilities of a deceased person by one of his living descendants whilst the other aspect involves coming into possession of the property of the deceased by a living descendant. Under common law, succession and inheritance are most times used interchangeably. However, in customary law as described by Bennett:

Collaboration with Helgard Patemann, *The Shades of New Leaves, Governance in Traditional Authority: A Southern African Perspective* (2006) Centre for Applied Social Science (CASS), University of Namibia at 247.

¹³ For insight through court decisions see *Ryland v Edros* (1997) 2 SA 690 (C) where the Cape Town Court afforded a Muslim wife limited protection at the dissolution of marriage without recognising the validity of a Muslim marriage; *Daniels v Campbell NO* (2004) 5 SA 331 (CC) where the Court held that a wife in Muslim law cannot be regarded as a spouse in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990; See also Recognition of Customary Marriages Act 120 of 1998, Intestate Succession Act 5 of 1989 (amended 1996).

'inheritance denotes the transmission of rights to property only whilst succession implies the transmission of all rights, duties, powers and privileges associated with status'.¹⁴

The significance of distinguishing between the two concepts appears from the following passage by Himonga:

'Succession is the process of coming into possession of the estate, office or status of a deceased person, while inheritance refers to the process of taking possession of the property of a deceased person. Usually, the person selected as successor does not, in Zambian systems of succession, as in many other African systems, inherit all the property, although he may have the power to administer the estate and a right to a larger portion of it. Otherwise, the right of inheritance belongs to a much wider group entitled to inherit from the deceased according to the form of kinship that operates in that particular society'.¹⁵

Inheritance of property is not always linked to succession to status. The successor does not inherit the family property but steps into the shoes of the deceased by taking charge and control of his estate, family and family property.¹⁶ To understand the customary law of succession, it is instructive to understand the social context and the purpose under which the law developed. In the first instance, the rules of customary law particularly the rule of primogeniture have its origin in the traditional African society, where the family unit is at the centre

¹⁴ TW Bennett, *A Sourcebook of African Customary Law for Southern Africa* (1991) Juta & Co Ltd, Cape Town at 383.

¹⁵ C Himonga 'The Law of Succession and Inheritance in Zambia and the Proposed Reform' (1989) 3 *International Journal of Law and the Family* 160 at 161.

¹⁶ I P Maithufi 'The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession' (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 142 at 147.

and it was absolutely important to protect the family heritage and lineage.¹⁷ The family remained the central focus from where individual interests were subsumed into the common goals and objectives of the group and at the head was an elder male or patriarch who exercised control over the family property and members of the family.¹⁸

Thus, the main purpose of succession was to keep the family property in the family and essentially to preserve the family unit. Land and livestock were the primary property and an important resource providing the family with a place to live and a source of livelihood. The father as the head of the family was responsible for the maintenance of the family and property. Upon his death, two objectives had to be achieved: the perpetuation of the family and having someone to be responsible for the family by taking over the duties and responsibilities of the deceased family head. This is achieved by making rules to transfer the rights and obligations of taking control of the family and property to the eldest son.¹⁹ The eldest male descendant therefore becomes the successor or *indlalifa* or *di-okpara*.²⁰ The underlying purpose of customary law of succession is to protect the family and ensure that the dependants are well taken care of. This is achieved

¹⁷ C Rautenbach, Willemien du Plessiss and Gerrit Piennar 'Is Primogeniture Extinct like the Dodo or Is There Any Prospect of its Rising from the Ashes? Comments on the Evolution of Customary Succession Laws in South Africa' 22 *South African Journal of Human Rights* (2006) 99-118; I.P Maithufi (1998) *THRHR supra* 16 at 142.

¹⁸ Ngcobo J (as he was then) in *Bhe & Others v Magistrate Khayelitsha & Others* 2004 (1) BCLR 27 (C) at 162.

¹⁹ T W Bennett (1991) *supra* 14 at 383.

²⁰ I P Maithufi (1998) *supra* 16 at 147; Muna Ndulo 'Widows under Zambian Customary Law and the Response of the Court' (1995) *Comparative and International Law Journal of Southern Africa* 90 at 100.

with the appointment of *indlalifa* or *di okpara* as trustee of the family and with the responsibility of seeing to the welfare of the deceased's dependants in return for the control of the family property. This system ensures that members of the family always have a home and resources for their maintenance and those who cannot maintain themselves such as minor children have someone to maintain and support them.²¹ It must be stated that rising poverty, unemployment and greed in certain cases have resulted in failure to look after the welfare of the dependants, a conduct that has left many destitute.

Succession in customary law should then, be understood in the context of succeeding to the status of the deceased by the *indlalifa*. At the core of the process of succeeding to status is the rule of primogeniture. Primogeniture is central to succession and inheritance in many countries in sub-Saharan Africa. According to the rule of primogeniture, devolution of the estates of a deceased male African who died intestate is according to his male bloodline to the exclusion of women.²² This customary law rule that remains at the core of

²¹ L Mbatha 'Reforming the Customary Law of Succession' (2002) 18 *South African Journal on Human Rights* 259 at 260.

²² Primogeniture is still practised in many parts of sub-Saharan Africa. See for example in *Uka v Ukama* (1963) FSC 184 where the court upheld primogeniture; in the case of *Nezianya v Okagbue & Ors* (1963) 3 NSCC 277 where the court held that a widow cannot assume ownership of her deceased husband's estate or inherit it even with the passage of time; In another circumstance, if a woman must inherit from her father's house, then she must remain in such a house and have children especially male who will then inherit according to the *nrachi* custom in certain parts of Igbo land. Other instances of discrimination against women include Zimbabwean case of *Magaya v Magaya* (1999) 3 LRC 33, where the court held that a woman cannot administer the estate of her deceased father when she has a younger male step-brother; Although in South Africa, primogeniture was declared unconstitutional

succession had been aptly described by the South African Supreme Court of Appeal in the judgment of *Mthembu*:²³

‘The customary law of succession in Southern Africa is based on the principle of primogeniture. In monogamous families the eldest son of the family head is heir, failing him the eldest son’s eldest male descendant. The line of succession goes solely through the eldest sons of the family head. Where the family head dies leaving no male issue his father succeeds. Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased’s property, movable and immovable; he becomes liable for the debts of the deceased and assume the deceased’s position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources and not expel them from his home’

Given the position of the male descendant in the family, it seems that he experiences both succession to status and inheritance at the same

by the Constitutional court in the *Bhe* case, other actions such as domestic violence and violence against women still undermine women’s rights in relation to their status as women. In Zambia, discriminatory customary practices that allow for marital power and primogeniture still exist. In fact, 90 per cent of the country’s land is located in customary land titles which remains an obstacle to women because it sustains discriminatory customary practices in the law of marriage and succession. The Intestate Succession Act of 1989 of Zambia (amended in 1996), devises equitable distribution of property between surviving spouses and dependants however, this does not apply to customary land or land held collectively as a family land. This means that despite the Act, women under customary law still do not have rights in property. In countries where primogeniture is not explicit, women cannot inherit land located within customary land which for the most accounts for over 80 per cent of all the land. See for example the situation in Malawi, Zambia and Tanzania in the publication; Centre for Human Rights University of Pretoria (2009) *The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in six selected Southern African countries*, 77-78.

²³ *Mthembu v Letsela* 2000 (3) SA 867 (SCA) at para 8.

time. The position however, is totally different for female descendant who at the first instance would not even inherit let alone succeed as family head.²⁴ The rationale for the exclusion of was based on the fact that:

‘Women when they are married leave their original family after the payment of *lobola/ime-ego*, to join the family of their husbands. It was reasoned that in their new situation-as a member of the husband’s family- they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family’²⁵

The disinheritance of many women under customary law in Africa is justified by this expectation that she will be married off and therefore belongs to ‘that’ other family where one would expect her to inherit as a spouse but unfortunately for the women, the story is not any different because the ‘other’ family regards her as not a blood relation in terms of the law of primogeniture and so the cycle of discrimination persists.²⁶ This was also the crux of the matter in the *Bhe* case where there was no male descendant and the father of the deceased sought to succeed him. The rule of primogeniture limits the rights of women to succeed to the position and status of the family head. Women are excluded regardless of their availability and suitability to manage such a position. It does not matter even when they are the only child of the deceased. Neither does it matter where the woman contributed to the

²⁴ The situation is changing; because in South Africa, the Valoyi tribe has appointed a woman to be their *Hosi* as noted in the *Shilubana* case.

²⁵ *Magaya v Magaya* 1999 (1) ZLR 100 (S) at 109B-E.

²⁶ *Nezianya v Okagbue & Others* 1963 (3) NSCC 277.

preservation of the family property nor where she contributed to its acquisition.

Hence, this study deals with discriminatory aspects of both inheritance and succession under African customary law as they impact the female gender with the same outcome. The discriminatory aspects of property inheritance manifest in varied forms and scope, from the rights of the spouse and children particularly the girl-child to rights of children such as those adopted as well as those considered to be 'illegitimate'.²⁷ Although customary rule of primogeniture limits the right of women, things are beginning to change. Customary law is fluid to the extent that it adapts to the socio-economic circumstances of the time. The roles that were assigned to men and women in traditional African society were based on the social and economic structure of that time. As explained by Ndulo:

²⁷ The 'Illegitimacy of children' came under the spotlight with regards to customary law in the *Mthembu* cases. It was held in that case that Tembi the surviving daughter of her father cannot inherit from his estate because the deceased did not pay *lobola* for her mother (his surviving spouse) before his death. The term was also referred to in the *Bhe* case at the Cape High Court to describe children, who were conceived or born at the time that their biological parents were not lawfully married; in other words, the *lobola* was completed or not paid at all. Langa (DCJ as he then was) in the *Bhe* case considered the term to be degrading and bearing the connotation that the children due to circumstances of their birth were improper or unlawful. South African constitution values all human beings as being equal regardless of birth status or background in terms of the non-discriminatory clause of s 9. See also Udom Azuogu 'Women and Children- A Disempowered Group under Customary Law' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 129-130.

'In the modern economy nowadays women fend for themselves and help their husbands accumulate property during the course of the marriage. In essence, they have outgrown the status assigned to them in traditional society. Tribal law has lagged behind these economic and social changes. As more and more women begin working outside the home, earning money and acquiring property, the gap between their legal status under customary law and their economic status in society widens...Development and industrialisation have caused an irreversible breakdown in traditional African social order. The society is now highly individualistic, competitive and acquisitive. Customary rules do not operate to the benefit of women in this type of society...Application of the traditional concepts of customary law of succession to women in a modern context is unjust and discriminatory- a practice outlawed by the Zambian Constitution. It also ignores the fact that married women help their husbands accumulate property during the course of their marriage and should not, therefore, be denied any right in any portion of it.'²⁸

Clearly there are signs of change in the position of women in Zambia as noted above and same would be for Nigeria and South Africa.²⁹ However, the majority of women in these countries particularly those in the rural areas have not adequately benefited from the equality guarantees of their constitutional democracy.

1.2 Statement of the problem

The Constitutions of countries such as Nigeria, South Africa and Zambia prohibit discrimination against women on grounds of sex, birth and gender. However, majority of women continue to face discrimination arising from harmful cultural practices under the customary law system particularly in the areas of inheritance, succession and at widowhood. Notwithstanding constitutional as well as international human rights law prohibiting discrimination to which

²⁸ Ndulo (1995) *supra* 20 at 99-100.

²⁹ *Mabena v Letsalo* 1998 (2) SA 1068 (T)

these three countries are state parties, many women are forced to endure cultural practices that continue to subjugate them thereby infringing on their rights to dignity and equality.

In addition, the processes involved in seeking redress for violations of human rights arising from harmful cultural practices remain tedious for the majority of women. So, to effectively deal with discrimination arising from harmful cultural practices demands a shift in mechanisms designed to promote human rights and justice.

1.3 Objective of study and research questions

The objective of the study is to assess the normative standard already established in Africa for the enhancement of gender justice, in order to highlight their importance and relevance within the African customary law context with a view to matching universal standards with local values where community-based and informal justice systems are most relevant.

In pursuance of an appropriate and effective implementation of gender justice in Africa, the study poses the following research questions:

- (I) how best can states give effect to the non-discrimination clauses in their constitutions as well as international human rights law for the promotion of gender justice?
- (II) How sufficient are both regional and global human rights law in the promotion and protection of gender justice in Africa? And if not,
- (II) Can a viable model that recognises the complexities of the cultural obligations of state parties and its traditional institutions be proposed / adopted?

1.4 Scope

This study would be limited in scope to three countries in sub-Saharan Africa such as; Nigeria, South Africa and Zambia. The reasons for the choice of these three countries are as follows:

- They provide great reflection of what happens in majority of the countries in sub-Saharan Africa.
- Nigeria and South Africa have similarities in a number of instances such as cultural diversity, language as well as regional economic strengths. They also share similarities as countries colonised by Western powers but differs remarkably in ways in which colonisation affected their legal systems.
- Zambia is selected because of the deep traditional orientation of the people of that country and so, has challenges on the application of aspects of its customary law system. It also shares similarities with Nigeria as a country with aspects of British legal system working parallel with customary law. Zambia also shares sub-regional grouping with South Africa as countries from South African Development Community (SADC) and also as countries with dual legal systems.
- References to other countries in sub-Saharan Africa or elsewhere are merely to show similarities and differences.

1.5 Research Methodology

This thesis deals with the impact of systems of law on the realisation of gender justice in Africa. While the study aims to use analytical approach, descriptive sections are necessary to provide valuable information to inform the analysis. In addition to descriptive and analytical approaches, the study takes a comparative approach in

specific areas to highlight the experiences of the different countries on the issues dealt with in the thesis.

The study makes use of both primary and secondary materials. The Africa-based human rights instruments which include the African Charter on Human and Peoples' Rights, The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and other global human rights instruments are analysed with focus on their guarantee of women's rights.

The extensive literature on the topic from books, articles, newspaper articles, reports of research institutions and internet websites are analysed. Informal discussions have been used to supplement on areas requiring knowledge on actual impact of aspects of the systems of law dealt with in the thesis. In addition, the participation and observation of the author in few cases cited in the thesis provide valuable insight into the legal position of women particularly in Nigeria and South Africa.

1.6 Literature Review

Customary law, as an intricate part of the lives of the African people, shapes their belief, cardinal values and is deeply entrenched in their daily living as noted by Bennett.³⁰ Ebo³¹ further reiterates the resilience of this system in the wake of supplanting by received common law and modification by many pieces of legislation. That said,

³⁰ TW Bennett *Customary Law of South Africa* (1994) Juta & Co Ltd, Cape Town.

³¹ Chukwuemeka Ebo 'Indigenous Law and Justice: Some Major Concepts and Practices in Woodman & Obilade (eds) *African Law and Legal Theory* (1995) New York University Press 33 - 42.

the fact that aspects of customary law keeps women unequal in relation to men is a contested arena.

For human rights law, men and women should have equal rights. The African Charter on Human and Peoples' Rights has attempted to protect the rights of women according to Nmehielle,³² Murray,³³ Onoria³⁴ and Banda.³⁵ However, it is the Protocol on the Rights of Women in Africa ('the Protocol') that seems to set new standards for achieving gender justice. Substantive rights guaranteed in the Protocol aims to confirm universal standards of human rights on one hand whilst building up on a set of standards that is unique to specific problems of the African women according to Munalula.³⁶ This writer is of the opinion that the Protocol is an African blueprint intended to protect the rights of women from conflicts arising out of the practice of customary laws on the African continent. In as much as the Protocol may be a blue-print, some writers are sceptical on its actual intention

³² Vincent Orlu Nmehielle *The African Human Rights System: Its Laws, Practice and Institutions* (2001) Martinus Nijhoff Publishers Netherlands.

³³ Rachel Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems (2001) 1 *African Human Rights Law Journal* 4.

³⁴ Henry Onoria 'Introduction to the African System of Protection of Human Rights and the Draft Protocol' in Wolfgang Benedek, Esther M. Kissakye & Gerd Oberleitner (eds) *Human Rights of Women: International Instruments and African Experiences* (2002) Zed Books & World University Service, Austria, 231.

³⁵ Fareda Banda *Women, Law and Human Rights: An African Perspective* (2005) Hart Publishing- Oxford- Portland Oregon, 66.

³⁶ Mulela Margaret Munalula *Women, Gender Discrimination and the Law* (2005) University of Zambia Press, 34.

for the rights of the African women.³⁷ According to Rebouché³⁸ the Protocol failed to take into consideration the informal nature of the majority of women as it relates to labour. She considers the provision of the Protocol as being inadequate to effectively protect the majority of women whose works are informal and are hardly recognised by the state as contributing to the economy.

The use of gender analysis as a tool for measuring the impact of socio-economic, political and cultural factors in the enjoyment of equal opportunities for women as well as men remains relevant as a means to achieving gender equality.³⁹ However, gender justice calls for a new paradigm shift. According to Anne-Marie Goetz, the concept of gender justice that seeks to enhance women's autonomy in relation to men is controversial and arouses intense debate.⁴⁰ The intensity of the views has contributed to the difficulties found in explicitly defining gender justice. Simply put, the citizenship of women is called into question as they perpetually struggle for the enjoyment of their rights as women,

³⁷ DM Chirwa 'Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights (2006) *Netherlands International Law Review; Human Life International* 'The Maputo Protocol: Clear and Present Danger' (2007).

³⁸ Rachel Rebouché 'Labour, Land and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women' (2006) Vol 19 *Havard Human Rights Journal* 235-256.

³⁹ Christine Ainetter Brautigam 'International Human Rights Law: The Relevance of Gender' in Wolfgang Benedek, Esther M. Kisaakye, Gerd Oberleitner (eds) *Human Rights of Women: International Instruments and African Experiences* (2002) Zed Books at 23.

⁴⁰ Anne Marie Goetz 'Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates and New Directions for Research' in Maitrayee Mukhopadhyay and Navsharan Singh (eds) *Gender Justice, Citizenship and Development* (2007) International Development Research Centre, Ottawa, at 10.

particularly in cultural milieu. This is precisely the reason why it is necessary to engage with traditional leaders as agents of change within their communities and custodians of culture. Certain customs have been implicated in exacerbating the HIV/AIDS pandemic in sub-Saharan Africa. Thus, any discourse without the involvement of traditional leaders always seems to be ineffective.⁴¹ Therefore, it cannot be overemphasised the need for collaborative efforts. It is this gap in finding the appropriate approach to ensure gender justice in the traditional arena where it matters most for the majority of women that this thesis envisages to fill.

The impact of the deep traditional mindset of the people is evident in the number of countries that have ratified the Protocol and no domestication yet.⁴² Perhaps, what is responsible for such low ratification is not only the approach adopted by each state party in relation to incorporation of international treaties but also clear reservations on issues of custom and culture as they relate to women. The debate on the constant clash of culture, gender and human rights has been on-going in the continent.⁴³ Issues relating to access to land,

⁴¹ Johanna E. Bond 'Gender, Discourse, and Customary Law in Africa' *Southern California Law Review* (2010) vol 83 509-574 at 568; Richard Strickland 'To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa' (2004) International Centre for Research on Women, Working Paper.

⁴² It is 10 years since the Protocol on the Rights of Women in Africa was adopted and still about 16 countries are yet to ratify the Protocol on the Rights of Women in Africa, see chapter 6 on the countries that are yet to ratify this instrument. So, the idea of domestication seems very far from the minds of state parties.

⁴³ Marius Pieterse, 'Killing it Softly: Customary Law in the New Constitutional Order (2000) *De Jure*; Richman Mqoke, *Customary Law in the New Millennium* (2003) Alicedale; T Venter & J Nel 'African Customary Law of Succession and Gender

access to justice, marriage and proprietary consequences, inheritance rights, widows rights and sexual and reproductive rights are mostly pointed out as where women face lots of challenges. On one side of the debate are for example, those who call for the abolition of certain African culture that they consider harmful.⁴⁴ On the other hand, there are writers that insist that cultural identity is a protected right in human rights law.⁴⁵ The intersection between culture and human rights has not been properly explored to bring about reform in conduct of negative aspects of customary law. The kinds of modification envisaged from the issues flowing from this system of law require a new jurisprudence.

The question of universal application of human rights in order to protect and promote the rights of women in certain aspects of customary law undermines African values and traditions. According to

Equality (2005) *TSAR*; Himonga & Bosch 'The Application of Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning (2000) 117 *SALJ* 306; Manfred Hinz, 'Human Rights between universalism and Cultural relativism? The need for anthropological jurisprudence in the globalizing world' in Anton Bösl and Joseph Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) Konrad Adenauer Stiftung, Namibia; Anne Hellum, Julie Stewart, Shaheen Sarda Ali and Amy Tsanga, *Human Rights, Plural Legalities and Gendered Realities: Paths are made by Walking* (2007) Southern and Eastern Africa Regional Centre for Women's Law, Zimbabwe & Weaver Press; Hamisu Yadudu, 'Customary Law and the Nigerian State: Policies, Dilemmas and Options' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos.

⁴⁴ For example, Corinne Packer, *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa* (2002) Intersentia.

⁴⁵ Manfred Hinz (2009) *supra* 43 at 11.

Ibhawo⁴⁶ human rights of women within the indigenous system is an ideal that must consider cross-cultural dialogue and application. Abdullahi An-Naim and Jeffery Hammond⁴⁷ share the same opinion by reiterating the evolving nature of culture and the fact that all cultures are influenced by other cultures directly or indirectly. In other words, human rights standards are capable of developing and applying an integrative set of standards that are valid for all cultures including the indigenous African law system.

Siobhan Mullally⁴⁸ and Anne Philips⁴⁹ refer to such integrative standards as having consideration for multi-culturalism. In effect, giving importance to the idea that different cultures interact with each other through human agency and that negative perceptions can also be changed through the same agency. Therefore, there is no need to consider one type of culture as being better than others or considering a particular one to be the standard against which others could be measured.

It is also the opinion of the present writer that there is need for a more nuanced approach towards a collaborative effort at developing a set of standards that would not only develop indigenous law at the

⁴⁶ Bonny Ibhawo 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) vol 22 (1) *Human Rights Quarterly* 838-860.

⁴⁷ Abdullahi An-Na'im and Jeffrey Hammond 'Cultural Transformation and Human Rights in African Societies; in Abdullahi An-na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) Zed Books.

⁴⁸ Siobhan Mullally *Gender, Culture and Human Rights: Reclaiming Universalism* (2006) Hart Publishing: Oxford and Portland Oregon.

⁴⁹ Anne Philips 'Multiculturalism, Universalism and the Claims of Democracy' in Maxine Molyneux and Shahra Razavi (eds) *Gender Justice, Development and Rights* (2002) Oxford University Press.

grassroots but also ultimately protect the rights of women. Recent works used in this study indicate the extent of views on the debate of human rights and property inheritance / women's rights in Africa.⁵⁰ What remains to be established is whether the appropriate mechanism in dealing with gender justice in the customary law should involve a multi-layered approach given the multi-faceted nature of the challenges. This study is positioned to fill this gap.

⁵⁰ C. Himonga 'Taking the Gap-'Living Law Land Grabbing' in the Context of Customary Succession Laws in Southern Africa' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd at 114 ; G.Woodman 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd at 35; Lehnert Wieland 'The Role of the Courts in the Conflict between African Customary Law and Human Rights 21 (2005) *South African Journal of Human Rights* at 241; Sandra F. Joireman 'Entrapment or Freedom: Enforcing Customary Property Rights Regimes in Common Law Africa' in Jeanmarie Fenrich, Paolo Galizzi, Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press at 295.

Chapter Two

Conceptual analysis on gender
justice in African customary law

2.1 Introduction

In much of sub-Saharan Africa, customary law is a recognised system of law. Majority of those who are bound by its application are mostly found in the rural villages. The general socio-economic background in these settings demands that people live mainly in association with their relations. It is in this kind of small communities that they lived, bred and reared their children and livestock, formed political organisations and religious beliefs and organisation.¹ Thus, social order and interaction are largely based on the values, norms and institutions of the community. However, the majority of the time, the form and processes of the social order are dictated by men thereby putting women in a position of subordination.

With the passage of time, the institutionalised social order became a site for systematic discrimination against women. Hence, women's lives were largely subjugated to that of men in public as well as private spheres. The nature of the society was thus based on patriarchy and even with matriarchy found in some communities across Africa, the society maintained a system that thrives in social, familial and political contexts wherein all aspects of the lives of the people were mostly viewed and measured through the male eye.² In other words, the male figure became the only standard against which all other must be measured. This has left women as second class citizens in their daily existence where for example, many women cannot register property in

¹ Max Gluckman 'Natural Justice in Africa' *Comparative Legal Cultures, Natural Law Forum* at 176.

² Richman Mqeke 'Patriarchy and the Bill of Rights (2004) 25 (1) *OBITER* 109. In South Africa, women movements and activists challenge patriarchy as a societal norm, seeking an end to the negative connotations of viewing the society solely through the male eye.

their communities in their own names. It must be done by a man for them. In other words, women are considered and treated as minors who cannot enter into any form of contractual obligation.³ Thus, in marriages, property and land matters, there is unequal power relations. The unequal power relation is mostly evident in customary practices such as those relating to succession and inheritance. For example, the customary rule of primogeniture benefits mostly men in matters of inheritance and succession to property and status. Practices such as primogeniture in inheritance, forced and/ or child marriage and widowhood rites violate the human rights of women.

Human rights principles of dignity, equality and freedom are cardinal values underlying universal human rights. Men and women are equal and so, all forms of discrimination against women must be eliminated⁴, that they should have equal benefit and protection of the law⁵ and that women should have the freedom to make informed choices relating to their sexual and reproductive rights⁶ are some of the rights guaranteed in international human rights instruments. When a wife is considered as part of the property to be owned by a husband just like chattels, it clearly violates the right to equality in marriage.⁷ It, therefore, shows that women under customary law are adversely affected by the unequal power relation that permeates their marriage, political development, cultural life and access to justice. The fact that the male figure is intricately tied to her [the woman] means of

³ Women find themselves in this kind of position in countries like Lesotho, South Africa, Nigeria and Zambia.

⁴ Art 2 of CEDAW; art 2 of the Protocol on the Rights of Women in Africa.

⁵ Art 15 of CEDAW; art 8 of the Protocol on the Rights of Women in Africa.

⁶ Art 14 of the Protocol on the Rights of Women in Africa.

⁷ *Onwuchekwe v Onwuchekwe* (1991) 5 NWLR 197.

production, livelihood and effective functionality within the society remains a stumbling block to her full citizenship.

One of the key issues of contention in the discourse of customary law and human rights is the whole question of the universality of human rights versus cultural relativism. The debate seems to have polarised the human rights discourse to be between western ideologies of rights and those of African or Asian beliefs.⁸ The concept of human rights in Africa is constantly debated particularly on issues relating to the equality and rights of women.

This chapter therefore, examines the concepts that underlie the rights of women such as universalism, cultural relativism, gender justice, human rights and culture, customs, customary law / living law and the legal meaning of discrimination. The aim is to explore a practical mechanism for the enhancement of gender justice in a legal system that is filled with complexities. How access to justice is approached on matters of custom relating to women is an important factor in finding ways of ensuring that women's rights are protected even in the remotest villages of Africa. Against this background, the chapter discusses key concepts relating to ensuring gender justice in African customary law. For example; how the universalism/cultural relativism discourse have contributed in developing sensitivities towards eradicating gender discrimination; and how approaches to gender, equality and justice interact with other key concepts such as custom, customary law / living law with a view to advancing the rights of women.

⁸ Josiah Cobbah 'African Values and the Human Rights Debate' *Human Rights Quarterly* 9 (1987) 309-331.

2.2 Understanding the concept of universalism

The idea that human rights are universal is derived from the first global human rights instrument, the Universal Declaration of Human Rights (UDHR), where it was proclaimed to be:⁹

A common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind,...to secure their universal and effective recognition and observance, both among the peoples of member States and among peoples of territories under their jurisdiction.

In general terms, universalism tends to promote human unity that should transcend culture, borders and regional affiliations. To this extent, there must be minimum core standards that every one and every nation should adhere to, commonly referred to as human rights.¹⁰ It is this ideal of a society in which the common humanity of people are protected that gives rise to the concept of universalism. The universalism of human rights is deeply rooted in the idea that human rights are claims equally held by all human beings. In other words, there should be no hierarchy in terms of who holds the rights and they are also inalienable.¹¹ In other words, it does not matter as it

⁹ The Universal declaration of human rights (UDHR) was adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948 in San Francisco. At the time of its adoption most African and Asian countries were still under colonialism or at war. It is not a binding treaty of international law however; it has attained the status of customary international law.

¹⁰ Jack Donnelly 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly*, 281-306 at 283.

¹¹ Jack Donnelly (2007) *supra* 10 at 283.

relates to anyone's status or class in society. Donnelly¹² confirms this by advancing arguments in favour of the universalism approach by stating that human rights are the highest moral claims held universally by all and, therefore, there should be no subordination of rights to another person or institution. He also maintains that all human beings have rights based on their humanity and so, ethnic origin, nationality or gender should not be the basis for the rights of person.

These arguments are validated by the State Parties' ratification of international human rights law such as the International Covenant on Civil and Political Rights (ICCPR),¹³ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴ and the Convention for the Elimination of all forms of Discrimination against women (CEDAW)¹⁵ which is commonly referred to as the women's bill of rights.¹⁶ It must be stated however, that though state parties ratified these human rights instruments, many have entered reservations

¹² Jack Donnelly 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* at 400-419.

¹³ Adopted in 1966 by the United Nations General Assembly, it came into force in 1976.

¹⁴ Adopted in 1966 by the United Nations General Assembly, it came into force in 1976.

¹⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/ 180 of 18 December 1979. It entered into force 3 September 1981.

¹⁶ Mmatsie Mooki, Rita Ozoemena and Michelo Hansungule 'Women's Rights in International Law' in Azizur Rahman Chowdhury and Jahid Hossiah Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010), Martinus Nijhoff Publishers: The Netherlands, at 77.

particularly on matters relating to culture and religion in CEDAW.¹⁷ This is an indication that although they do agree to a universal concept, they may differ on the ideological content that the ratified instruments contain.¹⁸

The ratification of these international instruments further points to the global consensus as indicated in the 1993 Conference of the United Nations on Human Rights held in Vienna, Austria. The international community confirmed the interdependent and inalienability of human rights in terms of the Vienna Declaration and Programme of Action which stated that:

'All human rights are universal, indivisible, interdependent and interrelated'.¹⁹

In terms of conceptualising universalism, there is no doubt that the international community has made progress in setting the minimum standard for human rights. It therefore requires substantial effort on the part of countries to protect, promote and respect the human rights standards that they have voluntarily accented to despite national and regional particularities to which they belong.²⁰ Many countries experience issues differently and to that extent; there are variations of

¹⁷ See generally, UN Women Entity for Equality and Empowerment of Women (UN Women) www.un.org/womenwatch/daw/cedaw/reservations-country.htm (accessed 12 Nov. 13).

¹⁸ See generally the reservations entered on CEDAW by Egypt, Saudi Arabia, Iran, and Swaziland. See also Zoé Luca 'Reservations to the Women's Convention: A Muslim Problem III-Addressed' in Ingrid Westendorp (ed) *The Women's Convention Turned 30: Achievements, Setbacks, and Prospects* (2012) Intersentia, 417.

¹⁹ Paragraph 3 1993 Vienna Declaration and Programme of Action.

²⁰ Vienna Declaration (1993) *supra* 19.

historical, social, political, economical and cultural background. For example, in Africa, many countries historically encountered colonialism but no country in Africa experienced the deep-rooted injustices of racial segregation like South Africa. Equal rights as members of a race with the white minority were extinguished for the black majority. Thus, at the dawn of constitutional democracy, equality, dignity and freedom for all became sacrosanct.²¹

Thus, diversity is recognised in international human rights law by the provision of cultural rights in many of the instruments.²² Many times, the activities that are noted in some countries particularly non-western countries critically question the universalism of human rights and have in much of the non-western countries been a source of much controversy. The controversies stem from differing views on group rights, cultural and religious autonomy and national sovereignty.

In recent years, non-western countries particularly in Africa have been severely criticised for gross human rights violations. What is noteworthy is that with the same gusto as they are criticised, they question the universality of human rights. So, as the criticisms come, their defence become culturally-based maintaining the view that Africa has within its own system of law, a set of moral and ethical standard.²³ It is now apparent that universal human rights are viewed along geographical lines and cultural undertones. Historically, human rights

²¹ Preamble to the 1996 South African Constitution.

²² Art 27 of the UDHR; art 17 of the Protocol to the African Charter on the Rights of Women in Africa; art 15 (a) of International Covenant on Economic, Social and Cultural Rights.

²³ Bonny Ibhawo 'Cultural Relativism and Human Rights: Africanist Discourse No 1 (2001) Vol 19 *Netherlands Quarterly of Human Rights* 43-62.

in the international arena were viewed as a western concept of which many non western including those in Africa claim they had no participation in the formulation of the rights guaranteed in the instruments and thus had their own version of respect for human rights.²⁴ Although this argument may be contradicted by the fact majority of African countries later 'participated' through ratification and in some cases enactment of these international instruments into domestic legislation.²⁵ For many in Africa, it is a widely-held opinion that human rights have cultural bias towards western norms and so there is need for broader view of human rights incorporating alternative approaches to universalism.²⁶

How universal is the international human rights regime? This question is pertinent for engendering justice for the majority of African women. In cases of customary law of inheritance, it has been the practice to decide matters based on repugnancy clause found in most British colonial Africa rather than the use of human rights.²⁷ Although several writers also express different views on whether international human rights law is indeed universal, this may be divided in terms of geographical locations and cultural boundaries. The opinion of writers from North America is best described as mainly ideological, favouring

²⁴ Josiah A. M. Cobbah 'African Values and the Human Rights Debate: An African Perspective' *Human Rights Quarterly* 9 (1987) 309-331 at 311.

²⁵ Nigeria for example domesticated in full the African Charter on Human and Peoples' Rights.

²⁶ Steiner & Alston *International Human Rights in Context: Law, Politics, Morals* (1996) Oxford University Press: Oxford 187

²⁷ Nigeria and Zambia are among the countries that still apply the repugnancy doctrine.

universalism. According to Cassese,²⁸ the international bill of rights comprising the UDHR, ICCPR and ICESCR, have provided strong foundational and ethical values on a universal scope. Although the Americans have the tendency of pursuing radical universalism,²⁹ it has also been acknowledged that 'universal' human rights may only be a myth since they are conceived and observed differently. In other words, recognition that respect for human dignity and the common dignity of groups noted in many African communities are also based on human rights as envisaged by the West.³⁰ It is without doubt necessary to understand the cultural underpinning of most African practices and their African way of life as dependent on protecting the individual and group identity. This is because within their society, it is their own view of gender justice that acts as their universal protection of rights. This notion of human rights within African society as the basis for their own version of universal human rights is not without criticism.³¹ In my view, the most important thing is that the protection of the rights of women requires infusion of the rights language in a domain that is clearly traditional and most times unwilling to change. Such unwillingness might be found in the recognition of the right to

²⁸ Antonio Cassese *Human Rights in a Changing World* (1990) Temple University Press: Philadelphia 5.

²⁹ Lone Lindholt *Questioning the Universality of Human Rights* (1997) Aldershot: Dartmouth 26.

³⁰ Manfred Hinz 'Human Rights between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalising World' in Anton Bösl & Joseph Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) Konrad Stiftung Adenauer 8.

³¹ See generally Rhoda Howard 'Cultural Absolutism and the Nostalgia for Community' *Human Rights Quarterly* 15 (1993) 315-338.

culture protected also in international human rights law.³² Cultural rights are an integral part of individual as well as group identity which underpins its protection. On the one hand, cultural rights are protected and, on the other, the differences in its varied forms pose practical implications for universality of rights given the nature of divergent cultural practices in many African societies. For example, in many communities of South Eastern Nigeria, ownership of land is unknown under customary law. Hence, land that is communally owned can be used for agricultural purposes and most times, only married women may be allocated a portion of communal land by the family elders.³³ This is made possible to ensure that the woman is able to take care of her children. An unmarried woman may only acquire such land if she becomes what is commonly referred to as *idegbe*. In this instance, a daughter remains in her father's house unmarried but raises children for the family. All of these differences in approach to acquiring land points to the futility of applying same standard for all cases. It is in instances such as those enumerated above that demand finding a balance between the universal and the relative.

Closely related to the issue of culture and tradition is that of religion where universalism seem not to matter particularly as it relates to the rights of women. Cultural and religious beliefs are fundamentally based on higher moral authority symbolised by *Chi* (as known by the Igbo in Nigeria) or Allah as the Muslim North of the country. To this extent, nothing could be accepted as universal if it is not founded on

³² Art 27 (1) of UDHR; art 15 (1) (a) of ICESCR; art 12 (c) of CEDAW as well as sections 30 & 31 of South African Constitution provides for the right to belong to a cultural community; s 19 of the Namibian Constitution.

³³ *Restatement of Customary Law in Nigeria* (2013) Nigerian Institute of Advanced Legal Studies, Lagos, 207.

supreme values and sanctioned by guardians of the various faiths. For example in Nigeria, the application of Sharia law based on Islamic religion has many implications for human rights particularly for women. As a faith-based law, practices are strictly adhered to and most of the time tends to be immutable.³⁴ In other words, it does not possess the same fluidity as may be found in indigenous customary law. Several cases regarding the rights of women in Nigeria such as the widely publicised cases of Amina Lawal and that of Safiyatu Husseini in Katsina State on the charges of *zinah* (adultery) have brought into sharp focus the implication of religious law on the rights of women to equal treatment before the law, which is a universal principle and a fundamental right in most countries in Africa.³⁵ Therefore, the right to practice Islam as laid down by the Qu'ran and what actually happens in practice remains a source of controversy as found in the *zina* (adultery) cases from Nigeria.³⁶ This is a great challenge to the universalism approach to human rights.

Thus far, the arguments for human rights range from absolute universalism to soft universalism or weak relativism.³⁷ The dominant approach, however, recognises the foundational basis of universal human rights to the extent that it aims to provide a universal moral

³⁴ BAOBAB for Women's Human Rights (2003), a publication on Sharia and Women's Rights in Nigeria at 3 (on file with the author).

³⁵ Section 26 International Covenant on Civil and Political Rights (ICCPR).

³⁶ BAOBAB (2003) *supra* 34 at 4 said that those who have been charged under the new sharia penal code currently in operation in Nigeria have been predominantly poor, often rural and poor urban women, men and children. It is only women who have been convicted of adultery with its higher penalty of stoning to death.

³⁷ Hinz (2009) *supra* 30 at 7.

standard whilst providing the basis for particular adaptations where necessary.

In recent times, it has been pertinent to redefine cultural identity. Whilst the already established framework provides the foundational basis for conforming to international human rights law, it is also important to accept and appreciate cultural diversity where they effectively serve to adopt human rights under their specific circumstance. It is only then that the contentions surrounding the equal rights of the sexes can only be understood to be of greater benefit for promoting gender justice.

2.3 Understanding the concept of cultural relativism

The notion of relativism originally biased in anthropology sought to protect indigenous societies against destruction by elements such as colonialism, missionaries and any further threats to cultural right and identity. One of the most important features of relativism is, therefore, the ability to call in to question the western superiority and at the same time challenge the presumed universal standard.³⁸ Cultural relativism is both an ethical and moral stance taken by a group that considers that no one culture should dominate the other in a moral sense.³⁹

In as much the same way as there are varieties of universalism, so it is with relativism. The positions thus vary from radical relativism which

³⁸ Alison Dundes Renteln 'Relativism and the Search for Human Rights' (1988) 90 *American Anthropologists* at 58.

³⁹ Rhoda Howard 'Cultural Absolutism and the Nostalgia for Community' *Human Rights Quarterly* 15 (1993) 315-338 at 317.

demands that culture is the sole source of the validity of moral right or rule otherwise referred to as cultural absolutism⁴⁰ to weak relativism. Radical relativism or cultural absolutism pursues cultural, ethical and moral values to the extreme that it invariably excludes other forms of moral justice including human rights.⁴¹

Weak relativism posits that culture is a valuable tool but not really an indispensable source of validity of moral right. In other words, this kind of relativism understands the dynamic nature of culture to adapt to a set of social or economic circumstances that best describes the lives of the people at the time. In the view of the present writer, it is this poor understanding of the nature of customary law that leads to poor interpretations and ossification of customary law.

Some of the arguments that have been made in favour of relativism are:

- ▶ Cultural civilization varies across location and time; therefore international human rights are Western norms being imposed on all other cultures for all time.⁴²
- ▶ Although human rights norms may have universal acceptance, other prevailing historical and cultural values applicable make it a whole lot more negotiable.⁴³

⁴⁰ Rhoda Howard (1993) supra 39 at 315.

⁴¹ This extreme notion of relativism could be found in Nigeria, where women unduly bear the brunt of the radical application of Sharia law in that country. No doubt, poor interpretations of cultural beliefs are some of the features of this kind of relativism.

⁴² Diana J. Fox 'Anthropology and Women's Human Rights: Perspectives on Relativism and Universality' in Diana Fox and Naima Hasci (eds) *The Challenges of Women's Activism and Human Rights in Africa* (1999) The Edwin Mellen Press, Lewiston: New York at 39.

- ▶ Even if there are human rights norms accepted universally, it would be impossible to attach similar value or weight to them by other norms.⁴⁴
- ▶ Finally, the nature of society is that there is multiplicity of cultures and values and these have to be respected as they form the basis for understanding societal norms.⁴⁵

These features of relativism enumerated above is an indication of the need to value differences and to understand particularities in various cultures which most times have its way of interpreting universal rights that must be viewed in broad terms.

Cultural relativism supports broad articulation of values and principles with the belief that as cultures interact and intermix, so, cultural identities are bound to change.⁴⁶ In sum, no particular standard is capable of determining human rights solely on its own articulation and as such may be incompatible with cultural observances of other societies, and hence unacceptable.⁴⁷ Simply put, when cultural changes are viewed as a foreign imposition, it is usually unacceptable.

⁴³ Alison Dundes Renteln 'Relativism and the Search for Human Rights' (1988) *American Anthropologist* 56-72 at 68.

⁴⁴ Alison Dundes Renteln *International Human Rights: Universalism versus Relativism* (1990) Sage Publications, Newsbury Park: Carlifornia at 39.

⁴⁵ Alison Dundes Renteln *International Human Rights: Universalism versus Relativism* (1990) Sage Publications, Newsbury Park: Carlifornia at 37.

⁴⁶ Diana Ayton-Shenker *The Challenge of Human Rights and Cultural Diversity* United Nations Background Note available at www.un.org [accessed 22 March 2013].

⁴⁷ A Belden Fields and Narr WolfDieter 'Human Rights as a Holistic Concept' *Human Rights Quarterly* 14 (1992) 1-20.

So, the standard must be one that is duly recognised by the people for it to have validity.

In the same way as universal human rights; cultural relativism is also challenged on a number of grounds. In the first instance, cultural relativism to the extent that it takes culture as the only absolute standard fundamentally ignores the very nature and dynamism of culture.⁴⁸ Within any culture there are divergences, complex and variable practices, therefore culture is not static. Cultural relativism, however, by its nature sets particular practices of a specific group in a definite space and time. In other words, change of the mind-set becomes difficult to achieve and in that way, cultural relativism adopts a static definition of culture.

Another major weakness of cultural relativism lies in the advancement of human rights. There is usually conflict between those charged with the protection of rights and those whom they purport to represent. Most times dictators and repressive regimes use cultural relativism for their own self-preservation rather than the interests of indigenous culture.⁴⁹

⁴⁸ Rhoda Howard 'Cultural Absolutism and the Nostalgia for Community' *Human Rights Quarterly* 15 (1993) 315-338 at 315, where the author examined the nature of culture in the concept of relativism. It must be noted here that not all culture is protected in international law. The kind of culture protected is the one that would have positive influence on people.

⁴⁹ For example, in interpreting certain cultural practices, some chiefs deliberately act against the woman to cover for their own greed. See generally the forced abduction of girls for marriage in some communities in South Africa where the chiefs fail to intervene in the matter. See also Jack Donnelly 'Cultural Relativism and Universal Human Rights' *Human Rights Quarterly* 6 (1984) 400-419.

There are claims that in traditional African societies, human rights concepts existed which were materially consistent with the respect for human dignity.⁵⁰ These claims are based on the communal social organization system found in many pre-colonial African societies. According to Howard,⁵¹ this cultural specific concept is also referred to as the communitarian ideal which materially differs in certain respects from the western concept of human rights. In the first instance, people do not worry about their individual rights; but are rather more concerned with their ethnic cultural values as members of a group. Second, political decisions involving the lives of members of the group are made on the basis of communal consensus, the chief usually consults with the elders and so there is nothing like competitive model of party politics. In other words, concept such as loyal opposition is largely unknown and at best incomprehensible.⁵² In the final respect, wealth is redistributed in African community. Wealthy people share their resources with their less fortunate kin, so there is nothing like

⁵⁰ Dunstan M. Wai 'Human Rights in Sub-Saharan Africa' in Adamantia Pollis and Peter Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1979) Praeger, New York, 116-118; Chris C. Mojekwu 'International Human Rights: The African Perspective' in Jack L. Nelson and Vera M. Green (eds) *International Human Rights: Contemporary Issues* (1980) Human Rights Publishing Group, Stanfordville, New York 85-87.

⁵¹ Rhoda Howard 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons' (1984) vol 6 NO 2 *Human Rights Quarterly* 160-179 at 174.

⁵² T. O. Elias in his book *The Nature of African Customary Law* (1956) Manchester University Press at 82-94 exposes some fallacy that is found in certain anthropological works on groups in African society. According to him, the individual is not a robotic fellow within his kinship but in every way asserts his position as bona fide member who has relationship with his family as well as the community.

acquisition of private property.⁵³ Although this may be true, it must also be stated that in majority of the cases, poor people share their meagre resources with their neighbour regardless of what they may possess. It is for this reason that an individual may ask his relation to use his land to grow food for his family till he is able to stand on his own.⁵⁴

The concept of human rights as it exists in much of Africa has such distinctive features that distinguish it as a uniquely African concept of human rights. For many, particularly those in western cultures, it is the individual woman who suffers greatly in such communitarian society. To those persons viewing Africa from the outside, the so-called 'African concept of human rights' do not recognise the implication of group rights on the protection of rights of women.⁵⁵ It is not contested that social cohesion and viability of the community are the backbone of the African community as opposed to the individualisation of rights that underpins the western conception of human rights.⁵⁶ The western conception of human rights views the individual as the only relevant subject without much thought on the community. Common interest of all people is very important to the collective security and moral well-being of society. Thus, anything that would destabilise the social, economic and political equilibrium of the society must be viewed with grave concern as it spells greater doom for the people. This is why, at an early age, African children were

⁵³ Howard (1984) *supra* 51 at 174.

⁵⁴ T.O Elias (1956) *supra* 52 at 164-166.

⁵⁵ Contrast this view with the decision of Tanzanian Court in the *Ephraim v Pastory* case.

⁵⁶ Bonny Ibhawoh 'Cultural Relativism and Human Rights: Africanist Discourse' 19 (2001) *Netherlands Quarterly of Human Rights* 43-62.

taught to understand that being deviant or lazy does not achieve anything for the family or the community as a whole; and the interest of the family is paramount to their own.⁵⁷

Inherently, the marked differences between the African conception of human rights and western concept make it almost impossible to universally apply one concept without prejudice to the other. One of the most contested arenas between universalism and cultural relativism is found in the respect and protection of the rights of women. Aspects of traditional African culture are said to be inconsistent with women's right to dignity, equality and freedom from discrimination.

The main obstacle towards the achievement of women's right can be found in a cultural relativist dogma. It has been argued that the relativist stance is largely uncompromising in determining through cultural tradition including religious, political and legal practices the existence and scope of rights enjoyed by individuals in a given society.⁵⁸ Afshari argues that such a stance elevates culture to the level of being the supreme ethical value; much more than any other.

The same argument could be made for human rights where its universal implementation will result in undermining other ethical values. For this reason, many states reject universalism as inappropriate and therefore not applicable to them in their particular

⁵⁷ Dickson A. Mungazi *Gathering under the Mango Tree: Values in Traditional Culture in Africa*, American University Studies Series XXI, vol 9, Peter Lang, New York at 13-18.

⁵⁸ Reza Afshari 'An Essay on Islamic Cultural Relativism in the Discourse of Human Rights' 16 (1994) *Human Rights Quarterly* 235-276.

cultural circumstance. This objection to the universal concept of human rights in many instances could be the reasons for the many reservations made by some countries on specific articles of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Protocol on the Rights of Women in Africa.⁵⁹ Having regard to these reservations by these countries, it reiterates these divergences on the understanding of human values and status of women in different cultural communities that consequently allows for persistent gender inequality.⁶⁰

And herein lies the crux of the matter where rights discourse demand universal application of moral and ethical standards in the form of human rights. Is it then possible to have standards within various societies that are adaptable to the universal human rights capable of adequately protecting the rights of women? Cultural relativists argue that universalizing rights is a de-legitimization of other cultures and mainly supports western hegemony.⁶¹

The problem with these arguments remains that the rights of women are mostly not protected in the cultural arena. Hinz⁶² and the present

⁵⁹ See generally Lesotho's reservations in CEDAW, South Africa and Namibia reservations on the Protocol on the Rights of Women in Africa.

⁶⁰ Martha C. Nussbaum 'Human Dignity and Human Capabilities' in Maxine Molyneux and Shahra Razavi (eds) *Women, Development and Rights* (2002) Zed Books.

⁶¹ Sibongile Ndashe 'Re-envisioning Gender in African Customary Law' in Christie Van der Westhuizen (ed) *Gender Instruments in Africa: Critical Perspectives, Future Strategies* (2005) Institute of Global Dialogue.

⁶² Manfred O. Hinz 'Human Rights between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalising World' in Anton Bosl and Joseph Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection*

author are of the view that the argument needs to be broadened in a manner that supports the relevance of culture in the lives of many in various societies. The views reflect the need to find common grounds between these two competing interests.

2.4 Universalism vs relativism: Reconciling competing interests

The universality of human rights sets the stage for creating normative standards for societies. The impact of culture in shaping individuals indicates the relevance of the need to constantly broaden the standard to accommodate diversities. It is obvious that though interpretations and applications of universal norms and standards may be remarkably different, it does not mean that such values and standards do not have universal approval. In other words, we do not have an either or choice to make between cultural relativism and universal human rights. Rather, what is required is the need to combine the universality of human rights with the apparent particularities that flow from it in order to accept certain limitations of the universal concept of human rights.

Donnelly in his recent work states that certain versions of universalism are at best indefensible.⁶³ He emphasizes “relative universality” to point to the limits of the universal. Therefore, what is currently more sustainable in the international arena is more of universal possession and not universal enforcement. This is in direct recognition that in terms of conceptualization of the rights, it is universal. However, what

and Promotion (2009) Konrad Stiftung Adenauer 3-32; Jack Donnelly ‘The Relative Universality of Human Rights’ 29 (2007) *Human Rights Quarterly* 281-306.

⁶³ Jack Donnelly ‘The Relative Universality of Human Rights’ 29 (2007) *Human Rights Quarterly* 281-306 at 306.

markedly differentiates it from the substantive universality rests in the knowledge that the implementation and enforcement of universally held human rights is extremely relative and hence, largely a function of where one has the (good or bad) fortune to live.⁶⁴ In South Africa, for example, people are beginning to challenge certain aspects of their cultural practices which they view as discriminatory.⁶⁵ International human rights law for the most part relies on sovereign state machinery such as the courts for the implementation of internationally recognized human rights. Except for very few cases of crimes against humanity, genocide and war crimes, it remains the exclusive domain of sovereign states to implement human rights in their territories as they deem fit. Such authority of states to implement and enforce universal human rights underscores 'relative universalism'.

This is a reflection of the current trend that a cross-cultural approach is very relevant if the rights of women under customary law are to be adequately protected. Unless the nature of the internal struggles relating to perceptions and interpretations of cultural values and norms are properly dealt with, women would continue to bear the burden. Cross-cultural approach must be able to deepen the understanding

⁶⁴ Donnelly (2007) *supra* 63 at 283.

⁶⁵ In a Human and Sciences Research Council (HSRC) seminar on the South African Traditional Bill Rights in which the present author was present, Sizani Ngubane of the Rural Women's Movement challenged the participants particularly the CONTRALESA chairman, Phatekile Holomisa on the actions of certain chiefs in Kwa Zulu Natal concerning abduction of a young girl for marriage concluded without her consent by her uncle in which the chief failed to take an action.

that international human rights can only have sufficient legitimacy where particularities are properly taken into account.⁶⁶

In sum, it is argued here that all cultures contribute to the corpus of rights according to their own understanding and within the context of their social, economic and political lives. International human rights however, are *sui generis* because of the key principles they espouse and the setting of normative standards. However, these norms will only be valuable to the extent that they meet human needs. Therefore, it is pertinent to take into consideration national insights and experiences which must endeavour to improve, revise and perfect international standards and where necessary establish new values as necessity requires.

It is significant to note that the debate seems to transcend mere polarisation of the universalism versus cultural relativism debate, simply because the boundaries constantly shift. To this extent, governance structures in states must comply with these normative shifts so that the debate does not remain purely an academic exercise to the detriment of the rights of women in customary law. To further understand the basis for these debates, it is necessary to discuss the system and how the rights are derived, followed by the practices that emanate from it.

⁶⁶ Abdullahi An-Na'im and Francis Deng 'Introduction' in Abdullahi An-Na'im and Francis Deng (eds) *Human Rights in Africa: A Cross-Cultural Perspective* (1992); Josiah AM. Cobbah 'African Values and the Human Rights Debate: An African Perspective' (1987) *Human Rights Quarterly* 309-331; Roberta Cohen 'Human Rights in Africa: Cross-Cultural Perspectives' *Human Rights Quarterly* 15 (1993) at 459-461.

2.5 Cultural rights in Africa and its impact on women

The meaning of culture varies in the same manner as the various groups that are identified within any given society. In other words, there are a lot of different values and worldview of groups in the society and most times, the values are based on historical roots. How these worldviews are analysed or interpreted as cultures of any given group constitutes our knowledge about their identity. To this extent, there are different elements identified by writers of what culture means exactly. According to De la Rey:⁶⁷

Culture plays a large part in what we become. It helps us adapt to our environment, and it gives us a sense of continuity with our past. However, culture also functions to control and limit individual behaviour so that one conforms to the predominant values and norms.

That culture limits individual behaviour does not mean that the individual's entire life is totally subsumed into the dominant norm. In fact, individuality within the society is improved to the point that a person understands his or her role in relation to others and in the broader sense of societal values and norms.⁶⁸ For Geertz,⁶⁹ human beings would really be nothing without culture. According to him, culture is like a guide, directing the lives of a people through deep symbolic values. In his definition of culture, Geertz insists that the 'inherited conceptions of things expressed in symbols enable men and women to communicate, perpetuate and develop their knowledge

⁶⁷ Cheryl De La Rey 'Lets Talk about It' (1992) *AGENDA* 13 at 78-86.

⁶⁸ T. O. Elias *The Nature of African Customary Law* (1956) Manchester University Press at 83-89.

⁶⁹ Geertz C *The Interpretations of Culture* (1973) Basic Books: New York 49.

about life and attitude towards life'.⁷⁰ Through culture, an entire coping skills created by previous generation are learned, shared and tested to be transmitted to the next generation. These learned and shared behaviour is very fundamental because it indicates the way people do things.⁷¹ The historical nature of culture amply distinguishes it from tradition in many ways which makes it an important moral and social value to be legally protected by local as well as international law.

In the international arena, cultural rights are protected but at the same time, culture fuels the tension between universalism and cultural differences. Currently, the debate seems to move beyond rhetoric to focus on the positions as part of the continuous process of negotiating the ever-changing and interrelated global and local norms. Rights and culture should therefore, be seen as complementary rather than irreconcilable; moreso when culture has become an object of rights claim in international human rights law. For example in terms of article 27 of ICCPR, article 17 of ACHPR, and article 17 of the Protocol on the Rights of Women in Africa, and locally as guaranteed in the Constitutions of South Africa and Namibia.⁷² Now more than ever, cultural claims such as those that invoke notions of culture, language, religion, ethnicity, tribe or race have become familiar elements in rights processes. They are given proper consideration and weight in

⁷⁰ Geertz (1973) *supra* 69 at 89.

⁷¹ Fisher G *Mindsets: The Role of Culture and Perception in International Relations* (1988) International Press: ME Yarmouth 45-46.

⁷² The right to culture is provided for in s 31 of the South African Constitution and s 19 of the Namibian Constitution.

contexts where they are adjudicated on and may also add to grounds for claims in land, employment or political autonomy.⁷³

Within national and regional levels, there have been concerted efforts to give effect to specific cultural contexts leading to a refocus on 'new rights' such as group rights, indigenous peoples' rights and women's rights. This group of rights affect the socio-economic life of the people and so one would expect that they should be mutually reinforcing, but some times group rights and women's rights may clash and one would trump the other. In cases surrounding family land or communal land, individuals within the family are entitled to the use and ownership of land if they are allotted to them. In some cases where the land is held collectively, alienation by any individual is prohibited. This was the issue in the Tanzanian case of *Ephraim v Pastory*.⁷⁴ In this case, the High Court decided in favour of the woman whose male nephew prevented her from alienating her portion of clan land in accordance with Haya customary law. Although this case dealt with cultural rights claim, it further raises the tension between group rights and individual rights particularly the rights of women in customary matters.

In Africa, it seems that claims of cultural rights are still hampered by the tensions between group rights and individual rights. This is evidently shown in the many cases of the violation of the rights of women to own and alienate land as women under African customary law.

⁷³ Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson 'Introduction' in Cowan Dembour and Wilson (eds) *Culture and Rights: Anthropological Perspectives* (2001) Cambridge University Press, 9. See also the *Ogoni Case*, and the *Katanga case* that all came before the African Commission on Human and People's Rights.

⁷⁴ (1990) High Court of Tanzania at Mwanza. Also reproduced in (2001) AHRLR 236 (TZHC 1990).

Culture remains the source of individual and community view of the world which provides them with values to pursue and the legitimate means of pursuing them. To this extent, people within the society are treated according to these most-valued interests particularly those at risk or marginalised in some ways such as children, elderly people, women and disadvantaged people or minorities. However, certain practices originally designed to protect the girl-child and women have become the source of their disempowerment. Udom Azuogu aptly articulated this dilemma as follows:

'Women and children are a disempowered group under the common law and customary law. Their rights are non-existent and the discriminatory position of the two classes are scandalous'.⁷⁵

It has been found in many societies that it is mostly in matters relating to women that culture is invoked to the detriment of women and girl children. It is striking that it is in the context of the human rights of women in family law than any other area of law that progressive judicial activism is very slow. One of the reasons could be the fact that the rights of women are intrinsically linked to their role in the family. Many women in African societies have unequal power relations in the family, leading to their subordination. Thus, the quest for the human rights of women threatens patriarchy and those practices that perpetuate their inferior status. To that end, the tensions persist

⁷⁵ G. I. Udom Azuogu 'Women and Children- A Disempowered Group under Customary Law' in Yemi Osibanjo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 129.

between the rights of women and culture as the former is considered a major threat to societal cultural values.⁷⁶

2.5.1 Positive and negative culture

As a result of the persistent discrimination against women, particularly in the area of customary law, many international instruments aimed at protecting the rights of women delineate cultural rights as negative and positive. For instance, art 5 (a) of CEDAW provides as follows:

State Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either the sexes or on stereotyped roles for men and women

The need to eliminate perceived⁷⁷ or real prejudices based on customary practices is mostly based on the recognition that some practices tend to have a negative impact on women. It has been shown that women are mostly adversely affected by negative cultural practices. However, appropriate means of modifying conduct or patterns of behaviour seem to remain a point of contention. Many have argued for the abolition of customary practices that are considered a violation of the rights of women whilst there are views that demand a new interpretation to these practices by bringing it in

⁷⁶ J Oloka-Onyango & S Tamale 'The Personal is Political? Or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 Human Rights Quarterly 715.

⁷⁷ Some African men have the idea that if women know that they would inherit from their husbands, they might be tempted to kill them. These sentiments come in the wake of contract killings of husbands by their wives as seen in the South African case of Avathakhali, the son of Matate Tsedu, the former editor of City Press Newspaper.

line with modern circumstances.⁷⁸ In many instances, the historical nature of the conflict between human rights and culture are not properly understood. Hence, at this point, it is imperative to understand custom as the basis for many of the controversies surrounding African customary law.

2.6 The meaning of custom

The nature of custom in African context is riddled with controversy. The controversies arise from the influence of colonialism and of the colonialist's understanding of the way of life of the colonised, the emergence of Islam brought about by Arabic jihads and what has in modern times been equally referred to as customary law and finally the understanding of sociologists and anthropologists of the African society.⁷⁹ These influences on the habits and practices of African people have also led to some confusion on whether customary law is the same as indigenous law.

Abumere,⁸⁰ in his exposition on the *Esan* custom of dealing with societal deviants, defines custom as 'a rule of conduct, obligatory on

⁷⁸ Compare the views of Corrine Parker in her book *Using Legislation to Change Harmful Traditional Practices* (2003) Intersentia Publishers and those made by Chuma Himonga & Craig Bosch 'Application of the Customary Marriages Act 180 of 1998: A Problem Solved or Just Beginning' (2004) *South African Law Journal*; Florence Butegwa 'Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community –level Action' in Abdullahi A. An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) Zed Book, New York, 117.

⁷⁹ Etannibi Alemika 'Sociology of Nigerian Customary Law System' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Federal Ministry of Justice, Lagos at 84.

⁸⁰ P.I. Abumere 'Atukhiukiki Among the Esans in Bendel State: A case Study in Belief System in the Customary Law as a Means of Social Control' in Yemi Osibanjo & Awa

those within its scope, established by long usage'. In essence, the group that accepts it as rules are bound by its observance and sanctions. Time frame is a key element of how long these rules of conduct have been an integral part of the people. Thus, a valid custom having the force of law must be of 'immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law, though it may derogate from common law'.⁸¹ For a custom to be antiquated implies the habitual pattern of conduct that is deeply ingrained in the hearts and mind of the people. This could be the reason for the resilience of many rules and practices of African people because it has been of such antiquity that it has withstood the varied forms of supplantation by different forces. In other words, rules, habits and practices of a people are 'customary' to them and as such cannot be completely eroded. For example, among the Igbo, *the ndi otu mmanwu* has been a part of their lives from time immemorial as one of the enforcement mechanisms of the societal values. The *ndi otu mmanwu* or masquerade society has been used as a sanctioning spirit-voice to persons that have become deviants in the community. It is well known that whenever the *mmanwu* comes out, something has happened in the community. Nowadays, it will be used more for entertainment, but in some communities such as in Umunna in Onuimo Local Government Area, *ndi Mmanwu*, as they are referred to, are elderly men who sit as local justices to adjudicate on disputes particularly where it concerns land matters.⁸² This goes to show the fluidity of these customary

U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos at 95.

⁸¹ P.I. Abumere (1991) *supra* 80 at 95.

⁸² Barrister Ifeoma Offor, as one of the respondents as well as an indigene of the area and an officer of the court in Abuja, Nigeria told the present writer that practices indicate that most village women take matters to this group of people as

practices that have the force of law because it remains the essence of the society. That the values and practices reflect the changing nature of the socio-economic status of the society cannot be overlooked.

It shows, therefore, that what is customary to a people in terms of their practices are bound to undergo certain modifications to reflect the changes in the society. For instance in *Lusikisiki* in the Eastern Cape of South Africa, *ukuthwala* was part of the customary practices of the African people whereby a young woman is taken to her husband's house. Presently, the practice is being shunned by the community: men, women and the young women involved, because it has become a forceful abduction without the consent of the young woman concerned and without due regard to her dignity. The society finds the current practice of *ukuthwala* reprehensible.⁸³ Thus, this would remain the reflection of the current mores of the people. This is the reason why South African jurisprudence invokes the living law as it aptly describes and prescribes the prevailing values in the society.

2.7 The concept of customary Law/ living law

Whether the variety of customs and traditions practised in many African countries are in themselves customary law (so-properly called)

their own court of first instance. This form of court is effective in so far as it determines cases speedily and effectively, although cases of male bias against women do occur as noted in the matter between Ada Okoro and Raff Ozoekwe in 2011.

⁸³ South African Broadcasting Commission (SABC) Special Assignment on *Ukuthwala* (17th February 2011).

remains a matter of serious contention as noted by Alemika.⁸⁴ However, one thing that is ascertainable is that a number of common features among African societies have indeed attained the status of law. For instance, marriage in traditional African communities must be concluded between the families with the payment of *lobola*, *bohadi* or bride-wealth.

Although the authenticity of customary law has been largely established as a system of law consisting of a variety of principles, rules and norms, there are still contestations regarding the exact meaning of customary law as either being synonymous with or actually different from 'indigenous law or native law'.⁸⁵ Several factors contribute to this controversy such as the impact of colonisation, Islamic influence and industrialisation. Various features have then been established as identifiable with customary law: conciliation, informal and simple, reliance on oath as evidence, legal responsibility based on religious beliefs and practice, cheap and speedy administration, proper participation amongst parties, easy procedure and less acrimonious manner of settling disputes. It is argued that these features are largely responsible for the continued existence of customary law which in many instances is also referred to as indigenous or native law and custom.

What all of these tensions have done is to deepen the understanding on customary practices as lived out by people in the community rather than those deemed static and immutable. This has resulted in the

⁸⁴ Etannibi Alemika 'Sociology of Nigerian Customary Law System' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 83.

⁸⁵ Alemika (1991) *supra* 84 at 85.

arguments for the notion of living law.⁸⁶ It has been argued that certain practices or rules of customary law have been ossified leading to discrimination and violation of rights, particularly those of women.⁸⁷

The notion of ossification indicates the manner of keeping customary practices in a static position disregarding its very nature of being fluid and dynamic to the ever changing social, political and economic conditions of the society.⁸⁸ The effect of such a rigidified version of customary law is widely debated in academic scholarship and is said to adversely effect the proper development of customary law. This view was well articulated by Ngcobo J (as he then was) in the *Bhe* case of

⁸⁶ Chuma Himonga 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of Customary Law* (2011) Cambridge University Press at 31; Fareda Banda 'Women, rights and culture in Southern Africa' (2006) *Journal of Southern Africa*; See again Chuma Himonga 'Taking the Gap-'Living Law Land Grabbing' in the Context of Customary Succession Laws in Southern Africa' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd at 114.

⁸⁷ Julie Stewart & Amy Tsanga 'The widows' and female child's portion: The twisted path to partial equality for widows and daughters under customary law in Zimbabwe' in Anne Hellum, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga (eds) *Human rights, plural legalities and gendered realities: paths are made by walking* (2007) Weaver Press, Harare, Zimbabwe, 407-435.

⁸⁸ Mokgoro J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 172 stated that 'customary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community'.

the South African Constitutional Court,⁸⁹ in which the crucial questions regarding customary law of inheritance had to be answered. In the main opinion, the Court held that the customary rule of primogeniture discriminated against women and girl children on the basis of sex and birth.⁹⁰ It held further that the certain parts of the provision of the Black Administrative Act 38 of 1927⁹¹ were inconsistent with the Constitution. It held, however, that it is not possible to develop the rule of primogeniture as it applies within the customary law rule governing the inheritance of property.⁹² Ngcobo J in his dissent argued for the need to understand customary law as living law and to that extent it requires a re-interpretation of the rule of primogeniture that could have led to a gender-neutral shape of primogeniture.⁹³ If regard is had for this view on customary law, it shows that there is a need for a new jurisprudence in ways of dealing with contentious issues of customary law particularly as it affects women and human rights. For

⁸⁹ *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another*, 2005 (1) BCLR 1 (CC).

⁹⁰ *Bhe & Others v Magistrate Khayelitsha & Others* 2005 (1) BCLR 1 (CC) at para 53-54.

⁹¹ Two statutes govern intestate succession in South Africa; Intestate Succession Act 81 of 1987 and Black Administrative Act 38 of 1927. The impugned provision is section 23 of the Black Administrative Act.

⁹² *Bhe* Case 2005 (1) BCLR 1 (CC) at para 94.

⁹³ Contrast the views of Ngcobo J (as he was then called) in *Bhe* 2005 (1) BCLR 1 (CC) at para 219-223 to that of Langa DCJ (as he was then called) at para 94. Also their divergent views on living customary law which is the rules and practice as lived out by persons in the community at the time. Langa opines that it is not difficult to accept the notion of living customary law but rather the difficulty lies in ascertaining its content and to appropriately test it against the provisions of the Bill of Rights at para 109-110.

instance, in Zambia, *kusalazya* or sexual cleansing is a ceremony that is performed by a male relative of a deceased man on his widow to 'cleansed' her of the spirit of her dead husband.⁹⁴ The adverse effect of this practice is evident in the high prevalence of HIV/AIDS in the region and so people are seeking other means of adhering to their beliefs and values without endangering their lives. It would be argued that for a clearer understanding of customary law, there is urgent need to re-examine values, norms and standards in terms of the way they affect people. This can only be done when people whose values, norms and standards are allowed to make those changes without any form of imposition.⁹⁵ One of the new ways of re-envisioning customary law system is to look at legal pluralism as a fundamental factor with a view to developing gender justice.

2.8 Legal pluralism and plural legal order

Many countries across Africa and the world have plurality of legal systems, otherwise referred to in this study as plural legal orders.⁹⁶

⁹⁴ See Chapter Four below; Centre for Human Rights, University of Pretoria *The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in six selected Southern African countries: An advocacy tool* (2009) at 41 and 44.

⁹⁵ This could be deduced from the South African case of *Shilubana*, where a *tshivenda* community in Limpopo appointed a woman to be hosi (chief). This was to give effect to the guarantees of the new South African dispensation. However, this transformation within this particular Tshivenda community is not a true reflection of what might be seen in other communities in the surrounding areas or in other provinces such as in the Zulu kingdom of Kwa Zulu Natal.

⁹⁶ Enyinna Nwauche 'legal Pluralism and Access to Land in Nigeria' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd at 59 in which the author discussed the trend in Nigeria where persons affected by land issues do not only adhere to choice of law model but has gone a step further in what was referred to as 'norm shopping' in an

Every country and jurisdiction reflects one or more variations of plural legal orders which have great implications for human rights protection. The state is the primary protector of rights and thus it is pertinent to analyse the impact of plurality of legal orders on the protection of human rights of women; particularly international human rights.

For many women, it requires moving between two different systems of law: common law and customary law in order to protect their rights. Most times, in an attempt to deal with contentions between the two, women are left most vulnerable. The state has devised several methods in dealing with the tension between customary law and guarantees of gender equality. For example, one of the means involves exempting from the domestic constitution and by entering treaty reservation on family law which deals with marriage, property ownership and inheritance as well as other personal status matters.⁹⁷ Since customary law is elevated above the constitution, recourse to other agencies such as international human rights law becomes tenuous. Another means of resolving the commitment to gender equality and entrenchment of customary law is through legislative reform.⁹⁸ As can be expected in a domain that eschews any form of

attempt to find the appropriate mechanism that best delivers justice for them; See also Gordon Woodman 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd at 35.

⁹⁷ S 23 of Zimbabwe Constitution and s 24 of Zambian Constitution are few examples of claw-back clauses on non-discrimination.

⁹⁸ Tracy E. Higgins and Jeanmarie Fenrich ' Customary Law, Gender Equality and the Family: the Promise and Limits of a Choice Paradigm' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press at 423.

imposition, the practicalities of this form is equally contentious and do not necessarily protect women. For example, the South African Recognition of Customary Marriages Act 120 of 1998 requires in its provisions for division of estate in terms of accrual system. Obviously, this is highly unlikely for poor rural women who are yet to benefit from simple property inheritance let alone dividing property according to accrual system if married out of community.⁹⁹

Another means of dealing with plural legal system to promote gender justice is by means of choice of law. Of the three methods mentioned above, the latter two are found in a majority of African countries. The choice model would have been developed to promote the rights of women better but one main challenge is that most times, it is considered mainly in terms of where conflict of laws exists between customary law and other statutory laws.

Legal orders, therefore, include rules, norms and institutions formed to enforce order in society and thus achieve social stability in any given society or among groups of people.¹⁰⁰ These legal orders usually prescribe acceptable conduct within the society or group and possible consequences for violation or actions that contradict the acceptable rules. Plural legal orders arise when there are multiple laws, norms and rules that deal with a specific issue or subject matter and they co-exist within a particular country or jurisdiction.¹⁰¹ For example, in South Africa, the Black Administration Act was enacted to deal with

⁹⁹ See Rita Ozoemena and Michelo Hansungule 'Re-envisioning Gender Justice in African Customary Law through Traditional Institutions (2009) Centre for Policy Studies, Policy Brief 63.

¹⁰⁰ Report of the International Council on Human Rights Policy 'When Legal Worlds Overlap: Human Rights, State and Non-State Law' (2009) Geneva, Switzerland.

¹⁰¹ ICHR Report *supra* 100 at 2.

issues arising from the deceased estate of African people only. The impact of the Act on the rights of African people pre- and post 1994 was the subject of many constitutional decisions.¹⁰² The plurality therefore is not only solely based on variations of norms and laws but also the various approaches and values underlying the different forums of dealing with disputes.

Several factors give rise to plural legal orders, among them are the colonial legacy, conflict prevention, transnationalisation of law and identity politics. In much of sub-Saharan Africa, these factors are evidently part of the experiences of the states.¹⁰³ For example, in South Africa, Zambia and Nigeria, vestiges of the colonial regime are shown by the co-existence of common law and customary law. To add further to the complexities, there is no homogenous customary law even within the same group.

In most of the circumstances in the African continent, state control and legitimacy were factors for the existence of a plural legal order. It was necessary for the colonialists to maintain their authority by using local institutions and chiefs to ensure the legitimacy of their rule. For example, the use of warrant chiefs in Eastern Nigeria enabled the

¹⁰² See generally *Amod v Multilateral Accident Fund* 1998 (10) BCLR 1207 (CC); *Zonke v President, Republic of South Africa* 1997 (12) BCLR 1617 (D); *Ryland v Edros* 1997 (2) SA 690 (C).

¹⁰³ In Southern Africa, Rwanda post-genocide society had to employ a hybrid concept in the reconstruction and reconciliation of the Rwandan society. Gacaca courts were generally set-up to deal with the deep divisions that led to ethnic cleansing and where a particular issue demands that the perpetrator be jailed then modern court system was used. In other words, the country utilised a hybrid concept to deal with entrenched divisions that sought to destroy the country and its people.

British to gain control of this part of Nigeria through its programme of indirect rule despite the widely held notion amongst Igbos of not recognising institutionalised monarchy that gave rise to the saying that Igbos do not have kings- '*Igbo enwe eze*'.¹⁰⁴ Although indirect rule operated in Eastern Nigeria for much of the colonial period, it failed to effectively efface the power of the customary law of the people. This is evident in the common edict of Anambra and Imo states which sets out the rules applicable in these states according to the laws and custom of the people.¹⁰⁵

These influencing factors described above in practical terms have an enormous impact on access to justice. People may have various means of getting redress for any violation of their rights but it may not necessarily advance equality. It may be argued that whilst increasing access to justice is very imperative to securing gender justice however, for many African people particularly women, equality and justice take far too long time or not arrive at all.

Legal pluralism covers different and often contested perspectives on law which range from those recognised by state to ones that exist without the authority of the state or depend on the state for its legitimacy.¹⁰⁶ For example, the decisions of many community leaders taken by consensus regarding cases ranging from petty theft to

¹⁰⁴ Uchendu Chigbu '*Igbo Enwe Eze-The Igbo had no king*' (May 3 2009) Feature Article of Nigerian World (On file with the author); Pita Ogaba Agbese '*Chiefs, Constitution and Policies in Nigeria*' (2004) Issue 6 *West Africa Review* (On file with the author); International Council on Human Rights Policy (2009) *supra* 202 at 8.

¹⁰⁵ See generally the Customary Law Edict for Anambra and Imo States of 1977.

¹⁰⁶ Anne Griffiths '*Legal Pluralism*' in Reza Banakar and Max Travers (eds) *Introduction to Law and Social Theory* (2002) Oxford Hart Publishing, 289.

allegations of stock theft or grazing field's dispute or allegations of witchcraft do not necessarily require state validation. In other words, legal pluralism basically show that state law is not the only means of settling dispute or the only effective legal order in peoples' lives. Generally, it seems that legal pluralism as part of African legal order often presumes some kind of decentring of the state, the fact remains that the state has a primary role in protection of human rights.

Legal pluralism as deep rooted as it may seem in all societies even in Africa, has some challenges particularly as it relates to matters of women, marriage and family law in general. In South Africa, the Law Reform Commission had to deal with the choice of law issue that stems from legal pluralism.¹⁰⁷ The depth of the concept of legal pluralism and plural legal orders is still being felt by many in African communities, which has contributed tremendously to the discourse of universal versus localised rights. A notable feature of legal pluralism that must be harnessed to ensure gender justice is the capability afforded to individuals to 'forum-shop' for the possibility of a best practice that advance justice for them.

2.9 Gender as a concept

The term, 'gender', as a concept is sometimes viewed as sex. Sex refers to the biological attributes of both male and female.¹⁰⁸ Sex looks

¹⁰⁷ South African Law Commission, 'The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law, Issue paper 12, Project 90' (1998) 6-9.

¹⁰⁸ Christine Ainetter Brautigam 'International Human Rights Law: The Relevance of Gender' in Wolfgang Benedek, Esther M. Kisaakye and Gerd Oberleitner (eds) *Human Rights of Women: International Instruments and African Experiences* (2002) Zed Books at 21.

at the physiological structure of being male or female. Gender, on the other hand, refers to the roles male or female play in society,¹⁰⁹ in other words, the roles as ascribed to the male or female gender according to societal views and values of male or female identities. Simply, the concept of gender is largely driven by what the society considers appropriate for a male or female. As a result of this pre-conceived idea of the roles and capabilities of male and female, forms of behaviour or conduct, duties and responsibilities are created along the lines of what is seen as a man's job or females'. This was aptly described by the protagonist of 'Things Fall Apart,'¹¹⁰ Okonkwo, who shouted at his daughter to 'sit like a woman' when she brought him food. Thus, moral as well as social values are factors that affect gender roles.

Gender as a concept is therefore about the roles that men and women take part in the society and not solely about women.¹¹¹ It is the social construction of the difference between men and women, as also described by American Liberal writer Susan Okin who said that gender is the 'deeply entrenched institutionalization of sexual difference.'¹¹² In other words, there are deep rooted conceptions of gender in various

¹⁰⁹ Felicia Anyaogu *Access to Justice in Nigeria: A Gender Perspective* (2009) Ebenezer Productions Nigeria Limited at 14. Also, in the South African Constitution, gender is clearly indicated as a ground for non-discrimination. The ruling African National Congress (ANC) at their elective conference in Mangaung, Free State in December 2012, reiterated their commitment to ensuring that women play equal roles in governance by having 50/50 gender parity.

¹¹⁰ Chinua Achebe *Things Fall Apart* (1971) Heinemann Publishers, London, United Kingdom at 44.

¹¹¹ Christine Ainetter Brautigam (2002) *supra* 108 at 21.

¹¹² Susan Moller Okin *Justice, Gender and Family* (1989) Basic Books Inc. at 6.

aspects of life. For example, there are three distinct gender roles; (a) production/productivity, (b) reproduction and (c) community services.¹¹³

Production/productivity: This entails engaging in activities that yield financial reward or bring income, money or financial resources. For example, being an entrepreneur or chief executive of a company. In Africa, very few women are located in this group because they are largely activities in the public domain. You find more men than women in this arena. This could also be the reason why very few women are in decision-making positions in organisations or are members of governance structures.

Reproduction refers to activities that do not yield financial gain, for example, giving birth to children, doing household chores, taking care of the husband and children and dealing with manageable health issues. Women are mostly found in this group as nurturers, working within the family without remuneration. The unelevated status of women in this category of gender roles makes them vulnerable to abuse and other gender-based violence.

Community services are those services that are rendered in the communities or villages for the good of all persons. For example, women are usually charged with cleaning streams and village pathways, cleaning village squares for festivals and community celebrations, ensuring that meeting place for local chiefs or the king where they adjudicate community conflict or quarrels is clean and

¹¹³ Julia Ekenma Agwu, Gender Activist and Lecturer, University of Nigeria, Nsukka in an informal discussion with the present author as one of the respondents.

ready. Again, this kind of roles for women portrays them as service-oriented and not necessarily fit or positioned to work in the public arena.

Of the three roles, men largely perform activities that gain financial reward for them (Production/Productivity), in other words activities that push them forward as viable and bona-fide actors in the public arena. For women, the situation is different. They play roles that give them very little or no financial gain; activities that are domestic in nature. It is common knowledge that as a result of this dichotomy (public and private arena); women are often seen as not being capable to engage within the public arena. Thus, a life of dependency perpetuated by the vicious cycle of inequality becomes the norm for the majority of women. In order to be seen or to engage with the public sphere, women would have to show their capabilities much more than men. Martha Nussbaum¹¹⁴ describes the importance of creating an enabling environment to develop the full capabilities and potential of women.

Furthermore, gender roles are reflected within the socio-economic, political and cultural contexts and so varies according to specific context as well as culture in which they occur. For example, in looking at gender within the context of inheritance and succession; women are mostly dispossessed, they are discriminated against and experience gross inequality in access and control of land as a resource. The consequences for women are dependency, lack of socio-economic development, lack of decision-making power and ultimately loss of

¹¹⁴ Martha Nussbaum 'Women and the Capabilities approach' in Molynuex and Razavi (eds) *Gender Justice, Rights and Development* (2002) Zed Books and UNRISD.

citizenship. It is because gender roles and relations are largely responsible for shaping women's access to rights, resources, and opportunities in both public and private domain.¹¹⁵ Thus, the impact of gender must be assessed with a view to conceptualizing rights of women and the challenges that inhibit women's enjoyment of their rights.

2.10 Different approaches to gender as a concept

As indicated above, gender is a human rights issue and the ultimate goal in this study is to sustain the understanding that benefits of law, opportunities and resources should be available for both men and women without limitations. In some instances, the approach to gender treats women as an isolated group. This usually leads to programmes that are not fully integrative and comprehensive to achieve equality and empowerment.¹¹⁶ Part of the reason for the isolation may be found in the knowledge and understanding that women are unduly overburdened in society and hence deserves more attention.¹¹⁷

Gender mainstreaming therefore becomes one of the means to deal with discrimination against women, dispossession and inequality faced by women in their socio-economic and political development. In 1997, the ECOSOC (Council) deliberated on the question of gender

¹¹⁵ Christine Ainetter Brautigam 'International Human Rights Law: The Relevance of Gender' in Wolfgang et al (2002) Zed Books.

¹¹⁶ This forms one of the sentiments expressed during the consultations in South Africa on the legal definition of rape. It was widely acknowledged that a lot of men face rape in South Africa and their problems are not being dealt with as much passion and interest as the case for women.

¹¹⁷ TW Bennett *Customary Law in South Africa* (1994) Juta & Co Ltd, Cape Town discussed the gender implications of human rights as a relatively new concept.

mainstreaming all its policies and programmes in the United Nations system where it defined gender mainstreaming as:

“the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men can benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”¹¹⁸

The mainstreaming of programmes and policies to take into account women’s and men’s experiences is based on the recognition of the exclusion of women in most spheres of human development. The assumptions, attitudes and beliefs held by society and individuals, particularly relating to tradition and culture, contribute in perpetuating discrimination and inequality and thus remain obstacles towards achieving gender equality. It is not that men and women should be treated equally or that women are protected as an isolated group; rather it is an approach to deal with the nature and source of women’s subordination. The analysis of gender in such a manner becomes the means to the achievement of gender justice. For example, a cursory look at the United Nations Human Development Index Report for 2010¹¹⁹ shows that in countries in sub-Saharan Africa, gender inequality remains an obstacle to development.

¹¹⁸ See generally UN doc. A / 52/ 3, also quoted by Christine Ainetter Brautigam (2002) Zed Books.

¹¹⁹ Human Development Index-Report, 2010 also available at www.undp.org (accessed June 2011).

countries	Maternal Mortality (per 100,000 live births)	Seats in Parliament % (Female)	With Secondary education (% of 25 years & older Female male)		Labour force Participation Female male		Rank
South Africa	400	33.9	66.3	68.0	51.0	67.0	82
Swaziland	390	22.1	49.9	46.1	55.2	75.8	93
Lesotho	960	25.8	24.3	20.3	71.9	78.7	102
Nigeria	1100	7.3	---	---	39.5	74.8	---
Zambia	830	15.2	25.7	44.2	60.4	78.7	124

According to the report,¹²⁰ out of 41 countries in that category, only South Africa, Namibia and Swaziland¹²¹ are categorised as having medium human development. In terms of this report; the numbers of women taking decisions in parliament even on specific issues relating to women are less than 40 per cent across the board. So, also is the percentage number of women participating in labour force as well as education.

As indicated by the table above, the roles that women predominantly perform show the highest rates of casualties such as high maternal

¹²⁰ HDI-R, 2010 *supra* 119.

¹²¹ The categorisation of Swaziland as having medium human development is somewhat interesting in my opinion given the deep traditional history of Swaziland as the remaining absolute monarchy in Africa. Swaziland is highly dependent on South Africa for its economic survival and her human rights record as it relates to women is less than desirable. See generally the paper presented by COSATU international office representative at the African Institute of South Africa and Human Rights Watch Democracy series Seminar on 28th July 2011.

mortality. The low percentage of seats in parliament occupied by women indicates the high rate of inequality in decision-making roles. The implication is a vicious cycle of poverty brought about by poor socio-economic conditions where only an average of 55 per cent of women are engaged in labour participation compared to 75 per cent average of the male work force. Given the above data, it is an indictment against sub-Saharan Africa and its inability to improve the status of women as well as the inability to achieve any of the markers to the Millennium Development Goals.¹²² It is on the basis of gender barometer such as the one mentioned above that gender equality became an analytical as well as legal tool to combat discrimination. For example, in many African countries, the right to equality is guaranteed by their various constitutions.¹²³ In South Africa, for example, equality as a right as well as a value is entrenched in the Constitution and the court cases have developed their own equality jurisprudence through their decisions.¹²⁴ The South African experience depicts efforts that seek to improve the status of women through the promotion of equality as a right and a value which enshrines justice.

¹²² Countries of the world subscribed to the Millennium Development Goals in 2000, goal 3 which is achieving gender equality by the year 2015 seems like a pipe dream given the statistics above. See generally www.un.org/mdgs for the goals of the Millennium Development Goals (MDGs).

¹²³ Under the Nigerian Constitution, right to equality is provided for in section 42, in South Africa; it is guaranteed in section 9. In these constitutions, discrimination is prohibited on several grounds such as sex, gender, sexual orientation, religion and social status or circumstances of birth.

¹²⁴ See generally the following cases; *Bhe & Others v Magistrate, Khayelitsha & Others* (2005); *Ryland v Edros* 1997 (2) SA 690 (C); *Zondi v President Republic of South Africa* 1997 12 BCLR 1617 (D); *Daniels v Campbell* 2003 9 BCLR 696 (C).

The equality of sexes as an approach to gender may be commonly regarded as an end product of justice. Justice cannot be seen to be served where one part of the community is systematically dispossessed as a result of unequal power relations.¹²⁵ Advocacy for the elimination of discrimination against women started with feminists who ensured that equality between men and women must be achieved. Their approach towards achieving this objective was to view equality in different forms: as sameness or different or substantive equality.¹²⁶ The views of the feminists on sex discrimination are equally approached from the different schools of thought on feminism; whether they are liberal, Marxist/socialist, radical or post-modern. In my view, the essence is to promote and protect the rights of women under whatever circumstances that burden the realisation of gender justice for them.

Liberal feminism approach to gender is concerned with achieving equality between men and women with a focus on removing gender bias in law. In other words, laws should be gender neutral, applying to both genders in the same way.¹²⁷ Liberal feminists concentrated efforts on the individual's need to be autonomous, to make choices and so these efforts benefited those who are in the public sphere but are not allowed the space to express their individuality. Thus, the end product sought here is formal equality, being treated in the same manner as any man. South Africa dealt extensively with issues of

¹²⁵ H el ene Combrinck 'The Dark Side of the Rainbow: Violence against Women in South Africa after Ten Years of democracy' (2005) *Acta Juridica* at 171.

¹²⁶ Karin Van Marle & Elsje Bonthuys 'Feminist Theories and Concepts' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) Juta & Co Ltd (2007) at 34.

¹²⁷ Karin Van Marle and Elsje Bonthuys (2007) *supra* 126 at 32.

formal and substantive equality arising from the adverse effect of apartheid on first; equality between the races and then between men and women.¹²⁸

Those feminists who view women's subordination as arising from the class system and the notion of private property are the proponents of Marxist/socialist feminism. In their view, individual property accumulation is driven by monogamous marriage where the man has exclusive access to his wife's reproductive powers and labour. From this standpoint, what is important remains the powers of production held by men because women are relegated to the private sphere of producing heirs that would inherit the property of the man. Although this form of feminism is no longer popular, evidence of its use may be found in analysis of marriage and labour. Whereas a majority of men earn salaries from work in the public sphere, a majority of women are not gainfully employed and where they are; they are usually not in governance or decision-making positions. The challenge is located in addressing the economic factors that contribute to the subordination of women.

Radical feminism maintains that legal rules are complicit in sustaining male dominance in society by elevating 'male' as the standard against which all others must be measured. So, for the radical feminists, their approach to gender is to unseat patriarchy and effect changes in social structures that subordinate women.¹²⁹ There has been criticism

¹²⁸ See generally the unpublished LLD thesis of Nomthandazo Ntlama 'Impediments in the Promotion of the Rights of Gender Equality in Post-Apartheid South Africa' (2010) submitted to the University of South Africa.

¹²⁹ Karin Van Marle & Elsje Bonthuys (2007) *supra* 126 at 35.

against radical feminism for its inability to recognise that oppression on the basis of sex, class and gender does not mean that every woman share the same experiences. In other words, the concept of sisterhood does not exist in practical terms. This is an indication of the fact that homogeneity does not exist within women groups. Women experience subordination and discrimination differently depending on social status and location. Hence, the need to challenge patriarchy by dealing with status issues irrespective of sex, class and gender.

Another school of feminism that is relevant is the post-modern, ethical and post-colonial feminism. The view of the proponents of this kind of feminism is that local context is paramount. In other words, change should be applied as situation demands. Focus should not only be on differences between men and women but also differences between women. From this viewpoint, the effect of post-modern feminism is that there would never be a dominant force against which all other must comply; rather, there should be occasions to view things from different perspectives.¹³⁰

How these different schools of thought on feminism view women's subordination are invariably reflected on how gender equality is achieved. Equality as sameness expects that the law should treat one person entitled to be so treated like the other who is similarly situated. This was the basis for liberal feminism that demanded that men and women be treated identically. This approach was effective in removing arbitrary barriers particularly those based on false stereotypes.¹³¹

¹³⁰ Karin Van Marle and Elsje Bonthuys (2007) *supra* 126 at 37-38.

¹³¹ Catherine Albertyn 'Equality' in Elsje Bonthuys & Catherine Albertyn (eds) *Women, Law and Justice* (2007) Juta & co Ltd Cape Town, at 83.

However, it failed to take into account the deep and complex inequalities that exist in many societies. As a result of the complexities in gender inequalities, particularly in socio-economic arena, it was imperative to investigate the nature of gender difference and how best the law can address it. For example, in dealing with gender difference, the law must recognise the part pregnancy plays in the lives of women, which is why maternity leave is part of the employment regulations of many countries.¹³²

Other feminists such as Littleton¹³³ believes that all persons should be treated equally having the same humanity and equal moral worth. However, certain legal strategies may require some kind of differentiation. This model of dealing with equality has been used by Canadian Supreme Court¹³⁴ and South African Constitutional Court.¹³⁵

¹³² In South Africa, women can apply for Unemployment Insurance Fund (UIF) when on maternity, unlike in Nigeria where maternal mortality is among the highest in sub-Saharan Africa at 1100 for 100 000 live birth, coupled with low rate of births as a result of lack of attendance by skilled health professional according to the 2010 UNDP gender inequality index.

¹³³ Christine Littleton 'Reconstructing Sexual Equality' (1987) *California Law Review* 1279.

¹³⁴ In the case of *Egan v Canada* (1995) 29 CRR (2d) 104-5 where the Canadian Supreme Court described equality as 'meaning nothing if it does not represent a commitment to recognising each person's equal worth as human being, regardless of individual differences'.

¹³⁵ As part of its equality jurisprudence, the South African Constitutional Court described equality as entitling all to 'equal dignity and respect regardless of their membership of particular groups. That said it may sometimes require differential treatment. In essence, equality between men and women must be achieved but it may also be necessary to differentiate for the purposes of achieving the same objective. In *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para

It is not only liberal feminists that expressed views on the nature of the difference between the genders. Radicals emphasised the need to hear women's voices in dealing with equality because for them, women's difference is intricately bound to their subordination by men.¹³⁶ The view of the post-modernists and black feminists, to which the present author also subscribes, recognises the multiplicity of differences that affect women. It must be recognised that it is not only sex and gender that affect them but also race, class, religious and cultural practices. Recognising that a combination of these factors affects women's equality demands that the law must engage with women's voices and differences.¹³⁷

Equality within the family is the most contentious issue in many African contexts. In addition, regardless of the means of descent, authority within the family and everywhere else is fundamentally held by men. And in most cases, it does not matter whether the society is matrilineal or patrilineal because gender relations are predominantly controlled by men.¹³⁸ Women are then particularly challenged in enjoying their rights as human beings at three levels: as members of a

41, the court considered that women are the primary caregivers of minor children and not necessarily a man.

¹³⁶ Catherine Albertyn 'Equality' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) at 85.

¹³⁷ Cameron Jacobs (SAHRC) as one of the respondents expressed the same views on South Africa in a discussion with the present author; where he said that South Africa has not sufficiently dealt with the balancing of dignity, equality and culture as well as tradition and religion. It is still the prevailing circumstance given the apartheid past of the country when culture and identity were suppressed hence, the practice of culture still clashes with constitutional supremacy.

¹³⁸ Flexon Mizinga 'Marriage and Bridewealth in a Matrilineal Society: The Case of the Tonga of Southern Zambia' (2000) *African Economic History*, 53-87.

cultural society, as part of the religious group, and as an individual to whom international human rights have conferred such rights. For the majority of women in Africa, freedom from discrimination and enjoyment of rights must navigate different levels of ideologies and so, the potential for conflict is very high.

Another dimension to this complex situation is the fact that the woman as an individual must also operate within the culture or religion of the broader community. Most times, decisions are taken out of her hands by giving in to pressures brought on by the value system that dominates within that society. It is not just simply a matter of choice of law in which the woman determines how her affairs would be governed.¹³⁹ For example, if a woman may choose to conduct her affairs contrary to the culture she is associated with, it would be considered an affront by the entire community and she may be excommunicated. Similarly, if she determines that the state as a secular authority confers upon her rights stemming from human rights principles, the community would see it as a target against their culture. Undoubtedly, how gender as a concept is approached determines to a large extent on how the rights of women are promoted and protected.

¹³⁹ Florence Butegwa 'Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-Level Action' in Abdullahi A. An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) Zed Books, 108-125; Tracy E. Higgins and Jeanmarie Fenrich 'Customary Law, Gender Equality, and the Family: The Promise and Limits of a Choice Paradigm' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press at 423.

2.11 Gender justice, human rights and culture

As already shown from the discussions above, gender is human rights and so is critical to any discussion on culture and human rights. This is particularly true in the African context where gender is not only a social construction but a cultural one as well. In other words, the belief system of any particular society equally contributes to its views about roles and to that extent, the proper definition of gender justice. Those who take a political view of gender do not consider unequal gender relations as a central feature of African social relations,¹⁴⁰ whereas those who view women as powerless and suffering under domesticity are more likely to take a broader definition of gender justice which would entail overcoming women's subordination.¹⁴¹

Gender justice as a human rights approach to achieving the realization of women's rights and freedom focuses on the set of convictions that sustains what is right in human relationship and how the desirable outcomes may be achieved through the means of judicial reform and the practical task of access to justice; rights and capabilities.¹⁴² In other words, there must be avenues for women to contest conditions

¹⁴⁰ Ifi Amadiume *Male Daughters, Female Husbands: Sex and Gender in an African Society* (1987) Zed Books, Atlantic Highlands, New Jersey, explores the idea that in Nnobi community of Anambra State and other surrounding communities of Igbo land, gender is unrestricted in the sense that there are no defined power base between men and women as women can freely take up the role of a man and vice versa. This is evidently shown where a woman marries another woman for the purposes of creating a family unit that is duly acknowledged by custom.

¹⁴¹ Sylvia Tamale 'Gender Trauma in Africa: Enhancing Women's Links to Resources' (2002) paper presented at CODESRIA conference on 'African Gender in the New Millennium, Cairo, Egypt.

¹⁴² Maria do Mar Castro Varela 'Envisioning Gender Justice' at www.mcrq.ac.in/spheres/maria.pdf [accessed 09 February 2011].

or relationships that are adverse to their development as persons within the society.

Gender justice therefore is defined as 'the ending of, and provision for redress for inequalities between men and women that result in women's subordination to men'.¹⁴³ As a result of the patriarchal nature of most societies, including those in Africa, gender roles ascribed to women tend to subjugate rather than empower them.¹⁴⁴ The rights of women are thus heavily compromised by systemic discrimination emanating from their society, particularly within the family unit, which is widely acknowledged as the fundamental unit of all societies.¹⁴⁵ It is at this juncture that the majority of women face disability of such magnitude that erodes completely their visibility as equal partners with their male counterpart and compromises their active citizenship.

¹⁴³ Anne-Marie Goetz 'Gender Justice, Citizenship and Entitlements: Core concepts, central debates and new directions for research' in Maitrayee Mukhopadhyay and Navsharan Singh (eds) *Gender Justice, Citizenship and Development* (2007) International Development Research Centre, Ottawa and Zubaan, an imprint of Kali for Women, India.

¹⁴⁴ Udom Azogu 'Women and Children: A disempowered Group' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos. Most times, an assessment of customary practices is that it violates the rights of women. Whether the practices have the capacity to effect change from within is usually not tolerated. Further, proponents of human rights most times, seek to completely abolish the customs and traditions of the people as means of protecting the rights of women. It is the opinion of the present author that such an approach only seeks to complicate matters of family and identity within the African context which most times are communally determined and preserved in as much as they value individual freedom.

¹⁴⁵ See generally, art 18 of the African Charter on Human and People's Rights and the criticisms levelled against this particular provision.

Gender justice is therefore an imperative to ensure that women enjoy substantive equality and greater rights through access to justice within the society. Substantive equality recognises that certain groups such as women, children, people with disabilities, and indigenous people have been greatly disadvantaged, previously, and so efforts must be geared towards redressing past injustices. For women in general, and for women under customary law, in particular, it presents the opportunity for women to begin to access resources such as land, greater access to health care and access to justice.¹⁴⁶

Gender justice thus is a response to the multiple and intersecting factors that negatively affect women from being full and active citizens of their countries. The key element of gender justice is accountability by institutions that are power holders; in the community, household, market or the state.¹⁴⁷ Unequal power relations between men and women in any one of these sites or combination of them results in loss of membership to any group: in effect, loss of citizenship. In Africa, for the most part, the laws recognising women's right to inheritance and succession are not adequate where they exist or are ineffective due to contestations between traditional system and principles of human rights law. For example, the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa in article 20 and 21 provides for the right of women to inherit land and their rights as

¹⁴⁶ Mulela Munalula 'Changing the Customary Law Standard of Gender Justice: The Additional Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' in Manfred O. Hinz (ed) in collaboration with Helgaard Patemann, *The Shades of New Leaves, Governance in Traditional Authority: A Southern African Perspective* (2006) Centre for Applied Social Sciences (CASS), Faculty of Law, University of Namibia at 167.

¹⁴⁷ Anne-Marie Goerzt (2007) *supra* 143 at 10.

widows. At the level of international law, inheritance is currently a guaranteed right particularly in terms of the Protocol to the African Charter on the Rights of Women in Africa whereas most countries in Africa who are State Parties to this and other international treaties do not specifically provide for the right to inheritance in their respective constitutions.¹⁴⁸

The South African Constitutional Court in 2004 delivered what is considered in human rights circles as a landmark decision on the rule of primogeniture, which is central to customary law of succession. The *Bhe*¹⁴⁹ case decided that the customary rule of primogeniture discriminates against women and is contrary to the equality guarantees of the Constitution in so far it excludes women from inheritance.¹⁵⁰ For the majority of the South African society, there was the need to redress the injustices of the apartheid legislation; hence it

¹⁴⁸ It is only the South African Constitution that has provided for the right of access to land s 25 (5) and the right of access to housing in s 26 (1). The provision it may be argued is only constitutionally guaranteed to address the injustices of land dispossession of the apartheid system. It does not specifically address the challenges relating to access to land through inheritance. However, it must be stated that the gap may have been filled through strategic litigation as found in *Bhe* case. There are still challenges to this right for majority in South Africa. Zambia and Nigeria on the other hand continue to face challenges of lacunae in constitutional provision of the right to land and inheritance.

¹⁴⁹ *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) BCLR 1 (CC).

¹⁵⁰ There is a different view by Cameron Jacobs and Manfred O. Hinz that the *Bhe* case was legally progressive but not great practically, hence it is not a watershed case as may be viewed by rights activists and women organisation as social relations in the country remains unequal and the South African society has not yet properly dealt with the balance of dignity, equality and culture as well as the conflict between tradition and religion.

was imperative to create a society in which human dignity, freedom and equality are sacred.¹⁵¹

Another South African case that has protected the rights of women in succession is the *Shilubana* case. The case ruled that the Constitution would support efforts of tribal communities when they make decisions that support the rights of women as envisaged in the constitution and international human rights instruments. The Valoyi tribal authority made the decision to appoint a woman as *hosi* (chief). The tribal authority supported this decision by relying on the changes that have come to characterise the South African democracy: namely, the embrace of dignity, equality and freedom. The *Shilubana* case brought into sharp focus the need not only to eliminate discrimination of women in terms of sex, gender and birth, but also to promote gender justice in customary law. Understanding therefore, the legal meaning of discrimination is instructive to dealing with the subordination of women.

2.12 Legal meaning of Discrimination

Discrimination largely contributes to the inability of women to have full enjoyment of their rights as women. Some of the forms of discrimination that deny women the enjoyment of their rights include domestic violence that occurs within marriage and harmful traditional practices. To ensure that women are protected and that they enjoy inclusive and active citizenship, some of these rights have been entrenched in many international human rights law instruments. For example, the Convention on the Elimination of all Forms of

¹⁵¹ See generally, the preamble to the Constitution of the Republic of South Africa.

Discrimination against Women¹⁵² (CEDAW) defined discrimination in art 1 as:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field”

The purpose of this bill of rights for women was to specifically address issues of violation of rights of women on the basis of sex, gender and other discriminatory stereotypes.¹⁵³ Art 15 of CEDAW provides for equality of women and men before the law and art 16 provides for rights in property and further empowers the woman to own and alienate property. States are obliged to refrain from acts that would defeat the purpose and object of the instrument, namely, elimination of discrimination against women.

In line with principles based on democracy, equality and freedom many African countries have provisions guaranteeing equality of men

¹⁵² Adopted and opened for signature, ratification and accession by the General Assembly resolution 34/180 of 18 December 1979. It entered into force 3 September 1981.

¹⁵³ Another human rights instrument that has the same provision include the Protocol on the Rights of Women in Africa in art 1 defined “discrimination against women as any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.

and women in their constitutions.¹⁵⁴ For example, in Nigeria s 42 of the constitution provides for non-discrimination on many grounds including sex and birth.¹⁵⁵ Much as these countries have non-discrimination clauses in their constitutions, some of them have through the back door limited the constitution from effectively protecting the equal rights of women. For example in Zambia, Zimbabwe and Lesotho issues relating to personal law comprising inheritance, succession, maintenance, divorce and so on are precluded from constitutional scrutiny. In other words, these countries have made specific reservation to exclude family law from the purview of the constitution. The ripple effect is that gender-based discrimination persists in public as well private spheres. No doubt, the reason for

¹⁵⁴ In Africa, it is believed that some principles of societal relations are based on the inherent nature of kinship where each member of society is a brother or sister to the other; in other words, communitarian. This concept is still found in many African societies of today despite modern democratic principles which are based on the ideological underpinnings of liberalism. In many instances today, individualism is being portrayed as the most beneficial to many including women rather than communitarian which remains the basis of traditional lifestyle. On the other hand, the principles underlining human rights law such as equality and non-discrimination is based on men and women being born equal. It is a natural claim to each simply because they are human. See generally, Paul Gordon Lauren *The Evolution of International Human Rights: Visions Seen* 2nd edition (2003) University of Pennsylvania Press; Michelin R. Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (2004) University of California Press, Berkeley.

¹⁵⁵ See also art 12 & art 13 (1) & (2) of the Constitution of Tanzania, s 20 of the Constitution of Malawi prohibits discrimination, s 24 of the Malawian Constitution takes it further by providing for the rights of women in property, marriage, and personal capacity, non-discrimination clause also exists in Zambia in art 23 but in terms of art 23 (4), there is a claw-back clause which makes customary law not to conform with the constitution. Lesotho in s 18 prohibits discrimination but like Zambia, the provision contains a claw-back clause in s 18 (4) (c).

persistent discrimination of women could be found in the dominant view of gender; in other words the roles of men in society is to control and conquer the public arena whilst women to the extent that they can share in the public limelight otherwise they [women] dominate the domestic or private space in the society.

Conclusions

This chapter has been able to analyse the different fields at play in ensuring gender justice. They are numerous, complex and so require a paradigm shift and moving beyond rhetoric. The present author has argued for gender justice as it sustains substantive equality whilst also creating accountable mechanisms for power-holders within the community, household and market. However, what remains a critical source of concern are the machineries in place for achieving gender justice.

The rights of women in family law and personal status are central to the realisation of their rights as individuals within their particular group. It is nevertheless at this juncture that the complexities are heightened for the African woman where kinship and preservation of the family is of paramount importance. Group rights may not necessarily trump individual right because an individual is protected within the group he or she belongs to and so does not exist in a vacuum but as a member of a group whose interests and entitlements are protected within that group. So, the advancement of gender justice for women must evaluate individualisation of property as expressed by Chuma Himonga under the concept of living law. Alienating other members of family for individual protection of rights

seem foreign to African culture and sustains forceful take-over of family property from a surviving spouse. It is the opinion of the present author that a proper balancing act is required under these circumstances.

It has also been established in this chapter that nowhere is the debate between universalists and relativists more apparent than when dealing with the rights of women in family matters. As it stands, the issues are no longer academic but are geared towards finding common ground. Ensuring that the rights of women are protected is critical to the overall development of society because no meaningful progress occurs when women are divested of all potential in the socio-economic, cultural and political arena.

To be able to access resources and opportunities on the basis of equality with men have many levels of contentious issues, starting with proper understanding of equality as substantive and purposive interpretation of culture and tradition. Customary law as the living law of the people may be difficult to determine. Nevertheless, its sustenance is based on its intrinsic value as a mark of identity. On the other hand plural legal orders as noted in many African countries may have their complexities because of the varied forms and practices; it remains however a source for extending avenues for greater access to justice for women. Recognising the relevance of traditional systems in improving access to justice is a core component towards ensuring gender justice because it gives more people, particularly women the opportunity to use approaches that are less expensive, understandable, in close proximity and without too many delays.

In many African countries, constitutional guarantees are still steeped in colonial legacy which remains a challenge to the realisation of gender justice. Reforms are slow or do not take place at all, thereby leading to some form of ossification of customary law. And in some cases like Zambia and Zimbabwe, where customary law stands above the constitution, it often leads to grave consequences for women's rights.¹⁵⁶

It has been shown in this chapter that with customary practice as it now stands, states are merely divesting themselves of the colonial statutory legacy which fails to take into account the development of customary law. In my view such development would take place when international human rights law language is infused into traditional arena - not as a foreign concept but as a means of creating positive cultural context. There is no doubt that aspects of practices and rules of customary law go contrary to international human rights law. However, despite this unfavourable view about the traditional arena in engendering women's rights, to ensure gender justice within the traditional system, an overwhelming majority indicates the need to use its dispute resolution mechanism.

As noted in the chapter, the positive features of customary dispute resolution include promoting unity, reconciliation, respect and morals. To ensure that gender justice in African customary law is realised, there must be a balancing act of the different social fields and means of adjudicating disputes. Any model for gender justice should

¹⁵⁶ See for example, the Zambian case of *Musonda v Musonda* SCZ Judgment N0 53 of 1998, the court decided that the woman cannot share 50/50 the property with the husband and that she must show material contribution to such property.

incorporate human rights in informal system based on the intrinsic value that the system already espouses in ensuring fairness, equity and justice.

Chapter Three

Marriage: law and practice in Nigeria, South Africa and Zambia

3.1 Introduction

The majority of African women find themselves in a position where they are dominated by law and also discriminated against on the basis of sex, gender, marital status and birth. As a result of being unequal in power relations within the family and other areas, most women are unable to access justice and enjoy substantive equality on the same basis with men.

This chapter critically investigates and analyses the position of women under customary law in Nigeria, South Africa and Zambia as being reflective of what obtains in many countries sub-Saharan Africa in areas of marriage, and consequences of marriage. In the three countries mentioned above, received common law and customary law are sources of law, although in many cases, particularly on issues of personal status or family law, different rules and practices abound that militate against the rights of women.

This chapter therefore discusses these differences in law and practice with a view to showing the actual challenges encountered by the majority of women under customary law. It would also look at the limitations of law in achieving gender justice. As a starting point, it is imperative to commence with an in-depth look at marriage and related social institutions which form the basis of other societal custom and institutions of customary law.

3.2 Marriage under customary law in Nigeria

Marriage under customary law is one form of creating kinship and binding family relationships that is normally based negotiations and exchanges of agreed articles such as cattle, clothing and money. In

other words, marriage is basically the formation of an informal understanding between parties to have a man and a woman unite, which is followed by a more formal agreement between the families.¹

Among many tribes in Nigeria, the marriage of any young woman under customary law marks the beginning of legal relationship between the families of the women and that of the prospective husband. Such relationship is followed by certain processes aimed at ensuring that the woman to be married is accorded all the rights, duties and obligations due to her and her family and vice versa.

The informal agreement is entered into when a man finds a woman to marry and the formal aspect proceeds when he asks her family for her hand in marriage. When the woman's family agrees to give her in marriage to the man, the family of the man agrees to pay bride price (interchangeably bride wealth) or referred to as *ime ego* in Igbo. The man thus agrees to fulfil his obligations as an in-law. This agreement is then finalised and publicly celebrated in the presence of one or more witnesses. Usually, the celebration is a public acknowledgement of the union of the families signifying new kinship and social relations. This is the reason why dissolution of customary marriages requires stringent measures and is viewed seriously as the families have gone to great length to solidify the relationship.

To have a valid customary marriage in many communities in Nigeria, the following elements are required:

¹ BM Gimba 'Customary Law of Marriage in Borno State' in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos at 432.

Capacity: Generally, there is no specific age to marry under customary law but it is widely acceptable that a woman is grown to be married at the age of puberty which is usually 12-16 years for the girls and 16-20 for the boys.² Clearly, the difference shows that there are disparities in the age at which girls marry under customary law. One of the reasons for the disparity is that physical maturity is quick for women. The early age at which girls are married off in many communities have raised issues of vesico-vaginal fistula (VVF) due to non-maturity of the pelvic bones to bear children at such a young age.³ Within Nigeria, there are disparities on the age of capacity in the North and South. In the South, girls mostly are given away in marriage as from 16 -18 years whilst in the North, the age is much lower which is why there are more cases of VVF in Northern Nigeria. Undoubtedly, the clear lack of certainty regarding age raises a number of gender issues. As already indicated, young women are at great a disadvantage with adverse risks to their health, education and general well-being when they marry early.

Consent: Generally, consent for marriage under customary law is given by the family unlike other forms of formal law where the state grants the authority according to the case of *Hyde v Hyde*.⁴ One of the

² See *supra* 1, 432-433, also according to an informal discussion with Barrister Chinelo Emeruwa, a woman in Eluama, Isikwuato South East, Nigeria was married at the age of eight, which is the lowest they have heard.

³ BAOBAB for Human Rights (2005) Publication on the Rights of Women, Lagos, Nigeria.

⁴ *Hyde v Hyde and Woodmansee* (1866) All ER where Judge Penzance of the Courts of Probate and Divorce declared that 'marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others'..

key elements under English law is that the marriage must be entered into voluntarily. Under customary law, on the other hand, it is acceptable practice to have the consent of both parties to the marriage. However, often times the consent of the bride in question is dispensed with because parental consent is of greater importance.⁵ The importance attached to this requirement for marriage is notable in an Igbo adage that says: *ofu nwoke adighi aga okwu nwanyi* meaning that 'one man does not go to negotiate marriage'. The challenge with consent in marriage under customary law is that often times, the consent is obtained illegally by coercing the young woman to marry someone she does not know well and is usually much older; and in some instances, the young girl is underage and so her consent is basically illegal.

Bride wealth: In most ethnic groups in Nigeria and in much of Africa, bride wealth signifies the binding nature of African customary marriage.⁶ Traditionally, bride-wealth is paid with valuables such as cattle, textiles, and now increasingly money. The present author has observed in the course of this study that in many Igbo communities,

⁵ Chief Ume Okwoaka in an informal discussion on marriages in Eastern Nigeria with the author told of the position of a 16 year old girl, whose consent to marriage was not taken into account to a man older than her by 15 years or more because as the only girl of her parents, the prospective husband at the time promised to take care of her.

⁶ Northcote Thomas *Anthropological Report on the Ibo-speaking peoples of Nigeria, Part 1 Law and Custom of the Ibo of the Awka Neighbourhood, South Nigeria* (1969), Negro University Press, New York at 63. In this report on the lives of Igbo people by a government anthropologist indicates the resilience of the practice of bride-price as a valid custom then and still remains a prerequisite for customary marriage in Igbo land today. Changes have taken place in what may be given as valuables but the essence of the practice remains the same.

the amount has been fixed at 500 naira for those who are not educated (3 USD) or 1000 naira (6 USD) for those who are educated or working. The bride-wealth varies according to locality.⁷ Several things are inherent in the giving of bride-wealth such as the names and lineage of the children of the marriage; property matters and where the woman may be laid to rest if she the dies. In other words, bride-wealth indicates not only the nature of the relationship but also consequences that may arise from it. It must be stated that many women insist that their bride-wealth be given to their families before they go to live with their prospective husbands. In essence, bride-wealth solidifies the basis of a marriage relationship and the rights therein; intended to ensure that she is protected within the confines of her marriage. Nowadays, however, the concept has become an avenue for abuse of women and girls because of the commercialisation of the concept and bad interpretation of the custom by those who view it as purchasing the woman and her fecundity.

Celebration: With this element of marriage, it is intended that the society to which the woman belongs realises her new family relationship and the importance of respecting such liaisons. In other words, the public knowledge attached to marriage celebration under customary is largely intended to protect the value, dignity and rights of the woman. With people in Europe or using common law concept, the ring signifies the marriage in public but in African customary law, the celebration serves as the equivalent with all the values attached to it.

⁷ This information was gathered from Chief Ume Okwoaka and Barrister Chinelo Emeruwa on the position of women in Enugu, Imo and Anambra States of Nigeria which make up the South East region of the country.

Across many communities in Nigeria, be it at Awka or Enugu in the South or in the Northern communities of the Kanuri, Gwoza and Bolewa, these elements of marriage described above are present even though there are differences in each ethnic grouping. The marriage celebration, thus, marks the significance of marriage as the bedrock of social institution and society. For instance, marriage regularises the link between the couple by stipulating the kinds of chores that they both perform in the family. Chores that are deemed strenuous are left for the men whilst women do the less strenuous and dexterous ones. For example, among the Igbo, women do not climb trees and certain crops are not associated with them such as yam. Most times, women are known to plant crops such as cocoyam. The justification for this division of tasks is purely based on biological and functional strengths of the sexes.⁸ Unfortunately, it is not acknowledged in many communities of the strenuous job of tilling the field which many women do for production of cash crops for the family without any form of compensation. What is also not usually viewed as amounting to heavily strenuous work are the pains endured by many women during childbirth. It is viewed by society as work that the body of the woman has been built to do which could account for the many number of women left in throes of pains of childbirth unattended to and who loose their lives in the process.⁹

⁸ Onyeka Nwanunobi *African Social Institutions* (1992) University of Nigeria Press, Nsukka at 37.

⁹ See Chapter two where the maternal mortality in Nigeria is the highest among the three countries under study according to the 2010 Human Development Index Report of the United Nations.

Marriage is also significant in that it creates families and so qualifies persons as ancestor. Ancestry is formed when a person is married and has children. The institution provides the child with a lineage. His or her origin as person depends on his lineage whether it stems from his father if it is a patrilineal society or a matrilineal if from the mother.¹⁰ Previously, during the pre-colonial times, marriages among the nobles and kings was used a diplomatic tool to deal with intra communal conflict and wars generally. During times of conflict, there is usually famine and so marriages between rivals or enemies create allies and prevent loss of lives.¹¹ Although diplomatic marriages no longer take place, it is a testament of how communities maintain peace and stability.

Another significance of marriage is that within the African kinship context, it creates a monopoly of sexuality. Marriage gives a husband the monopoly over his wife's sexuality, labour and services. In other words, for the African man, it is important to have male heirs to inherit the property and carry on the family name. Thus, the man may intentionally drive the reproductive process to advance his intentions of having a son to the detriment of the health of the woman. Although, the situation may create a reciprocal claim for the spouse, it may be argued that other factors such as unequal power relations, social status and chiefly authority had contributed to rights weighing more in favour of the husband rather than on equal basis. For example, post-colonial Africa saw the erosion of powers of women and stripping of

¹⁰ Nwanunobi (1992) *supra* 8 at 39.

¹¹ This is evident in the conflicts arising from boundary disputes in many parts of Nigeria. For example is the community conflict between the Aguleri and Umuleri towns of Anambra State in Nigeria. In 2004, there was huge fighting between the towns; yet marriages are still contracted between the two towns.

rights in land and property through granting of titles to men only as heads of the household.¹² Also, the dichotomy between the public and private spheres contributed to weak economic position for women as they were relegated to the domestic sphere that do not in any way create economic fortunes. Whilst the participation in public affairs such as land administration and chieftaincy matters as well as decision-making powers principally resided with men, the situation leaves the majority of women without a voice.¹³

Evidently, customary marriage in Nigeria today has retained its characteristic of being a symbol of social interaction between families that get together in marriage. People still contract dual marriage ceremonies; customary marriage for its importance in their identity as members of a particular group or community on the one hand and civil marriage for its creation of greater rights in terms of the common law. Much as customary law may not provide much right for women, majority of marriage commence with customary law.

¹² Bioye Tajudeen Aluko and Abdul-Rasheed Amidu 'Women and land rights reforms in Nigeria' a paper presented at the 5th FIG Regional Conference on Promoting Land Administration and Good Governance, Accra, Ghana March 8-11, 2006 at 9.

¹³ In South Africa, very few women are chiefs in their communities and majority of rural land administration are vested in the hands of the chiefs. As a result, many women hardly participate in decision making relating to resource availability and control; according to Inkhosi Pathekile Holomisa in a Seminar on the Traditional Courts Bill and Gender Equality held at the HSRC on 25th July 2012. Also in Zambia for example, the Minister of Justice is vested with the power to appoint local justices who preside over customary land matters. Hardly do you find women as local court justices hence it is very difficult for them to participate in such matters affecting their resource base and livelihood.

Within customary law, two kinds of marriage are known; monogamy and polygamy. In between them are other forms of marriage not widely practiced in modern times or its form has been modified with changes in socio-economic condition. For instance, it is acceptable in some parts of the Igbo land for a woman to customarily marry another woman for the purposes of a valid and recognised marriage. The children born of this union belong to the family of the 'female-husband'.¹⁴ It is a very interesting practice within the Igbo culture that could still be found in 21st century African community. It is also interesting to note that the validity of this form of marriage have not come under constitutional scrutiny. This practice is known among the wider community of Ogbaku and Amoli, Mbanabo local government area, Nigeria. The three children born to a female husband (Nnewedum Okolo) in Amoli, are now adults with their own families.¹⁵ This form of marriage is contracted as a monogamous *marriage without the tendency* of it being labelled a gay relationship.¹⁶ In my

¹⁴ Ifi Amadiume *Male Daughters, Female Husbands: Sex and Gender in an African Society* (1987) Zed Books.

¹⁵ According to Uchenna Okonkwo Eneh in an informal discussion with the author said that this form of marriage was entered into by a family member, Nnewedum. She has 4 sons of her own with her husband who was the traditional ruler in Enugu State, Nigeria; she was also the female husband to Grace and mother to her two sons and daughter from her female wife who had died several years earlier. The children born of the wife of Nnewedum were legally and formally recognised by the community as her children.

¹⁶ The emphasis on this form of marriage never to be viewed or seen as a gay relationship is based on the fact that it is not. It is also a means of demystifying gender roles in traditional setting, that a woman could be a husband as it is intended in the community to a woman, taking care of her and giving the woman and her children her maiden name. See also Ifi Amadiume, *Male daughters, Female Husbands: Sex and Gender in an African Society* (1987) Zed Books.

view, being a female-husband addresses aspects of gender justice to the extent that the wife in question is accorded all the rights and privileges.

Most polygynous marriages in Igbo land are done with a slightly modified form since Christianity is now widely practiced. The need to be seen as Christians has become important to some men that they decide to marry one of their wives in the church as a Christian. This view is coming from the premise that polygamy is against God and man. Thus, one marriage is governed by civil law and the other by customary law. It must be argued that though this form of marriage is aimed at creating a stable family with rights accorded to each wife, the entire system is fraught with inconsistencies as both women have been married under customary law first and then one is married according to the church which is recognised as conferring on parties the rights as obtained in civil marriage.

3.2.1 Religious marriages in Nigeria

In the Northern part of Nigeria which is predominantly Muslim, marriages are conducted in terms of the religious belief based on the Quran and the application of Shariah law. Since 1999, in about 12 states of Northern Nigeria some of which are; Zamfara, Kano, Kaduna, Jigawa, Bornu, Sokoto, and Niger decided to apply the extreme form of Shariah. Many women in these states have faced countless charges with extreme forms of punishment such as stoning to death for the crime of *zina*-adultery.¹⁷ The influence of the current application of Shariah in Nigeria has great impact on the rights of women in

¹⁷ BAOBAB for Human Rights (2005) publication on the Rights of Women, Lagos, Nigeria.

marriage and divorce. Undoubtedly, the status of women under Islamic law in Nigeria is inferior compared to rights enjoyed through common law and even indigenous customary law.¹⁸ Promoting gender justice within this arena presents many challenges due to the immutable nature of Islamic law. South Africa is another country in which Muslim marriages take place. The position of women under this system is unclear as Muslim marriages are not legally protected under the South African Constitution. The Courts have however, been progressive in protecting spouses as noted elsewhere in this study.

3.3 Marriage under customary law in Zambia

The forms of marriage recognised in Zambia are customary and statutory marriages. In Zambia as in most countries in Africa, the customary law is as varied as the tribes or ethnic groupings found in the communities. And so, customary marriages are contracted according to the customs of the parties; be it *Lozi*, *Bemba* or *Tonga* or *Ila*.¹⁹ Thus, with minor variations all customary laws recognise as essential for its validity the following:

- (a) parties must not be prohibited by recognised degrees of affinity in relationship;
- (b) *lobola* must be paid by the man to the bride-to-be's relatives or family;
- (c) the woman must be unmarried;
- (d) parties must have reached the age of puberty;

¹⁸ Yüksel Sezgin 'Women's Rights in the Triangle of State, Law and Religion: A Comparison of Egypt and India' Vol 25 2 (2011) *Emory International Law Review* 1007-1028 at 1012.

¹⁹ Chuma Himonga *Family and Succession Laws in Zambia: Developments since Independence* (1995) LIT Verlag, Münster at 75.

(e) the consent of the parents of the woman must be given to the marriage.²⁰

It must be noted that customary marriages in Zambia is mainly polygamous²¹ and so it is the woman who must not have any other marriage relationship. It can be argued then that polygny is traditionally acceptable and not polyandry.²² Many have raised concerns of gender equality on this matter, however, in the present author's view, pursuing equality purely on the basis that it should be right for men and for women to each have as many spouses as they desire would not ensure gender justice rather, it is the substantive equality that would be reflected in any union that would promote greater rights to justice for women.

In Zambia, parties are usually not under obligation to register their customary marriages however, practices have shown that it is a preferred course of action among people. Registration of marriages may be done at a local court or at a rural district council.²³ For example, during the colonial time, the colonial administrators

²⁰ Chuma Himonga (1995) *supra* 19 at 75.

²¹ Polygamy is huge in Zambia and is allowed mostly in the South of the country according to Brenda Kalenga, from Bemba, Kasama North of the country as one of the respondents in this study.

²² Polyandry is mostly prohibited in Africa because the practice allows women to marry more than one husband whilst polygny on the other hand allows men to marry many wives.

²³ It is a common practice though not a strict requirements that each village head should register customary marriages in terms of the Village Development Act 30 of 1971, Cap 289 Laws of Zambia.

registered marriages for the purposes of taxation²⁴ and for protecting women and children against forced marriage and sexual abuse.²⁵

According to Himonga,²⁶ registration of customary marriages is an imperative that would deal with many challenges such as: proof of unregistered marriage by witness evidence; minimal time wasted on litigation trying to prove the validity of marriages due to lack of documentary evidence; and provision of proof of marital status for purposes of benefits such as housing. Although these may be necessary interventions, it must be noted that majority of the people involved are rural, poor women who would face challenges of understanding the processes, financial burden of going to look for where to register and its attendant consequences.²⁷

It is an acceptable practice among people in Zambia to bless their customary marriage in a church as a religious blessing. There is no legal prohibition against such blessing hence the ceremony does not in any way have any legal significance to the status of the marriage which remains a customary marriage. The case of *Chaila v Chaila* is an example of religious blessing of a customary marriage in Zambia.²⁸ The case dealt with the jurisdiction of the local court to hear a complaint by a husband against his wife. The wife applied to the High

²⁴ Martin Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985) Cambridge University Press at 172.

²⁵ Himonga (1995) *supra* 19 at 161-166.

²⁶ Himonga (1995) *supra* 19 at 76-77.

²⁷ Compare and contrast Himonga's argument in the Zambian situation and her position in the recognition of customary marriages in South Africa to be discussed below.

²⁸ 1982 /HE/101 (HC ka).

Court for an order prohibiting the local court to hear the matter. She claimed that the local court had no jurisdiction to hear the complaint under customary law because the marriage had only been solemnised at a Roman Catholic Church. The church had no license neither was the priest given a certificate by the Registrar of Marriages to the parties before the celebration of the marriage. The High Court held that the parties had not intended to contract a marriage in terms of the Marriage Act²⁹ but to obtain blessings only from the priest.³⁰ The *ratio decidendi* in this case being that though 'blessed' according to Church rites, the marriage was not *de jure* performed according to the Marriage Act and, therefore, was not 'statutory' in terms of this law.³¹ Blessing of customary marriage differs significantly from marriages conducted in church under a licensed church minister and of which the formal requirements for a marriage under the Act have been complied with.³² The practice of having a licensed church marriage in addition to customary marriage as seen in Zambia is found also in Nigeria. However, in Nigeria, customary marriages remain exclusively so if the parties so desire and therefore the blessing of customary marriage is not known in Nigeria.

²⁹ Marriage Act Chapter 50 Laws of Zambia.

³⁰ The status of women who has gone to the Church to bless their customary marriage remains critical as the law can only protect them if they followed the requirements in terms of the Marriage Act. Mere solemnisation does not adequately protect the woman if any dispute arises. It raises confusion on the status of customary marriage which effectively remains so despite the 'blessing in Church'. The implication is that many women think that they are protected in terms of the law whereas they are not because they have not properly complied with the requirements in terms of the law.

³¹ As a matter of fact and law as it stands, the priest in this case should have rejected the request for the marriage blessings for lack of jurisdiction.

³² Ss 20 and 26 of the Zambian Marriage Act.

Despite modernisation, majority of Africans in fact undergo two marriage ceremonies one based on statutory marriage according to imposed law and the other customary marriage according to the customs, rituals and traditions passed on them by their ancestors. This is common cause in most African jurisdictions that judges and other presiding officers cannot easily tell when confronted with a case involving a marriage dispute and can only make determination as regards their jurisdiction or lack thereof upon assessing evidence deposited by parties and their witnesses. Marriages concluded according to the law and practice of their ancestors is truly the first of family union that they know. Therefore, Zambia simultaneously entertaining two different marriage systems in the same jurisdiction which poses status identity problems that are only put to rest by the intervention of a Judge is not unique to this jurisdiction.

The customary practices involved in a marriage are long and elaborate particularly where every custom or practice was followed hence, dissolution of customary marriage is difficult. So often, many women who find themselves in abusive marriages face multiple challenges because they cannot freely and safely lay charges against their abusive spouses. The court environment is intimidating and the processes too complex that many cannot follow through with a case; and where the customary marriage had been elaborate and lots of money was spent, it is usually very difficult to pay back what was given in terms of the *lobola* or bride wealth. In majority of the cases, it is not possible to pay back the *lobola* because of poor socio-economic conditions. Even in cases where they are paid back, the community continues to regard the woman as a wife particularly where there are children from the marriage. In other words, many women face major

constraints that would adversely affect their socio-economic conditions in marriage whether they remain in an abusive marriage or otherwise.

3.4 Marriage under customary law in South Africa

Like most countries in Africa, South Africa entertains imposed law and customary law. These laws have influence on the personal status of many people in South Africa. Particularly for persons married under indigenous customary law, Muslim and Hindu customs, these forms of marriages were considered potentially polygamous and were thus not recognised as valid marriages under the South African law prior to 1998.³³ Prior to 1998, the Supreme Court was of the view that

³³ In 1998, Recognition of Customary Marriages Act 120 of 1998 was enacted to give majority of Africans legal protection which they did not have previously. Different laws applied to persons married under customary law which treated Africans differently making it impossible for spouses of deceased African man to benefit from his estate. Persons married under Muslim and Hindu customs are still discriminated against in terms of the law. See generally the following cases: *Ryland v Edros* 1997 (2) SA 690 (C), in which the court did not recognise the validity of the marriage as it was considered potentially polygamous but it afforded a Muslim wife a limited protection at the dissolution of the marriage; *Kallah v The Master* 1995 (1) SA 261 (T) at 270G-H in which the court held that Muslim marriages did not comply with the constitutional need for gender equality and thus it became an additional ground for the invalidity of Muslim marriages; In *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 12 BCLR 1617 (D); 1994 (4) SA 1319 (SCA), the Supreme Court of Appeal found that the deceased Muslim husband has a legally enforceable duty to support his wife but the court also failed to recognise the validity of the Muslim marriage; Also in *Daniels v Campbell NO* 2003 9 BCLR 696 (C), where the constitutionality of certain sections of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 which failed to include spouses married in terms of Muslim Personal Law was at issue. The court held that a wife in Muslim Law could not be regarded as a spouse in terms of the legislation but it also found that the exclusion was discriminatory and unconstitutional. Currently, a

customary marriages are potentially polygamous and thus it is an unacceptable practice.³⁴ The reason for the status of customary marriage then was first and foremost racially based and on values that did not accept African way of life. Second, it envisaged that polygamy is against public policy. Further, it seemed that customary marriage would compete with civil marriage. For example if parties conducted customary marriage and subsequently the man married another woman under civil rites, the prior customary marriage is automatically dissolved.³⁵ The subsequent marriage would have an adverse effect on the children and spouse of the customary marriage. The children would be deemed illegitimate and the spouse would have no right in maintenance and inheritance for the children.³⁶ Instead of conducting subsequent civil marriage after a customary one, persons are compelled to marry as many wives as he may under customary law. Under this circumstance, the rights of the spouses may be in jeopardy.³⁷

Muslim marriage Bill is being debated in parliament. It is expected that this Bill will bring it at par with other recognized marriages in the country.

³⁴ *Seedat's Executor's v The Master* (Natal) 1917 AD 302. See also Elsje Bonthuys & Marius Pieterse 'Still Unclear: The Validity of Certain Customary Marriages' (2000) *THRHR* 616 at 619.

³⁵ *Kumalo v Kumalo* 1954 NAC (S).

³⁶ Kaganas & Murray 'Law and Women's Rights in South Africa: An Overview' (1991) *Acta Juridica* 1-38.

³⁷ See generally, Rashieda Shabodien 'Reconciling gender and justice in religious, traditional practices' (June 2010, on file with present author), An Opinion by a former Commissioner for the Commission on Gender Equality in which she interrogates the impact of traditional and religious practices on men and women. She argues that the gender justice scale overwhelmingly tilts in favour of men.

Against this backdrop, customary marriages were recognised to afford women equal rights with men within the marriage and upon dissolution. Thus, the Act places customary marriages on the same footing with civil marriages. The Recognition of Customary Marriages Act 120 of 1998 (herein after 'the Act') makes provisions that specify the requirements of a valid customary marriage,³⁸ regulates the registration of the marriage,³⁹ provides for equal status and capacity of spouses within the marriage.⁴⁰ The Act further regulates the proprietary consequences of customary marriage and its dissolution.⁴¹ For a valid customary law marriage, there must be consent between the parties who must both be over the age of 18. Further, the marriage must be negotiated, entered into and celebrated in accordance with customary law.⁴² After the celebration, the bride is then officially expected to be taken to her husband's house. This is sometimes referred to as 'transfer of the bride'.⁴³ This practice is regarded as a requirement for the conclusion of a customary marriage. Although this particular practice is not explicitly regulated by the Recognition of Customary Marriages Act, it may be argued that s 3 (6)

³⁸ S 3 of Act 120 of 1998.

³⁹ S 4 of Act 120 of 1998.

⁴⁰ S 6 of Act 120 of 1998.

⁴¹ S 8 of Act 120 of 1998.

⁴² The requirements for a valid customary marriage is characterised by consent, negotiation and celebration of the marriage. Consent in customary marriage remains controversial in many places owing to instances of child marriage (to be discussed below) in which consent is rarely obtained from the young girl in question. Negotiation and celebration are indication that gifts must be exchanged between the parties and the community must be made aware of the new liaison which is followed by a celebration.

⁴³ T.W Bennett *Sourcebook on African Customary Law* (1991) Juta & Co Ltd, Cape Town 213.

of the Act may be intended for its regulation. The custom of *ukumekeza* was questioned as a requirement for valid customary marriage in the case of *Mabuza v Mbata*.⁴⁴ In this case, the legal question was whether the right to dignity is infringed where a custom requires that a woman is expected to appear semi-naked in front of her prospective in-laws crying. And if she refuses to cry will be forced to do so by beating her. Hlophe J held that the custom is not a prerequisite for a Swazi marriage and that the practice must not be in conflict with the constitution which protects the right to dignity. In other words, there is absolutely no value in this customary practice in a constitutional democracy that enshrines human dignity.

The Recognition of Customary Marriages Act provides that customary marriages should be registered. Marriages that were entered into before the commencement of the Act is expected to be registered within 12 months or at such time as may be determined by the minister by a notice in the gazette.⁴⁵ A certificate of registration of customary marriage is an indication of proof of existence of a customary marriage and the particulars contained in the certificate.⁴⁶ However, failure to register a customary marriage does not affect the validity of such a customary marriage.⁴⁷ The Act further provides for

⁴⁴ *Mabuza v Mbata* 2003 (4) SA 218 (KH).

⁴⁵ S 4 (3) (a) of Act 120 of 1998.

⁴⁶ S 4 (8) of Act 120 of 1998.

⁴⁷ S 4 (9) of Act 120 of 1998. This provision in the Act is considered as adequate protection for persons who failed to comply with the Act. It is in recognition of the huge number of persons in South Africa who may not have the resources or opportunity to do so. Perhaps, this is the reason why South Africa entered reservation on s 6 of the Protocol on the Rights of Women in Africa (to be discussed below) which nullifies customary marriage that has not been registered.

equality of status and capacity of the spouses to the marriage. So, a wife in a customary marriage on the basis of equality with her husband and subject to the matrimonial property governing their marriage has full status and capacity. This includes the capacity to acquire assets and to dispose of them, as well as to enter into contracts and litigate on her own.⁴⁸ Under the Act, customary marriages could be dissolved in the courts including property settlements, custody of children and child support.⁴⁹ Just like it is obtained in ordinary courts, divorce is now possible under customary law. In the past, divorce was a very difficult option as the woman's family would have to return the *lobola* which in most cases has been spent. So, regular courts can now grant divorce and this is a radical departure from practice under customary law.⁵⁰ Under customary law, families have vested interest in the subsistence of any marriage and such vested interest is expressed through mediation in times of conflict in the marriage to keep the union together.

A remarkable aspect of the Act is the provision that *lobola* is not essential to the validity of customary marriage. This is an interesting development given the often misconceived controversy that surrounds the payment of *lobola* as the buying of a wife or the purchase of her reproductive rights.⁵¹ It was imperative that the myths about *lobola*

⁴⁸ S 6 of Act 120 of 1998.

⁴⁹ S 8 of Act 120 of 1998.

⁵⁰ Sections 7 and 8 of the Recognition of Customary Marriages Act deal with issues such as the proprietary consequences and divorce. It is interesting to note that there had not been floodgates of cases of divorce since the coming into effect of the Act. In other words, the situation has not changed on ground largely due to ignorance.

⁵¹ Sara C. Mvududu, Chikadzi Joseph and Puleng Letuka *Lobola: Its implication for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland,*

are debunked and controversies normalised by making it irrelevant to the validity of customary law.⁵² Although this development in the South African body of laws is a welcome relief for many, it may create loss of identity for others and an avenue for abuse in the relationship.

A cursory look at the impact of the Recognition of Customary Marriages Act in South Africa is that it has created a hybrid of law.⁵³ It is one that recognises the need to protect majority of women as equal partners in marriage, with legal status and capacity whilst at the same time recognising the importance of *lobola* as an element for a customary marriage. However, where *lobola* is not paid, it does not invalidate the marriage. It is argued that this form of practice in South Africa has the potential of creating a paradigm shift in law and practice that would support people and not inhibit them from getting married

Zambia and Zimbabwe (2002) Women and Law in Southern Africa Research Trust, Weaver Press, Harare, Zimbabwe.

⁵² *Lobola* has generated so much controversy but it has however, remained an integral part of marriage in South Africa as in other parts of Africa. In 2006, a marriage of the daughter of one of the chiefs in Gonzana farms in Fort-Beaufort in the Eastern Cape could only take place with payment for 20 cows. The woman in question to be married is a working class in Johannesburg. This drives the point home that despite the debate about payment of *lobola*; it remains a strong foundation for marriage for majority of people even in South Africa with all its consciousness about women's rights and in Africa in general.

⁵³ The idea of a hybrid of law is that now in South Africa; one can find almost the same provisions as in the Marriage Act and the Divorce Act 70 of 1979 with regards to registration of marriage; proprietary consequences and divorce. Still it does not practically reduce or supplant the essence of customary marriage. See generally Marissa Herbst and Willemien du Plessis 'Customary Law v Common Law Marriages: A Hybrid Approach in South Africa' *Electronic Journal of Comparative Law* vol 12 1 (2008) at 14.

or create unnecessary suffering for their dependants where the husband dies without having been properly married to his spouse.⁵⁴

South Africa also has Islamic influence in personal status law. Marriages according to Islamic belief or Hindu were considered in law as potentially polygamous and thus are not recognised as valid marriages. The non-recognition continues to have adverse effect on the lives of dependants particularly as it relates to maintenance of surviving spouse and other spousal obligations.⁵⁵ For many that face challenges due to the practice of Islam in South Africa, it is untenable. Recently, there has been discussion on the recognition of Islamic Marriage Bill aimed at ameliorating the adverse effect of being recognised as a valid marriage in South Africa as well as not being at par with the position of those under customary marriages.⁵⁶

⁵⁴ See generally *Mthembu v Letsela* 1997 (2) SA 936 (T), *Mthembu v Letsela* 1998 (2) SA 75 (T) in which the court held that the surviving daughter of a deceased man was illegitimate because the deceased husband did not complete payment of *lobola*; *Thibela v Minister of law and Order* 1995 (3) SA 147 (T) in which the claimant instituted a claim for the unlawful causation of death of the deceased as a bread winner. The claimant could make these claims because the deceased paid *lobola* for the claimant and her illegitimate son; And finally in *Bhe* case, the constitutional court confirmed that *lobola* is not a requirement that must be paid in full before marriage is concluded, an agreement to pay is sufficient.

⁵⁵ See generally *Khan v Khan* 2005 (2) SA 272 (T) where the court gave effect to some obligation arising out of Muslim marriage such as maintenance but the court is yet to pronounce on the validity of the marriage and they also mostly refrain from expressing approval of polygyny except in this particular case.

⁵⁶ The Department of Islamic Studies, University of Johannesburg in 2011 presented a seminar attended by the present author in which, the Islamic Bill was discussed and the reforms it would bring to the current position of women under Muslim law in South Africa.

From the above overview of customary marriages in three selected countries, it is obvious that a great deal of challenges to gender justice flow from marriage as an essential part of the lives of the people. Thus, issues such as child marriage, *lobola*, polygamy which are considered harmful practices militating against the rights of women need to be examined particularly to determine whether sufficient changes if any have taken place in Africa.

3.5 Harmful cultural practices relating to marriage in Africa and their impact on women

Women most of the time bear disproportional burden in relation to men in many societies particularly in marital relationships. This has lead to the violation of the rights of women as equal partners in marriage entitled to rights such as dignity, equality and freedom. Generally, forced and early marriage of girls, payment of *lobola* and polygamy are some of the challenges that militate against full citizenship of women and the protection of gender justice.

3.5.1 Forced and child marriage in Nigeria

As already discussed, marriage in Nigeria is a strong form of social relations that primarily unites families for kinship and ancestral ties. However, many young girls are given away in marriage without their consent, unable to fully determine their sexual autonomy and rights. Forced or child marriage as it is mostly referred to is practiced mostly in Northern Nigeria.⁵⁷ It may also be referred to as early marriage, a

⁵⁷ The present author in a discussion with a Northerner indicated that he is very happy his daughter was approaching 12 years. He would give her hand away in marriage as soon as he returns home. It must be stated that the Northern father making these statement is educated and was doing his National Youth Service Programme in Kaduna. Clearly, this is an indication of a practice that is deeply

term that denotes the extent of the differentiation between what the law states which in certain states is from 16 years and what happens in practice which could be from as early as 9 years in some Northern states.

Child marriage is defined as marriage of a child below 18 years of age.⁵⁸ Child marriage affects both male and female but girls are disproportionately damaged by the practice as they are majority of the victims. Its effect are damaging to the health, social and psychological well-being of the girls.⁵⁹ In Northern Nigeria, the end of childhood marks the beginning of puberty which is usually about 10 or 12 years. Most times these girls at the onset of puberty are made to marry men who are very much older and old enough to be their fathers. The perpetrators cut across men from varied status, for example government officials who are supposed to remedy this social ill are some of the perpetrators. In 1986, the Minister of Trade and Industry in the Babangida administration then Dr Bunu Sheriff Musa married a sixteen year old girl. In another instance, mohammed, a graduate of agricultural science in 1995 in Kaduna was insistent that his 12 year old girl must be married soon to a man he had already selected for her.⁶⁰ The practice is not as widespread in the South as it is in the

entrenched in the minds of the people that not even the education of this father was relevant in changing his ideas.

⁵⁸ Art 1 of the Convention on the Rights of the Child (CRC).

⁵⁹ Nawal N Nour 'Health Consequences of Child Marriage in Africa' (2006) Emerging Infectious Diseases available at www.cdc.gov/incidod/EID/vol12no11/06-0510.htm [accessed March 2012].

⁶⁰ It is obvious from these two examples that consent is not obtained from the girls and so they are made to marry whoever is chosen for them whether they like it or not. Clearly, it is a violation of their rights in terms of international human rights law.

North of Nigeria. However, there are cases of young girls being given away in marriage whilst they are still in high school or have just completed high school.⁶¹ The reasons given for this kind of practice ranges from protecting their virginity and chastity to having one mouth less to feed at home whilst gaining more from the payment of bride wealth. Obviously, this form of marriage has no value as a cultural practice in modern democracy where human dignity and equality are protected. Nigeria also seems to take retrogressive steps rather than progressive one in the area of child marriage. Section 29 (4) (b) of the Nigerian Constitution 'regards married *girls* as adults in the eyes of the law'. The Senate in that country has recently amended the provisions of S 29 (4) (b) to read: 'any woman who is married shall be deemed to be of full age'. The implications for this provision are that (a) girl children can marry irrespective of their age. (b) As soon as they are married, they are deemed adults in the eyes of the law which means that they would be held criminally liable for offences irrespective of their age. (c) The section is an explicit endorsement of child marriage which undermines the legal protection that children are accorded under the Child Rights Act 2003 of Nigeria.

3.5.2 Forced and child marriage in South Africa

In the Eastern Cape town of Lusikisiki, young girls ranging from 12 years to 18 years have been married to older men without their consent and in fact abducted and forcibly sent to their husband's

⁶¹ According to Uchenna Okonkwo Eneh, one of the respondents, Adaozor and Uloma were both married at the age of sixteen. Ada was married immediately she completed her high school and was not afforded the opportunity to exercise her autonomy. Uloma on the other hand was married whilst she was still attending high school; she was never given opportunity to pursue tertiary education even though she was an intelligent young girl.

home.⁶² Forced marriage occurs when intending spouses have not given their full and free consent to the marriage.⁶³ Thus, the girls found in the rural Eastern Cape community cannot escape the vicious cycle of discrimination when they are sent into marriage without their consent. The young girls forced into marriage in Lusikisiki have expressed their discontent and abhorrence for the practice of *ukuthwala*⁶⁴ as it prevents them from having normal childhood or pursuing their individual future plans. According to the elders in the village, the practice of *ukuthwala* as it is done now was not the initial purpose of the custom.⁶⁵ One thing that is obvious at the moment is that whatever the initial purpose of the custom, it has not made any positive impact and thus should not be protected.⁶⁶ The CEDAW

⁶² SABC Special Assignment Programme on *Ukuthwala*, 17th February 2011.

⁶³ Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS (2009) volume 2 Family and Property Issues, Canadian HIV/AIDS Legal Network, 1-12.

⁶⁴ This is a practice found among Africans in South Africa where young girls are forcibly taken to the house of an older man to be his wife after the intending spouse must have paid *lobola*.

⁶⁵ This essentially validates the statement that certain cultural practices have lost their value in present day society and must be shunned as a violation of women's rights. When cultural practices have lost their values such as in this situation, Gender justice can only be protected through a system that is accountable to its people such as the traditional institution.

⁶⁶ *Ukuthwala* as recently being practised have been denounced by many traditional authorities. Dr Sibanze of the Department of Traditional Affairs in an informal discussion with the present author as one of the respondents confirmed that the practice was never meant to be forced abduction and rape of young women. He also made reference to the practice of *Ukungena* (forced levirate marriage) as one of those practices that are harmful to women and he had a personal experience with his own mother who had the courage to refuse being forced into marrying her deceased husband's relative.

Committee has noted and also, criticised some countries that permit forced marriage on the basis of ethnic origin of some particular group, custom and religious belief.⁶⁷ This criticism comes in the wake of the association of forced marriage with child marriage as noted in the Eastern Cape with its risks of abuse and HIV infection. The link of HIV infection to forced and/ or child marriage underscores the use of General Comment by the African Commission on Human and Peoples' Rights regarding article 14 (1) (d) and) (e) on HIV/AIDS.

In South Africa, the Recognition of Customary Marriages Act allows for parties under the age of 18 to get married provided that both parents of such minors or their legal guardian consent to the marriage.⁶⁸ The Minister of Home Affairs or his delegate may give written permission to minors to marry if the Minister or his appointed officer considers such marriage desirable and in the interest of the minors.⁶⁹ These provisions of the Recognition of Customary Marriages Act present an indirect consent to practices such as *ukuthwala*. According to Jacobs,⁷⁰ the culture of human rights is still not an integral part of the South African society given the implication of this provision. This is because of the adverse impact of this kind of cultural practice on the social, health and reproductive aspects of the lives of the young girls.⁷¹

⁶⁷ Respect, Protect and Fulfill: Legislating for women's rights in the context of HIV/AIDS (2009) 1-12. The CEDAW Committee made the statement in paragraph 15 of 'General Recommendation No 21'.

⁶⁸ S 3 (3) (a).

⁶⁹ S 3 (4) (a).

⁷⁰ Cameron Jacobs, of the South African Human Rights Commission in an informal discussion with the author in Johannesburg as one of the respondents.

⁷¹ South Africa is a state party to African Charter on the Rights and Welfare of the Child which in terms of Art 21 (2) prohibits child marriage and betrothal of boys and

The issue of child marriages in Africa is widespread as it may be deduced from the above discussion. Unfortunately, there is little accountability for its negative impact on the lives of the young girls. It is submitted that gender justice in social and reproductive health for these young girls can only be achieved when leaders are held accountable for the protection of women's rights particularly that of the girl-child. The girls are highly at risk of contracting HIV because of lack of sexual autonomy. They are usually married to men who are older who may have contracted HIV.⁷² They are not capable of negotiating sex, use of condom or when to start having children let alone spacing them.

3.5.3 Forced and child marriage in Zambia

Early or child marriage in Zambia occurs as a result of customary practices and ancient beliefs that allow women to marry at a much lower age than the statutory and international human rights law approved age of 18.⁷³ Early marriage is common against the backdrop of customary law that is variedly practiced in the country. Women are

girls. At the 22nd Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child, 4th -8th November 2013, Addis-Ababa, the theme of the general discussion was on 'Discrimination and Violence against Girls in Africa'. See generally www.acerwc.org (accessed 12 November 2013).

⁷² In Ndola, Zambia, research indicates that about 30 percent partners of married adolescent girls were infected with HIV/AIDS compared to about 9-14 percent of partners of their unmarried counterpart. See generally Respect, Protect and Fulfill: Legislating for women's rights in the context of HIV/AIDS (2009) 1-9.

⁷³ Mutegaya Julius 'Child Marriage-A fundamental violation of human rights: causes and health consequences' *The Children In Need Network Policy Brief* (on file with author).

frequently discriminated against in the application of family law relating to marriage, custody of children particularly where there is a huge gap in the statutory legal age for marriage. For men, the legal age is 21 years and for women, it is 18 years. As a result of marrying much younger, adolescent girls are exposed to increased risk of violence such as marital rape and other reproductive health problems.

Most girls in Zambia marry as soon as they reach puberty which usually is not uniform for all girls; so one may find that some girls may have married at the age of 10 which is when they attained puberty. Even though the minimum legal age for marriage for both men and women is 16 years; parental consent is required if parties are under the age of 21. Most times, the bride's consent is not obtained; in this instance, customary practice disregards the law.⁷⁴ The lack of effective consent of the bride or even both parties where they are still very young raise issues of violation of the rights of children because the female children may be given away in marriage at a time that is considered too young and her consent may not have been obtained by her parents or the man wishing to marry her.⁷⁵

Consequently, a custom that requires a child to marry at a tender age is a violation of the rights of the girl-child. In addition, the Penal Code of Zambia⁷⁶ prohibits carnal knowledge of children; for female children

⁷⁴ Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS (2009) Vol 2 *Canadian HIV/AIDS Legal Network* 1-9.

⁷⁵ It is interesting to note that forced / early marriage of children as a customary practice have not been recorded as being repugnant to natural justice for not seeking the consent of parties to marriage. See generally, the *Zambian Constitution of 1967* with regards to this situation.

⁷⁶ See generally ss 137 (2), 138 and 157 of Cap 146 of the *Laws of Zambia*.

under twelve or sixteen years, it is punishable under the penal code with fourteen years and life imprisonment respectively and for boys under fourteen years it is punishable with seven years imprisonment. Although it seems that female children are somewhat protected, it remains a challenge that issues of customary law are not considered an offence under the Penal Code. This kind of contradiction is evident in the decision of the High Court which held that carnal knowledge of a child at a tender age within the customary relationship of marriage does not constitute an offence under the code.⁷⁷ It must be noted that the Penal Code in this instance has a higher age range for the female child than the male child which in most cases is an exception to the rule. The age range for boys is usually higher than that of the girls. The expectation of the present author in this instance is that education of the children would make a greater impact in dealing with this challenge.

According to an International Women's Health Coalition report, an estimated 80 percent of unprotected sexual encounters occurred in marriages with adolescent girls.⁷⁸ This is an alarming statistic given that these girls are still adolescent but they are being over-burdened with issues well beyond their tender years and thus exposed to a myriad of challenges that inhibits their social, economic and reproductive development.

⁷⁷ *R v Chinjamba* (1949) 5 NRLR 384.

⁷⁸ International Women's Health Coalition Child Marriage: Girls 14 and Younger at Risk (2008) as quoted in Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS, vol 2, *Canadian HIV/AIDS Legal Network* (2009) 1-9.

Among the Bemba in Zambia, like many other cultures in Africa, virginity is viewed with a lot of pride. Although it seems an ideal practice to protect the virginity of young girls; in practice the situation is different given the precarious position young girls find themselves. They are sometimes abducted and forcibly married off preventing them from attending school due to the fact that they become young mothers unable to cope with family and pursuing education. In certain circumstances, it has been suggested that early marriage provides the avenue to protect girls from unwarranted and unsanctioned sexual activity.⁷⁹

3.5.4 Justification for the practice

Certain customary practices are justified by their custodian for maintaining the social and cultural fabric of the society. For example, preventing moral and sexual laxity among adolescent girls is one of the reasons for the justification of early marriage.

Poverty also plays a crucial part in perpetuating early and forced child marriage.⁸⁰ In order to eke out a living and survive harsh and inhumane conditions, many parents give away their adolescent girls in marriage. This comes in the form of bride wealth that is paid to the bride's family and other forms of economic help that is rendered to the family such as gifts to the parents where the girl is a virgin and at the time she gave birth to children particularly male children. It is preferable to have the girl child marry early rather than have a

⁷⁹ *Supra* 78 at 1-9.

⁸⁰ Nawal Nour (2006) *supra* 59.

diminished bride wealth as a result of unsanctioned sex and illegitimate children.⁸¹

Other factors that justify early marriage are the forming of bonds and alliances for strong social and kinship ties. These family relationships are vital for stability and growth in the clan, tribe or village. Also, some of these adolescent girls grow later to be the pathway to family fortunes and taking care of their parents and other younger siblings.⁸² The commodification of girl's body as a means of lifting families out of poverty in the opinion of the present author is reprehensible and undermines gender justice. The health, economic, cultural and social implications of forced /early marriage creates a vicious cycle that actually does not end the poverty as envisaged but exacerbates it somewhat differently.

3.6 The rights child marriage violate

Through the decades several international agencies have tried to eradicate child marriage. In majority of the cases, full age is overlooked and consent is not freely obtained from the girl. Whereas, article 16 of the Universal Declaration of Human Rights states that parties must be at 'full age' when married and that marriage should be entered into 'freely and with full consent'; therefore, it is a violation of human rights where any child is given away in marriage at an age that

⁸¹ Nawal Nour (2006) *supra* 59.

⁸² This is noted in a town called Mgbowo in the South Eastern Nigeria where some girls (like Adaozor and Uloma) had married just after high school. Through the marriage relationship, the poor parents of the girls had gotten fresh approach to surviving poverty since their daughters married affluent men.

is not legally acceptable.⁸³ In addition, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention) considers any marriage that is forced upon a girl or woman by her family or guardian as akin to slavery.⁸⁴ It is acceptable that family is critical to decisions about marriage and in fact they may be a determinative factor in the entire marriage process however, spousal consent cannot and should not be superseded by the wishes of others including those of parents or guardians.⁸⁵ Thus, obtaining the free and full consent of both spouses to the marriage should remain paramount at all times.

When girls are forced into marriage at a very tender age, they encounter huge reproductive challenges that diminish their dignity, equality and freedom. Many adolescent girls do not have fully matured pelvic organ at the time that they are married and have begun active sexual relations. In addition, they are usually given away in marriage to men who are much older and overbearing whilst many of these adolescent girls are immature and so cannot negotiate the use of condom or demand sexual exclusivity from their spouses. Most times,

⁸³ Article 16 of UDHR of 1948, Other international conventions that stipulate full and free consent are CEDAW art 16; ICCPR art 23; ICESCR art 10; Convention on Consent to Marriage, Minimum Age for Marriage and Recognition of Marriages (Marriage Convention), UN General Assembly, GA Res 1763A (XVII), 9 December 1964, art 1.

⁸⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention), 266 U.N.T.S.3, 30 April 1957, art 1 (c).

⁸⁵ T. Higgins, J Fenrich and Z. Tanzer, 'Gender equality and customary marriage: bargaining in the shadow of post-apartheid legal pluralism' 30 (2007) *Fordham International Law Journal*, 1653-1708 at 1671.

there are instances of physical abuse and coercion; such forced sexual intercourse leads to vaginal tears in the young girls causing a wide range of sexual and reproductive problems for the girl victim in the future.⁸⁶ These young girls do not possess the physical strength to deal with overpowering spouses, thus their right to freedom from violence, assault and assault with intention to do grievous bodily harm are violated.⁸⁷

The right to best attainable standard of living is also violated when girls are married and forced into sexual intercourse. Their young and underdeveloped body usually are unable to cope with the pressures of pregnancy, labour and childbirth. These young women are exposed to trauma as a result of prolonged labour. Also, maternal mortality and infant mortality abound in cases of underdeveloped pelvic condition of the girls. Many are likely to die in childbirth and the risks for their reproductive well being are compromised particularly in cases of fistulas and HIV/ AIDS.⁸⁸ In Northern Nigeria, many women suffer from vesico vaginal fistula which is a condition where girls suffer incontinence, so uncontrollable that they literally leak urine and faeces

⁸⁶ Reports of the IAC symposium for legislation on the drafting of an African Declaration on Violence against Women (1997) 4.

⁸⁷ R. J. Cook State Responsibility for the Violation of Women's Human Rights (1994) 7 *Harvard Human Rights Journal* 125.

⁸⁸ Felicia Anyaogu 'Women, Sexual Rights, And Vulnerability to HIV/AIDS in Nigeria' in Carol Arinze-Umobi and Ogugua VC Ikpeze (eds) *Gender Rights Law in Nigeria* vol 1 (2008) Folmech Printing and Publishing Co Ltd: Odoakpu, Onitsha at 265; see also Karl Lydersen 'The Injustice and Injury of Child Marriage (2006) at www.infoshop.org/news/article.php [accessed May 2012].

constantly as a result of childbirth through an underdeveloped pelvis.⁸⁹ These problems created by labour and childbirth are risks to the right to life of the young girls. In addition, the psychological effect of all the risks to which these girls are exposed to, have a debilitating effect on their lives.

An adolescent that is exposed to early marriage would not have made any career choice. Therefore, they lack skill, education and the experience required to enter into any gainful employment. Being married to much older men does not afford them the opportunity to engage with their spouses the basis of equality. Hence, they lose their capability to acquire property and to acquire education and skill necessary to make a living on their own.⁹⁰ And, where they reside in rural area, they are most likely to spend most of their time on agricultural work or other broad family engagements. Their right to education and equality of rights in marriage are hugely compromised.

In sum, early marriage exposes young girls to huge risks in their socio-economic development. This has implications for proper development of these young girls as well as creating a stable, secure society for all particularly those that are vulnerable such as women and children.

⁸⁹ BAOBAB for Women (2005) a publication on Shariah and the Rights of Women in Nigeria (on file with the author).

⁹⁰ World Bank 'Gender, The Evolution of Legal Institutions and Economic Development in Sub-Saharan Africa' (1992) 27.

3.7 Reconciling the differences

As shown from above, early and forced marriage has numerous negative impact on affected girls and the community. Despite multifarious efforts aimed at eradicating early and forced marriage whilst protecting the rights of women and children particularly the girl-child, the practices persist as depicted in South Africa, Zambia⁹¹ and Nigeria. The age at which to consent to marriage has been stipulated by international instruments as already noted in the African Charter on the Rights and Welfare of the Child. However, the inconsistency that arises from use of the term puberty which may be at different ages for many further exacerbates the already desperate situation.

The right to participate in the cultural and religious life of the community exerts its own pressure on parents to take decisions considered to be beneficial to the family. That it is better to get married young rather than falling pregnant and bringing the family honour into disrepute or rather to marry wealthy individuals who ensure that the girl and her family are taken care of. Hence total abolition of these practices may be met with contempt by the people as it has a direct impact on their right to culture, honour and wellbeing.

In as much as there may be some good envisaged by parents who marry off their adolescent girls, undoubtedly, there is considerable harm being done to the lives of these young girls as this study has

⁹¹ In seeking to protect the girl-child, the Zambian Penal Code Amendment Act 15 of 2005 raised the minimum prison term for defilement to 15 years which is applicable to both girls and boys. To combat gender-based violence, the Zambian Parliament enacted the Zambian Anti-Gender based Violence Act 1 of 2011.

shown from the discussion on three selected countries. Many girls suffer tremendously as a result of health complications, the benefits thought to be fruitful becomes shame and abandonment for the girls in many instances.

It is therefore at this juncture that it has become imperative to resolve the differences in law and practice. The removal of the vicious cycle of denigration and abuse of women and girls must be viewed by the community, government, civic organisation and traditional authorities as paramount. The approach to dealing with this social, cultural and reproductive challenge is not wanton abolition that could lead to nocturnal practice to the detriment of girls but through merging traditional practices and modern democratic rights guarantees. This can be achieved by education of stakeholders individually and collectively taken into account that human rights law can bridge the gap between the two values (tradition and modern).

An in-depth look at the practice of bride wealth / *lobola* and polygamy and their influence in customary law marriages gives insight into the complexities surrounding some customary practices and the need to bring them in line with human rights principles where necessary.

3.8 Critique of bride wealth/ *lobola*/ *insalamu*⁹² as a harmful practice

Although *lobola* has been mentioned previously as a requirement towards a valid customary marriage, it has become one of the most contested issues of customary law in the 21st century. *Lobola* however, remains an integral part of customary law. In fact it is an institution that provides the basis for marriage, inheritance and succession. Its role in marriage is aptly described by Kasunmu and Salacuse⁹³

One of the most distinctive features of Nigerian customary marriage is the requirement that a payment of some of sort be made by the boy or his family to the girl's family in order to establish a valid marriage.

Bride wealth⁹⁴ is given as consideration for marriage that has already taken place or is yet to take place. Bride wealth as a collective name

⁹² There are a variety of names given to the concept of bride wealth in African culture. For example, it has been referred to as bride price or dowry (mostly used by English speaking people); *ime ego* (in some parts of Igbo land); *lobola* (used in most Southern Africa countries; and *insalamu* (used by the Bemba tribe in Zambia). It is believed that these wide interpretations given to the concept has contributed to the controversies surrounding it as an African culture which non-Africans try to understand but fails dismally.

⁹³ Kasunmu AB and Salacuse JW *Nigerian Family Law* (1966) Butterworths: London at 77.

⁹⁴ The term 'bride wealth' isn't correct description of the practice to the extent it suggests the value of the bride. Most African cultures agree that this is the 'African contract of marriage' and is adduced in evidence in court during divorce or other proceedings. Others prefer to call it a 'token of appreciation' by the bride's family to the bridegroom's family for raising the bride responsibly. See also, Wolfgang Benedek 'The European System of Protection of Human Rights and Rights of Women' in W. Benedek, E.M. Kisaakye & G. Oberleitner (eds) *Human Rights of Women: International Instruments and African Experiences* (2002) Zed Books at 280.

serves different functions in different societies. It may be for loss of income and services to parents of the bride or it serves as a link to consolidate the bond of kinship that arises from marriage and most of all to legitimise the children born of the union.⁹⁵

As essential as bride wealth may be for the validity of customary marriage, there is evidence that bride wealth may not be essential. For example, according to Itsekiri customary law:

Payment of bride wealth (also referred to as dowry) was and still is unknown among the Itsekiri. The legality of the marriage resides with the accompanying ceremony called '*la emo tsi*' which takes place in the presence of witnesses. It is this celebration that differentiates marriage from concubinage.⁹⁶

It has also been established that in Nigeria, among the Munshi of the Tiv tribe, no dowry is necessary. What is required then is that the first child of the couple belongs to the wife's father while the rest of the children belong to the husband as widely known.⁹⁷ All of these variations mentioned here is an indication that even within culture; it is relative. The binding nature of bride wealth could be sought through other means within the family relationship as noted with the Munshi

⁹⁵ *Nsirim v Nsirim* (1995) 9 NWLR (pt 418) 144-147 CA where the Court of Appeal held that for a valid customary marriage, there must be payment of bride wealth or dowry, it must be in money; natural produce or any kind of property which must be made on an account of a marriage which is intended or has taken place.

⁹⁶ Begho Mason A. *Law and Culture in the Nigerian and Roman World: Being a comparative study of Nigerian and ancient Roman law, art and culture* (1971) Benin City, Nigeria, at 30.

⁹⁷ Meek Charles K. *The Northern Tribes of Nigeria* (1925) Oxford University Press at 210 who said, that "among the Munshi, a man who marries a virgin forfeits his claim on their children".

people of Tiv, Nigeria. So, as important as dowry is for a valid customary marriage, there are people whose way of life does not require the payment of dowry. Like the Itsekiri and Munshi, nomadic or pastoral Fulani of the North do not take dowry or bride wealth at any stage of the marriage.⁹⁸ Even for this particular tribe, that bride wealth is not made at any point in the marriage process does not detract from the fact that it is an essential element for the validity of marriage nor does bride wealth make the marriage invalid. It simply means that, for this group, bride wealth it is not required.

Whilst in some places there is payment of bride wealth, in others it has been found that marriages rarely take place because of the exorbitant amounts that is required. To intervene in this instance, the traditional leaders informed government to fix the amount payable as bride wealth. Through legislation, bride wealth was fixed to a level where it became affordable for many, and certain criteria were set such as the level of education of the woman to be married.⁹⁹ It must stated that by reference to the level of education as a criteria to determine bride wealth, it is an explicit acknowledgement of the value of education or skill for the woman which makes the point that giving adolescent girls away in marriage does not empower them.

⁹⁸ Stenning D 'The Pastoral Fulani of Northern Nigeria' in Gibbs JL (ed) *Peoples of Africa* (1965) Holt, Rinehart & Winston, New York, 386.

⁹⁹ S 3 of Limitation of dowry laws, Laws of Eastern Nigeria 1963. The amount is limited to about 60 naira or about R3. It must be noted that though this limitations are available for the payment of bride wealth, it is argued here that prospective groom still provide a huge amount of items listed for him to provide particularly towards the celebration of the marriage which at the end of the day is still a huge financial action for any prospective groom.

In South Africa, payment as obligation towards marriage in customary law is generally referred to as *lobola*, *bogadi*, or *Ikhazi*. Generally, such obligation towards marriage is made by way of giving cattle, money, and property to the father or guardian of the intended bride. Thus, the value attached to the payment of *lobola* is such that it is considered a blood contract that is imperative for any recognition within the communities of an African marriage.¹⁰⁰ This is evident in the primary function of *lobola* as a transfer of the reproductive potential of the wife to the husband's family as well as a binding tie for ancestral and family bond.¹⁰¹ That the payment of *lobola* is seen by some as a system of wife purchase has raised tremendous cultural and academic debate. According to Dlamini¹⁰²

'In a traditional black society, *ilobolo* serves a number of legal functions. Its ceremonial transfer from the husband's to the wife's people was evidence of the establishment of a matrimonial relationship. It validated the conclusion of a marriage and marked the husband's marital power over the wife, affording him exclusive access to her. This gave the husband parental power over the wife's children whereby they became legally affiliated to him'.

Flowing from the above statement, one interpretation regarding the husband's power over the wife may be viewed as abuse of the woman rather than the idea that *lobola* creates an exclusive relationship

¹⁰⁰ Sara C. Mvududu, Chikadzi Joseph and Puleng Letuka *Lobola: Its implications for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe* (2002) Women and Law in Southern Africa Research Trust Weaver Press, Harare, Zimbabwe.

¹⁰¹ Dlamini C.R.M 'The Role of Customary Law in meeting Social Needs (1991) *Acta Juridica* 78.

¹⁰² C. R. M Dlamini (1991) *supra* 101 at 78; C.R.M Dlamini 'Should *Ilobolo* be Abolished? A Reply to Hlophe' (1985) *CILSA* 361-376.

between the man and woman as may be found in other cultures of the world. In fact, the value attached to the payment of *lobola* by Africans cannot be simply abolished by mere legislation against the practice because of the great attachment to the practice by the majority of people as a mark of their cultural identity. What remains controversial is whether the deferred payment or otherwise of *lobola* invalidates a customary marriage. It has been established that there can be no valid customary marriage without an agreement that *lobola* will be delivered.¹⁰³ In many instances, as long as the *lobola* requirement has not been met, the marriage may be regarded as incomplete. The incompleteness does not however, affect the validity of the marriage, as the marriage is completed on the understanding that the requirement would be met.

In the case of *Mthembu v Letsela*¹⁰⁴ the father of the deceased husband stated that the payment of *lobola* was not complete before his son died. Therefore, there was no valid customary marriage. The court accepted the contention and thus decided that the daughter of the deceased was illegitimate and therefore cannot inherit from the deceased. The giving of *lobola* to the father or guardian by the bridegroom as essential to customary marriage cannot be underrated. In the case of *Mabena v Letsalo*¹⁰⁵ it was held that it does not really matter who received the *lobola* payment on behalf of the family. The mother of the bride was the 'head' of the household and thus was deemed capable under customary law to accept *lobola* payment for her daughter.

¹⁰³ *Moima v Moima* 1936 NAC (N & T) 15, *Mpanza v Qonono* 1978 AC (C) 136.

¹⁰⁴ 1997 (2) SA 936 (T).

¹⁰⁵ 1998 (2) SA 1068 (T).

3.8.1 The rights bride wealth/*lobola*/*insalamu* violate

The practice has been criticised primarily because it discriminates against women on the grounds of dignity and integrity where they are treated as chattels and property to be purchased.¹⁰⁶ In addition, the high rate of cohabitation, domestic violence and divorce can be attributed to the increase in the commercialisation of bride wealth. Many young men would want to marry properly according to tradition but find it nearly impossible to come up with the resources to provide all the materials required for a valid customary marriage.¹⁰⁷

The practice of *lobola* is also criticised for violation of the right to inhuman and degrading treatment as well as the right to dignity. Many women and children remain in abusive relationship or marriage because they are unable to return the money paid for *lobola* on their own or their families are unwilling to refund the money paid. In fact, the payment of bride wealth confers on men the entitlement to control the child-bearing capacity of their wives including their sexual and reproductive lives.¹⁰⁸ Although, the reproductive capacity of a woman may be relevant in the payment of bride wealth, this notion that it entitles men to have control of the reproductive capacity of the woman in the view of the present author is not African. Depending on the particular community, where children belong is partly decided by bride

¹⁰⁶ Alice Emasu 'Uganda: bride price-can abolition end violence against women?' <http://allafrica.comugandabrideprice-canabolitionendviolenceagainstwomen.htm> [accessed May 2011].

¹⁰⁷ TW Bennett *Sourcebook of African Customary Law* (1991) 196-202.

¹⁰⁸ S. Coldham 'Customary marriage and urban local courts in Zambia' *Journal of African Law* 34 (1) (1990) 67-75. See also s 52 of Tanzania Local customary law which states that in the case of divorce 'without fault of either wife or the husband, bride-wealth shall be refunded *only if they are childless*' (emphasis mine).

wealth and does not necessarily mean that the reproductive capacity of the woman is thus determined. This is because no man is allowed where a woman to be married is being prepared for marriage on how to take care of her family. Fewer men also know categorically when the woman should be approached for sex for the purposes of procreation and the determination to have children are most times pursued by the woman much more than the man.

Bride wealth has been cited as a rationale for widow inheritance and conferment of the right to the custody of the children upon dissolution of the marriage to the man.¹⁰⁹ Like any other system of law regarding marriage, the taking of bride wealth in African customary law has its positive and negative aspects. In my view, those aspects that are negative merits modification and such changes must take place purely on the understanding of the purpose of taking bride wealth within the communities that apply them. Bride wealth has also been linked to placing restrictions on women's ability to own land within a marriage or upon being widowed or divorced.¹¹⁰

¹⁰⁹ CEDAW Committee 'Consideration of Reports submitted by State Parties under Article 18 of the Convention for all forms of discrimination against Women, Third and Fourth Periodic Report of State Parties: Zambia'. CEDAW /C/ZAM/3-4, 12 August 1999; T Higgins, J Fenrich and Z. Tanzer 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism' 30 (6) (2007) *Fordham International Law Journal* at 1674.

¹¹⁰ In Zambia, women have been denied ownership of income and property earned from employment on the grounds that women must bring some benefit to her husband and his relatives by working for him if *lobola* was paid on marriage; Chuma Himonga *et al* 'An Outline of the Legal Status of Women in Zambia' in Armstrong *et al* (eds) *The Legal Situation of Women in Southern Africa* (1990) University of Zimbabwe Publications, Harare, 156-157.

Also, the right to health and adequate standard of living is violated where many women remain in unfaithful marriages at the risk of sexually transmitted diseases (STDs) including HIV/AIDS because they cannot afford to return the money paid at the time of marriage. It is also argued that the rigours involved in refunding money paid at the time of marriage contributes to the socio-economic dependency of women and their inability to extricate themselves from abusive marriage.

The cultural justification for the practice lies in the need to solidify family bonds created by marriage and to legitimise the status of children born of the union. The belief in ancestral link between the living and the dead drives the need to ensure that the society as whole is protected whilst at the same time creating a stable social institution of which marriage is key component for the creation of ancestral lineage; which is the reason behind the resilience of bride wealth as an essential element in the validity of a customary marriage.

3.8.2 Resolving the conflict

Bride wealth / *lobola* remain therefore, a cultural heritage that must be protected. It is widely practised in many communities across the African continent and so an attempt to abolish it may also lead to interference in traditional means of protection for the woman. It is evident from the above exposition on the role of bride wealth in promoting the social and legal status of the woman. Undoubtedly in some cases, it has been shown also that many women have been grossly disadvantaged. So, in instances where violation occurs, it must be necessary to ensure that the right of the woman to exit from abusive relationship is not compromised by huge bride wealth

payments that they have to make before they can be free from discrimination.

3.9 Polygny / Polygamy

In many African countries, men by culture could marry as many women as they can afford to take care of whilst the same is not possible for women. Polygamy as a general term refers to the incidence of multiple partners in customary marriage.¹¹¹ As a feature of African family system, it confers status, wealth and elegance to any man to marry many wives. In fact, in Igbo land, as a mark of wealth and status, the polygamist is referred to as '*ogaranya*'. In other words, it is only a very rich man who could afford to have so many wives and children because he will have to build each one a house, and give each one portions of land to cultivate to feed their families. So, through this system, the husband is guaranteed of many hands to work at his farms and increase his productivity.

Prima facie, the practice creates a prerogative for men alone to marry as many wives as they desire under African customary law. To this extent, the practice creates a further situation of inequality and low status for women within the marriage. The relationship between the man and the woman is such that the man is at the helm where resources of the family are in his control as well as the sexual relations in the marriage. The woman also tends to lose her individuality as well as her claims within the marriage at its dissolution because they

¹¹¹ Johanna Bond *Voices of African Women: Women's rights in Ghana, Uganda and Tanzania* (2004) Caroline Academy Press at 247.

are many and most times, the dissolution is acrimonious.¹¹² The negative financial consequences for women due to the sharing of the husband's income allow for persistence of feminisation of poverty with the woman as its face. This position of women most times drive them to extra-marital relations in order to gain access to the much needed resources, putting them at further risk of HIV.¹¹³ In addition, polygamy has been cited as a source of much confusion over the distribution of property at times of death or at dissolution of marriage and it has increasingly become a complicating factor in the spread of HIV/AIDS.¹¹⁴ Also as a result of the concurrent sexual partners within the marriage; the man and each of his wives, it has been established that women in polygamous relationships are more prone to HIV infection than their counterparts in monogamous relationship.¹¹⁵

According to the CEDAW Committee and the UN Human Rights Committee:

¹¹² Jacqueline Asiimwe 'Making Women's land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses' (2001) 4 *Yale Human Rights and Development Law Journal* 173-174.

¹¹³ I.O. Oruboloye *et al* 'Sexual Networking in the Ekiti District of Nigeria' 22 (2) (1991) *Studies in Family Planning*, 61-73.

¹¹⁴ Richard Strickland 'To have and to Hold: Women's Property and Inheritance rights in the Context of HIV/AIDS in Sub-Saharan Africa (2004), *International Centre for Research on Women* (ICRW) Working paper.

¹¹⁵ Kapiga *et al* 'Risk factors for HIV Infection among Women in Dares-Salaam, Tanzania' *Journal of Acquired Immune Deficiency Syndromes* 7 (3) (1994) 301-309; Centre for Reproductive Rights 'Women of the World: Laws and Policies affecting their Reproductive Lives, Francophone Africa (1991) at 191; L. Kelly 'Polygny & HIV/AIDS: a health and human rights approach' *Journal for Juridical Science* 31 (1) (2006) 1-12.

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such a marriage should be discouraged and prohibited. The committee notes with concern that some state parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with customary law.¹¹⁶

It is such a contentious issue with numerous implications particularly for women that Basden in recognition of this institution's multiple impact on gender justice in Igboland stated that:

Polygamy is a subject that is honeycombed with pitfalls; a slippery path even to the wary. Anything written is open to criticism, because its problems, complications and ramifications are so manifold. With the exercise of extreme caution, one is still liable to misjudge, or to fail to discern the true aspects of this widely spread and deeply rooted institution.¹¹⁷

CEDAW's Concluding Observation and Basden's comments above captured the need to devise a multi-layered approach in dealing with issues of polygamy. The standard for gender justice in this instance must be based on ensuring dignity and freedom because of the wide influence of the practice of polygamy on women in both traditional and modern society. Reconciling gender and justice remains an imperative for dealing with issues surrounding polygny / polygamy. In South

¹¹⁶ CEDAW Committee in its concluding observation in 1998 for Tanzania strongly criticized the fact that Tanzania allows for polygamous marriages: CEDAW Committee, 'Concluding Observations: United Republic of Tanzania', U.N. Doc A/53 /38/Rev.1 19th Session, 10th July 1998 para.229. Also, see generally U.N. Human Rights Committee, 'General Comment NO 28: Equality of Rights between Men and Women (Article 3).

¹¹⁷ Basden GT *Among the Ibos of Nigeria* (1966), Frank Cass & Co, London at 228.

Africa,¹¹⁸ this is controversial given the constitutional guarantee of equality and the fact that polygamy still exists in the country particularly with the current president who is married to four wives. It remains a difficult issue for many to reconcile the concept, law and practice.¹¹⁹ The difficulty lies in the failure by many to understand that a number of women willingly enter polygynous relationships as their own cultural heritage which is protected under various national and international instruments.

3.9.1 The Rights polygny / polygamy violate

Currently, there seems to be no international instrument that explicitly abolishes polygamy or polygynous unions. In Africa, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provided the standard regarding polygamy in Africa. According to the Protocol on the Rights of Women in Africa,¹²⁰ monogamy is the preferred form of marriage, however, in polygamous unions, parties should be equal.¹²¹ It remains a controversial topic

¹¹⁸ In Zambia, polygamy is practiced particularly in the South where it is allowed as a valid form of marriage.

¹¹⁹ Rashieda Shabodien 'Reconciling gender and justice in a new South Africa' (2010) (On file with the author) in which, the writer draws attention to the unique South African situation in which the constitution guarantees the right to culture (s 30 & 31), the right to equality (s 9), and the right to dignity (s 8).

¹²⁰ Art 6 (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa which provides that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected'.

¹²¹ During the process of drafting the Protocol on the Rights of Women in Africa, initially in 1995, polygamy was abolished when Women in Law and Development in Africa (WILDAF) started the process even at Kigali process; it was at the Addis-

amongst Africans and the wider society as a result of its reflection of inequality of sexes amongst African men and women intensifying this fundamental inequality.¹²² It is claimed that by having the exclusive right to marry four wives in Islam and unlimited number of women in customary law, the rights of women to equality is grossly violated. The fundamental right to equality of all persons and non-discrimination is hugely compromised under the circumstance.¹²³

Polygny most times results in some form of exploitation of women. Women and children become objects of means of production and labour force to the detriment of the needs, dignity and empowerment of the woman. At the same time, the prestige, status and sexual needs of the man remain a top priority for the woman.

Further, many women suffer from polygny-related abuses that threatens their freedom, security, free consent and freedom from discrimination.¹²⁴ In mainly patriarchal societies as found in many African communities, women are usually submissive as part of the societal requirements for being a woman. This kind of position sustains discrimination that is detrimental to achieving gender justice.

Ababa process that most Muslim and Arab countries challenged the article on polygamy.

¹²² Muna Ndulo 'The Changing Nature of Customary Marriage in Zambia' in Cynthia Bowman and Akua kuenyehia (eds) *Women and Law in Sub-Saharan Africa* (2003) Sedco Publishing Limited: Ghana 34.

¹²³ ACPHR Art 2, UDHR art 16, CEDAW art 2 and Protocol on the Rights of Women in Africa art 3.

¹²⁴ Issa Tanre 'Arusha Tanzania: Women and Polygamy-A Controversial Issue' (Jan 2008) at <http://Africa.com/stories/2008/2100535.html> [accessed March 2012].

In many polygamous households, rivalry and competition for resources and affection of the main provider who is the husband exacerbates domestic violence.¹²⁵ The general mood of many polygamous households is one of much antagonism, rivalry and rancour that reaches a peak point during inheritance matters particularly where the man dies intestate.

The HIV/AIDS pandemic in sub-Saharan Africa is heightened by polygamy. The multiple sexual relationship created by a man marrying many wives put the health of many at risk. Many lives also remain at risk and vulnerable to HIV/AIDS infection because they cannot demand sexual exclusivity from their husbands due to the form of marriage contracted.

Several arguments have been advanced justifying the practice of polygny / polygamy. In the first place, Islamic injunctions provides for adherents to marry up to four wives as long as they are capable of fulfilling the Koranic requirements. Any attempt to prohibit polygny would be seen as unjustified attack on the right to practice their religion.¹²⁶ In some places such as Gambia, the Koran injunctions are

¹²⁵ Chinua Achebe, *Things Fall Apart* (1971) Heinemann Publishers, in which the author examines the influence of colonialism on African culture by using Okonkwo-the protagonist as a conservative, traditional African man who has numerous wives and children treating them firmly and fairly. This work of Achebe is said to be among the first that gave insight to the lives of Africans and how they dealt with issues of equality within the family in relation to themselves and in relation to their husband.

¹²⁶ Wolfgang Benedek, Esther Kisaakye & Gerd Oberleitner (eds) *Human Rights of Women: International Instruments and African Experiences* (2002) Zed Books at 277.

interpreted as absolute and fundamental without the benefit of the proviso that a man is only allowed to marry up to four wives as long as *he is able to treat them equally*.¹²⁷ Most times, in practice equal treatment under this situation remains unattainable.

Second, in some circumstances, women who are in polygamous unions do so by choice. They do so as an expression of their right to marriage of their choice.¹²⁸ It is argued that polygamy benefits the individual as well the society in general particularly its role in stemming incidences of prostitution and also ensuring that 'surplus' women get a chance to get married or be remarried as there are more marriageable women than men.¹²⁹ This argument may be seen as chauvinistic but the idea that marital chores may be shared by both men and women could be viewed with huge interest and relief. In fact, the larger the numbers of people in a homestead, the more the productivity as there are many persons making up the workforce including women and children.¹³⁰ In many rural settings, cattle herds are looked after by many children and productivity is enhanced creating food security among families.

Third, it is a central argument amongst Africans that an authentic African life and community is based on polygamy and monogamy on the other hand is a Western concept alien and any attempt to sustain monogamy is an 'imposition' on Africans.¹³¹ In other words, polygamy

¹²⁷ Muna Ndulo in Cynthia Bowman & Akua Kuenyehia (eds) (2003) *supra* 122 at 35, (emphasis mine).

¹²⁸ Dlamini C. R. M 'The Role of Customary Law in Meeting Social Needs' (1991) *Acta Juridica* 71 -85 at 78.

¹²⁹ Muna Ndulo in Cynthia Bowman & Akua Kuenyehia (2003) *supra* 122 at 34.

¹³⁰ Issa Tanre (2008) *supra* 124.

¹³¹ Wolfgang Benedek et al (2002) *supra* 126 at 278.

is cultural within the African society. It exemplifies the nature of the kind of people Africans are; the effect of rules of social order on social relations in that though polygamy is an accepted practice of African custom, where choice is necessary. The choice paradigm in these circumstances in the opinion of the present author validates the practice as an African value where choice expressed by some segment of society which must be respected.

3.9.2 Resolving the conflict

Complete ban or prohibition of polygamy would not eliminate the practice instead it will create a situation where many women would end up not being adequately protected by law. What is also worthy of note is that despite the problems associated with polygny, many men are still practising it and not ready to give it up.¹³² For example in Madagascar and Côte d' Ivoire , there is a total ban on polygamy in these two countries yet the practice is still widespread and has gone unpunished for offenders.¹³³

Several attempts have been made by various countries as already alluded to above to prohibit polygamy with varying degrees of success.

¹³²Roshieda Shabodien 'Reconciling gender and justice in religious, traditional practices (2010) in which the author expressed opinion on the disconnection between the right to culture as guaranteed in the constitution and the right to gender equality. The author was of the view that South Africa with such a progressive constitution still suffers from engaging with the multifarious challenges that women face in the country.

¹³³ Art 7 of the Civil Code and Art 30 of the Penal Code of Madagascar, CEDAW Committee, 'Concluding Observations: Madagascar', U.N Doc A/49/38, 1994, p 225; For Côte d'Ivoire, art 390 of the Penal Code. See also H. French 'For Women in Ivory Coast, new fight for equality' *The New York Times*, 6 April 1996.

The rate of the success is an indication that polygamy is deeply rooted in the religious and customary practices of many countries. Tunisia and Ivory Coast were among the group that imposed an outright ban, which may be considered as a bold step. This is because in some communities, there may be a mushrooming of 'informal second houses' which provides no legal protection to women and children and may also result in the disinheritance of children born of the relationship.¹³⁴ Hence, the need to adopt a midway approach by imposing conditions on the husband to seek permission and consent from the court or recognised authority to marry the second wife upon meeting certain specified conditions; or by giving the wife the right to divorce if it is shown that she would suffer injustice or material harm.¹³⁵ The affirmation of spousal consent or oversight of relevant authority for subsequent marriage is aimed at facilitating the woman's choice to determine the nature of the marriage she intends to engage in, which may in the future help to ameliorate any harmful aspects of polygamy.¹³⁶

The ban on polygamy does not in my view change the attitude because as it has been observed, some women are thrown into the

¹³⁴ See generally, the Namibian case of *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (TK), also in the South Africa case of *Hassam v Jacobs NO and Others* 2008 ZAWCHC 37, the High Court recognized that surviving spouses of polygamous unions were discriminated against because they were not contemplated to benefit under the intestate and maintenance legislation thereby leaving many of them destitute. The Court held that those laws relating to intestate and maintenance applied to spouses in polygamous marriages thus securing financial support to those spouses that would have otherwise been destitute.

¹³⁵ Esther Kisaakye in Wolfgang Benedek *et al* (2002) *supra* 126 at 279.

¹³⁶ Legal Assistance Centre of Namibia (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, (1999) 92-93.

marriage relationship based on other circumstances that they have no control over. Many women at grassroots are not aware of these laws in the first place. Therefore, if contracting parties are comfortable with the situation, it must not be denounced or criticised especially where there are no prejudice against either parties or the society. There are also many women who are thrown into polygamy as a result of circumstances surrounding their marriage.

Consider the position of Ginika, an urban Nigerian woman living with her husband in Johannesburg, South Africa who had been instrumental to acquiring the assets in the estate of her husband. The marriage subsists but she is unable to provide him with an heir and after 8 years of marriage, the husband went to his village, gave *lobola* for another woman and had a child with her. The husband insists that he loves his wife and wants to remain married but he also wants Ginika to remain as his first wife and then to acknowledge his second wife and child.¹³⁷

Some times, many polygamous unions are created as a result of these kinds of marital challenges and both parties do accept the situation as a valid action under customary law. Seemingly, most women are still protected in their marriages in these circumstances and so, any ban or denunciation of polygamy may lead to unwanted divorce or informal 'second house' relationship and loss of any legal or social protections that they would be otherwise provided for such as spousal maintenance.

Conclusions

In this chapter, it has been shown that marriage under customary law with all the required elements is still a valid practice in many African

¹³⁷ This information arose from informal discussions between the present author and Nigerian women residing in Johannesburg and Pretoria, South Africa in 2011-2012.

communities. It has also been shown that despite education and skill, most marriages commence with customary marriage, underscoring the relevance and importance of this form of marriage within African customary practices. Bride wealth as a valid element in the binding nature of customary marriage has also been extensively dealt with in this chapter. Consequently, it has been shown that bride wealth is essential to the status of African marriage between a man and a woman, nevertheless; there are a number of instances where bride wealth is not a requirement.

Generally, under customary law marriage processes it has been shown that there are challenges the promotion of gender justice. Practices such as forced /early marriage, payment of *lobola* /bride wealth and polygamy are shown as an impediment to women's dignity and full enjoyment of their human rights. In some circumstances, it would be obvious that the seemingly offending practice is in fact acceptable for some women, which reinforce the popular view that women are not a homogenous group and that culture also evolves. The standard should therefore be one that does not infringe on the dignity of women but rather afford them the opportunity to live decently.

Marriage remains the base for kinship, affinal bond and social relations within the African society. Still, within marriage, many women and children experience discrimination to the extent that even at the risk of disease or death, they remain in such marriages or relationships. Most times they remain in such abusive relationship because they cannot afford to return the money paid as bride wealth or *lobola* or *insalamu*. In cases where return of such resources may be feasible, the process

involved leaves the parties cold and unwilling to break the already formed family ties.

Although many controversies surround the payment of bride wealth as a practice that infringes on the right of women to decision-making about reproduction and in negotiating sexual relations, it is still a cherished custom among many Africans today.¹³⁸ It is also noted that childbearing is one of the expectations of marriage; it must be stated that the pressure of childbearing may be on the woman as well as the man and in most cases it would be the woman who insists she must reproduce even to the detriment of her health.¹³⁹ There are other aspects of customary practice that adversely affects the lives of women and children such as forced / early marriage. This chapter has shown the practice to be operative in the three countries under study. The health, social and cultural consequences of forced / early marriage is one that requires communities to ask pertinent questions. For example, there is no value in continuing to practice *ukuthwala* where the girl-child could have the opportunity of bettering her life and those of her family through education. It is the view of the present author that clearly, society adapts to changing socio-economic conditions which is why even in South Africa, the young girls being abducted and even traditional leaders are condemning the practice.

¹³⁸ D Kaye *et al* 'Implication of bride price on domestic violence and reproductive health in Wakiso District Uganda', *African Health Sciences* 5 (4) (2005) 300-303.

¹³⁹ Notably, in a discussion by the present author with the husband of Mrs Ezema of Nsukka, Nigeria who according to her husband insists she must have a male child even after giving birth to four girls. Her point is that her husband is an only son and so it is her duty to ensure the survival of his male line.

Ensuring gender justice through equal rights in marriage under customary law remains a thorny challenge. It has been observed that in order to give effect to the numerous international human rights instruments that support equality in marriage, countries has taken steps to enact pieces of legislation protecting the rights of women in marriage under customary law.

It has also been shown in this chapter that, in certain circumstances enacting pieces of legislation to prohibit cultural practices does not bring about the desired outcome. Rather, it supports practices that would have negative impact on women. In fact, from the examples of countries such as South Africa and Ivory Coast in cases of polygamy, it has shown an obvious inference that outright ban or prohibition of African customs will be met with either contempt or informal activities that would end up not providing any safety nets for women even though the proscription is intended for their benefit. It is the contention of the present author that bride price and polygamy as core practices of African custom should be reformed according to only those modifications that emanate from people as they interact with other cultures as well as changes in socio-economic conditions, would definitely impact people with positive changes that would result in positive cultural values.

Chapter Four

Challenges to the law of succession and inheritance in Nigeria, South Africa and Zambia

4.1 Introduction

African customary law of succession is one of the areas of law that directly affect a majority of women in Nigeria, South Africa and Zambia. Its influence is extensive in the socio-economic development of women. As already indicated, most countries in Africa have dual legal systems which in practice compounds the equitable access to justice problem. Although there could be issues associated with the choice of law in African states, it is argued that plural legal norms may contribute in the promotion of access to justice. This is because there would be in existence within the society many paths available to women to seek redress for infringement on their rights.

In this chapter, the author aims to critically analyse customary rules and practices relating to succession and other related matters such as inheritance, widowhood and divorce. These areas in many countries are dealt with as personal law, which play a huge role in how women are perceived within the African society; rather than as partners in development entitled to equal treatment before the law, they are most times deprived of their inherent citizenship as bona fide members of society through the practice and application of certain rules of customary law.¹

4.2 Succession and inheritance in Nigeria

Bearing in mind that the nature of customary law is such that it embodies the aspirations and recognition of a particular ethnic group;² its feature as a system of law with flexibility has been described as its

¹ This chapter discusses mainly Nigeria, South Africa and Zambia as selected countries under study.

² *Eshubayi Eleko v Government of Nigeria* (1931) AC 662 at 673.

major contribution to the character of law. This was aptly stated by Osborne CJ in *Lewis v Bankole*:³

‘One of the most striking features of ...African native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without losing its character’.

As a result of this feature, it remains a means to making customary law amenable to the rights of women. That international law in the general comments of both CEDAW and ICCPR have outlawed several customs and have depicted them to be inconsistent to human rights also point to the wide capacity of customary law to adapt to changing circumstances.

In Nigeria, the customary law of intestate succession applies only in instances where there is no written testamentary disposition. Thus, where a will exists, intestate succession is not applicable.⁴ Usually, the type of marriage entered into by the deceased determines the devolution of his property. In Nigeria, if anyone who is married according to the Marriage Act⁵ dies, the surviving spouse is entitled to take one-third of the estate where there are children of the marriage; if there are no children, the surviving spouse takes one half of the estate.

³ *Lewis v Bankole* (1908) 1 NLR 81 at 100-101.

⁴ It is worthy of note that in some states of the federation of Nigeria, one cannot make a testament that will negate the rule of customary law irrespective of the kind of marital regime in operation. See generally *Idehen v Idehen* (1991) 6 NWLR (Pt 198) 382; *Lawal Osula v Lawal Osula* (1993) 2 NWLR (Pt 274) 157.

⁵ Cap 218 Laws of Federation of Nigeria 1990.

4.2.1 Rights of the spouse in Nigeria

With regard to spouses to a deceased man's estate who died intestate under Yoruba customary law, wives are considered strangers in terms of the property of the deceased. To this extent, wives are excluded from inheritance even where there are children of the marriage. Under Yoruba customary law, it is well settled that family property belongs to the children of the deceased to the exclusion of wives or other relations of the deceased.⁶ The position of surviving spouses under Yoruba customary law may seem untenable but it can also be interpreted that she may not partake in two places because the surviving spouse may already have been protected in her natal family where she is entitled to inherit and being married does not extinguish such rights. Also, it is argued that this kind of system may be responsible for lack of property-grabbing by relatives of a deceased man in Yoruba land.

The position of women in Igbo land of the South East, Nigeria is mainly entrenched in the Succession Manual of Anambra and Imo States.⁷ In Awgu and Onitsha, a man's compound is inherited by all his sons as a body with the eldest son acting as a caretaker. In some variation, the eldest surviving son exclusively inherits the compound, though in

⁶ Felicia Anyaogu *Access to Justice in Nigeria: A Gender Perspective* (2009) Ebenezer Productions Nigeria Limited, Enugu at 325.

⁷ In 1977 an attempt was made to bring certainty to customary law particularly as it relates to inheritance, land and house. The Customary Law Manual published by the Ministry of Justice, Anambra State made attempt to codify laws governing succession and inheritance for Anambra and Imo States. These two states form the majority of Igbo land. It is worthy to note that since this manual, Anambra has been divided into two, with other known as Enugu State and Abia State was also created out of Imo State.

practice he may give part to other sons at their request for building purposes.⁸ The other form of variation relates to succeeding to property as well as to the status and privilege of the deceased. When there is a surviving second son as well as son of the deceased's eldest son, the compound and headship of the family passes to the second son and not the son of the deceased's eldest son. In certain communities, some variations exist. For example, in Idodo-Nkanu and Umuchieze, Otanzu and Otanchara West communities of Okigwe, the surviving son of the deceased eldest son inherits the compound and becomes the new head of the family as well, While in Enugu, the surviving son of the deceased eldest son will inherit the compound only and not being the new head of family.⁹

In Igbo land, despite many variations regarding succession and inheritance, it is considered absurd and 'un-Igbo' in cases where the son of the deceased eldest son of a man's compound inherits such compound or becomes the new head of family. In fact, such form of inheritance comes from a minority group because it seems very illogical for the son of a man that did not survive his father to inherit the compound of his grand father when there is a surviving second son. The *Okpara* or '*Opara*' or '*Di Okpa*' (all meaning the same as eldest son) thus resides with the surviving second son who assumes the duties and responsibilities of the family.

⁸ HRH Eze Rueben Mbalewe 'Customary Inheritance in Ibo Land: Anambra and Imo States' in Yemi Osibanjo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 418-419.

⁹ Mbalewe (1991) *supra* 8 at 419.

In many communities in Igbo land, much privilege is accorded to the *Okpara* (eldest son) and the *Ada* (eldest daughter). In fact, among the Onitsha people *Ada* plays a crucial role in installing the *Okpara*.¹⁰ This role has nothing to do with inheritance but is albeit paramount because the *Okpara* or any other member of the family cannot be buried if the *Ada* does not perform the function of *itigbu okụkụ* (killing of fowl). This is a customarily prescribed function in which it is important for the family to purify the home and compound of the deceased.¹¹ Without the *iju uno* (purification), it is believed that the deceased is still alive. Evidently, custom meets religion in this instance and remains actually the basis for many customs as they are largely based on their varied belief systems. It is also interesting to note that given such importance to the role the *ada* in the family home purification, the *Ada* has no say whatsoever with inheritance matters.

In Igbo land, the wife and the daughters have no share in the deceased husband or father's property. They can only own property if they acquire it through purchase or gift.¹² Such disinheritance does not

¹⁰ Akunnia S. N. G Bosah 'Onitsha Customary Law of Inheritance' in Yemi Osibanjo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 430-431.

¹¹ Akunnia S.N.G. Bosah (1991) *supra* 10 at 431. Compare this form of purification of the home after the passing of the husband in some parts of Igboland with the form that obtains in Southern Africa. *Iju uno* as a form of purification is not personalised as such rather it is performed for the compound of household as a whole. *Ikuchi Nwanyi* in Igbo land is therefore not a purification process but rather a form of extending the lineage of the deceased person as opposed to *Kusalazya* that purports to cleanse the widow of the spirit of her deceased husband.

¹² Priscilla Kuye 'Rights of Women under Customary Law' in Yemi Osibanjo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 386-388.

serve justice or in any way alleviate the deplorable socio-economic conditions of many women. It is argued here that the system seem illogical and unsustainable towards the welfare of women wherein a woman cannot inherit from her father or husband and if she does acquire some form of real property, it is inherited by her father's family even if such property was acquired before marriage. Regarding the property that she acquired after marriage, it goes to her husband on her death.¹³ These reflect the views of society about women and their entitlements within the family. Simply put, women are strangers that work through different family lives without actually owning anything. It does not even matter if a spouse contributed in acquiring the wealth within the family.¹⁴ If she must get anything as a co-participant in acquiring the wealth, she must show in monetary terms her part of the contribution. Most times, this is difficult to prove under customary law.

In most societies, it has been widely stated that the family unit is a microcosm of society even though in the world today, the family unit has taken different types due to civil union of many kinds that exist today pushing for recognition as a family unit.¹⁵ What has remained complicated is that women are not seen as members of the family in some way. The consequence is the persistent discriminatory practices

¹³ *Nwugege v Adigwe* (1934) 11 NLR 134.

¹⁴ *Uka v Ukama* (1963) FSC 184.

¹⁵ South Africa remains the only African country to allow same-sex marriage in 2009. The position of sexual minorities in most traditional areas of South Africa has raised serious human rights concerns. It has even been advocated that the rights of people with non-conventional sexual orientation as protected in the constitution must be reviewed. See generally the comments of Inkhosi Phatekile Holomisa, 'So many Questions' in *Sunday Times* May 13 2012.

that destroy the political, cultural, social and economic aspects of the lives of women. In other words, they lose their inherent citizenship as bona fide members of society who should actively participate in their development. Hence, whether as a daughter or as a spouse, women cannot inherit or own the most important resource in Africa: land. To measure the extent of the injustice faced by many women, consider these cases:

Case one

In Neni, Anaocha Local Government Area of Anambra State, a woman known as Maria Ezeani was ruthlessly beaten up in her village because she sought to challenge the illegal sale of her family inheritance by some individuals.¹⁶ It is alleged by her that these individuals are taking advantage of the poor mental state of her male sibling by selling off some of the landed property left behind by their father. The people she is accusing of masterminding the assault on her are former high court judge and former permanent secretary; who are male personalities in the village.

What is interesting with this case is that even an officer of the law in the form of a high court judge was fingered as masterminds to the assault. In my view, the expectation of the people was that such disputes should have been resolved with community elders and leaders instead, they resorted to further aggravate the situation of the woman. It is unclear whether she would have received any form of justice

¹⁶ Chris Oji 'Woman beaten, stripped naked for seeking redress over inheritance' posted in <http://thenationonlineng.net/web2/categories/news> and <http://groups.yahoo.com/group/AnambraForum/message/27068> [accessed May 2012].

which underlies the challenge that the persistent discrimination of women under customary law thus, is more perilous as access to justice becomes further compromised. The unequal position of women within the family and the society as a whole makes it difficult to access judicial intervention. For example, with the case of Maria Ezeani, she is fighting on behalf of her male siblings in a matter that technically she has no share in on the one hand because as an Igbo woman she cannot inherit in terms of the rule of primogeniture that is still in operation despite the landmark case of *Mojekwu v Mojekwu*; and on the other, she is fighting to be an active member of her ancestral home because she and her brothers have been ostracised for taking members of the community to court in contravention of a town union by-law prohibiting such course of action.

In some cases, being educated or a working class woman would prove very essential. Living and working in the city affords some women opportunity to benefit from the deceased husband's estate because she is in a space where the in-laws have little or no say in what happens. It must be stated that only very few, in fact an insignificant number of women who find themselves in this particular position of advantage. For example:

Case Two

Mama Chomo¹⁷ is a 40 year old Birom woman from Jos, Plateau State who was married to a pharmacist attached to the University of Jos, Plateau state, Nigeria. Mama Chomo was living with her husband in Jos, when he died unexpectedly. They had two sons; one four years at

¹⁷ Mama Chomo in Jos, Plateau State, Nigeria narrated her story and that of her sister to the present author in an informal discussion in 2011.

the time and the other eighteen months. The house in which they were living was not fully completed. She was working in one of the government department at the time. Due to the very bad vaginal tear and scar she sustained during the birth of her second son, she was not in very good health at the time of her husband's death. As a Christian in the predominantly Northern city of Jos, her husband's funeral was made quick and fast. And he was buried in the compound that was still unfinished at the time. So, early on, Mama Chomo had to make plans for herself and her minor children. Fortunately for her, it was not easy or simple for anyone to claim the compound because her husband was buried there and as such the house cannot be sold by anyone or to anyone because it is unknown in Birom culture and many other cultures in Nigeria that the house or compound a man was buried in is sold to another person or that another man can make that particular compound his own.

In this instance, it may be argued that the woman had a few things standing in her favour such as being a working mom, so she had to look for money through tenants to finance the finishing of the house and that her husband was buried there acts as a buffer as well as the house being in the city, all added to a huge advantage for her. Mama Chomo is only one in thousands of women who are deprived shelter and means of livelihood when their homes are taken away forcibly from by their in-laws.¹⁸

¹⁸ It is noteworthy that in Nigeria, there is no law against property-grabbing by the in-laws. Compare this position to that in Zambia where there is legislation against property-grabbing.

Majority of the time, the situation ends very badly for some women and most of the time they cannot fight their in-laws or whosoever wants to take away their home because of lack of access to justice. Many women then, leave all the assets that are rightfully theirs and walk away in to a life of destitution and vulnerability to risky behaviour or exploitation.

Case three

Christina Fom¹⁹ (not her real name) is Mama Chomo's sister from the same mother who was also married to a man living on the outskirts of Jos city. Her husband also passed away, leaving her with minor children. Before Christina could come to terms with her loss, her in-laws accused her of having a hand in what happened to her husband. Armed with this kind of accusation, the in-laws proceeded to chase her out the home she shared with her husband and three kids. Being a very young woman at the time, Christina had no recourse to justice. She was left on her own with her children and all she possessed was taken away from her.

The cases above illustrate the dire position of majority of women which is that of inequality, discrimination, injustice and ultimately loss of citizenship. As already noted in many parts of Africa, inequalities in inheritance laws and practices have been ossified and are not new issues. It has, however, become increasingly urgent to deal with women's property inheritance issue particularly in the context development and empowerment as well as the grave risks resulting

¹⁹ The information concerning Christina Fom was also given to the present author by Mama Chomo as one of the respondents, from Nigeria.

from the HIV epidemic in the continent.²⁰ The effects of HIV/AIDS are so profound on women particularly in having resources to maintain themselves and their family that many are left destitute. According to UNAIDS and WHO, 1.6 million people died of AIDS in Sub Saharan Africa in 2007 and about 22.5 million people are living with HIV.²¹ As a result of these statistics, many women have become heads of households or widows where resources are depleted or non-existent due to the ravages of the illness. In majority of the circumstances, these women are poor, not having independent property rights or means of livelihood of their own.²² Hence, the importance of engendering justice on the right to inherit and other property rights as a basis for independent, equal and resourceful African women.

4.2.2 Rights of children in Nigeria

In terms of customary law of the Yoruba of South Western Nigeria, the rule of primogeniture does not apply.²³ According to Yoruba customary law, daughters have the same rights as sons over their father's property. Daughters as well as sons have the right to the family house and such rights do not terminate on their marriage as they have the entitlement to return to the family house and reside with their children at the termination of their marriage either by death of their husband

²⁰ Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS (2009) vol 2, Family and Property Issues (Module 5) published by *Canadian HIV/AIDS Network*, 5-3.

²¹ UNAIDS and WHO, (2007) *AIDS Epidemic Update*, December 2007 at 41.

²² Richard Strickland 'To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV /AIDS in Sub Saharan Africa, (2004) ICWR Working Paper. It has been argued here that women who have control of or own property are usually in a better position to improve their lives and are also able to handle crises.

²³ *Lewis v Bankole* (1908) 1 NLR at 100-101.

or by divorce.²⁴ In fact all the children of the deceased, irrespective of sex and marital status, share in the property equally.²⁵ In terms of Yoruba customary law, it is known that it is only the children of the deceased who are entitled to share in his property. It has also been judicially noticed that brothers and sisters of the deceased cannot share in the property if the deceased is survived by children. In this instance, there is nothing like property-grabbing by brothers of the deceased to the detriment of the children of the deceased.

At the death of a father, his eldest son becomes the *Dawodu* according to Yoruba custom. The title of *Dawodu* indicates that the eldest son becomes the head of the family taking charge of the responsibilities and duties of the deceased for himself and other dependants of the deceased.²⁶ In terms of succession to the status of the deceased as head of the household taking charge of the estate; daughters are entitled to inherit as well as to be heads of household or family.²⁷ In other words, where the eldest child is a female; she succeeds as head of the family. According to Osborne CJ in *Lewis v Bankole*, there is 'nothing inequitable in this recognition of women's right because women's right is worth its recognition and it is also necessary to accord them the requisite right as equal in worth and recognition'.²⁸ This is the hallmark of the Yoruba customary law as it relates to children of the deceased. Most times, the *Dawodu* determines the appropriate system for the devolution of the property. For example, there are two systems under Yoruba customary law: *Idi-gi* system and

²⁴ *Coker v Coker* (1957) WRNLR 10.

²⁵ *Olowu v Olowu* (1985) 3 NWLR 372 SC.

²⁶ *Olowu v Olowu* (1985) 3 NWLR 372 SC.

²⁷ *Folami v Cole* (1986) 2 NWLR (pt 22) 372; *Lewis v Bankole* (1908) 1 NLR 81.

²⁸ *Lewis v Bankole* (1908) 1 NLR 81.

Ori-Ojori.²⁹ The most widely applicable system is the *Idi-gi* which indicates a polygamous home, unless otherwise stated by the court then *Ori-Ojori* would apply.

Among the Igbo of South East Nigeria, the position of female children and surviving spouses remain perilous. In the first instance, a woman cannot administer the estate of a deceased man on the basis of the patrilineal custom that excludes daughters and women from inheritance.³⁰ The practice generally referred to as primogeniture accord rights and privileges to sons to the exclusion of daughters and spouses in their husband's home. Simply put, for the majority of Igbo women beginning from cradle as female children to their graves having been wives; they do not have explicit rights to succession and inheritance. The right they may acquire is tied to holding rights and privilege in trust for their minor male children until they reach maturity.

4.3 Succession and inheritance in South Africa

4.3.1 Rights of the spouse in South Africa

The South African customary law dealing with intestate succession has been through a long metamorphosis. The law dealing with intestate succession in South Africa prior to the constitutional dispensation was

²⁹ The Supreme Court dealt with the matter of which applicable system of devolution of property in the case of *Dawodu v Danmole* (1962) 1 All NLR 352. The *Idi-gi* system means according to mothers. In other words, it means that the father's property is divided into shares of the number of wives not for the purpose of inheritance by the spouses. This system comes into being once a woman has a child whether male or female.

³⁰ *Nezianya v Okagbue* (1963) 1 All NLR 352; *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt 104) 373.

based on racial discrimination which brought untold sufferings to surviving spouses and children of deceased Africans.³¹ Since the 1996 Constitution came into being, the rights of women have witnessed remarkable progress regarding substantive equality and more particularly inheritance rights for women.

Early on in the use of the non-discrimination clause in the Constitution in terms of section 9, the case of *Mthembu v Lestela*³² started the paradigm shift leading to transformation in the area of customary law of succession. The *Mthembu* case challenged the constitutionality of the customary law of primogeniture which was generally applied as the customary law of succession at the time. In terms of the rule of primogeniture, the devolution of property of a deceased African is mainly according to the male bloodline to the exclusion of female.³³ In other words, according to this particular rule of customary law, the

³¹ See generally Black Administrative Act 38 of 1927 and the Intestate Succession Act 81 of 1987.

³² *Mthembu v Letsela* 1997 2 SA 936 (T); 1998 2 SA 675 (T); 2000 3 SA 867 (SCA). These citations of the case indicates the three times the same case was heard; twice in the Transvaal and then in the Supreme Court of Appeal. Although it was not successful for the claims sought by the applicant at the time, it launched the attack on the whole system of the devolution of estate on intestacy under African customary law in South Africa.

³³ See generally Centre on Housing and Evictions (COHRE), *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa* at 112; I.P Maithufi 'Adapting or Reforming Customary Family Law in a Democratic Constitutional Dispensation: The South African Experience' in Manfred O. Hinz (ed) in Collaboration with Helgard K. Patemann *The Shades of New Leaves, Governance in Traditional Authority: A Southern African Perspective* (2006) Centre for Applied Social Science (CASS), University of Namibia at 252.

widow Mthembu had no right to inherit from her deceased husband's estate and so, also her minor daughter Tembi because they were women. The question the court had to determine was whether they were unfairly discriminated against on the grounds of sex and gender according to the rule of primogeniture.³⁴ The Transvaal Court held that the applicant on behalf of herself and her minor daughter were not unfairly discriminated against by the rule of primogeniture because according to the applicable rules of 'official' customary law, they are entitled to be taken care of by the heir from the estate.

This case brought out many issues including the application of official customary law; the difference between 'official' and 'living' customary law and gender equality in terms of the non-discrimination clause in the Bill of Rights. The Supreme Court of Appeal in its refusal to develop the customary rule of primogeniture held that:

'In the present case, I therefore decline the invitation to develop the customary law of succession which exclude women from participation in intestacy and which also excludes children who are not the eldest male child. In any event, because the development of that rule, as proposed by Mr Trengrove, would affect not only customary law of succession but also customary family rules, I think that such development should rather be taken by Parliament.'³⁵

It is evident that Mthembu was decided when judges were still not ready to be creative and progressive on matters of customary law. The legal position of women and children has changed dramatically with

³⁴ This case first came to court during the use of the Interim Constitution Act 200 of 1993 which prohibited discrimination on the grounds of gender and sex in section 8 (2) at the time.

³⁵ *Mthembu v Letsela* 1998 2 SA 675 (T) at 686I-J.

the case of *Bhe and Others v Magistrate, Khayelitsha and Others*.³⁶

This case signified the unconstitutionality of the customary rule of primogeniture in so far as it discriminates against women and children. In the opinion of the court, the rule of primogeniture is based on patriarchy which 'reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of fathers, husbands or the head of extended family'.³⁷

The *Bhe case* made a clear departure from Mthembu by giving effect to the constitutional guarantee of equality whilst also making significant remarks regarding customary 'living law' as well as the legal position of other female dependants of a deceased and that of illegitimate children.

The *Bhe case* involved the two minor children of the deceased as first and second applicants with their mother as the third applicant. The three applicants lived as a family with deceased in a house that he acquired during his lifetime. They were all living at the property at the time of death of the deceased in intestacy. Since the deceased did not have a valid will, his estate must evolve according to customary law and his father claimed that he is the sole heir to the intestate estate based on the application of the customary law rule of primogeniture. He sought to sell the house to defray costs he had incurred at the burial of his son (the deceased). The applicants brought an interdict restraining him from selling the property in whatever manner.

³⁶ *Bhe and others v Magistrate, Khayelitsha and Others* 2004 1 BCLR 27 (C). This case is a trilogy in which issues of inheritance under customary law were dealt with extensively by the court. The Commission on Gender Equality was Amicus Curiae in this case as the matters dealt with inheritance for spouses, sisters and girl-children.

³⁷ *Bhe, supra* 36 (2004).

The question before the Constitutional Court was the following:

'whether a female African person, whose parents were not married, or married according to African law and custom, is entitled to inherit *ab intestate*, upon the death of her father?'³⁸

The court in this case dealt with the essence of equal benefits of the law between men and women by determining the standard of gender justice. It clearly held that:

'we should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for the purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' estates like any male person. This does not mean that there may not be instances where differentiation on gender line may not be justified for purposes of certain rituals; as long as this does not amount to disinheritance or prejudice to any female descendant. On the facts before us, therefore the first two applicants are declared to be sole heirs to the deceased's estate and they are entitled to inherit equally.'³⁹

From the above, the law is settled that no one should be discriminated against on the basis of gender or sex or any other status.⁴⁰ The Constitutional Court confirmed this decision by declaring certain aspects of the law regulating intestate succession to be

³⁸ *Bhe case* (2004) at 29G.

³⁹ *Bhe case* (2004) at 37E-F.

⁴⁰ It must be added that these were the sentiments expressed by the Valoyi tribe of Venda when the tribal community decided to appoint Tinyiko Shilubana as Hosi. See generally *Shilubana v Nwamtiwa* already mentioned extensively in chapter One.

unconstitutional and therefore invalid.⁴¹ To ensure that discriminatory laws are expunged from the statute books, the transformation seeks to be complete with the enactment of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. The recent judicial and legislative developments have been viewed with much apprehension and to some extent criticism. These views find expression in questioning the future of African customary law of succession in a new constitutional dispensation.⁴² It has been argued that a great deal of common law import into customary law of South Africa erodes the nature of customary law which is dynamic and at the same time does not contribute to the development of customary law

⁴¹ The impugned provisions are section 23 (10) (a), (c), and (e) of the Black Administration Act of 1927 as well as regulation 2 (c) of the Regulation for the Administration and Distribution of Estates of Deceased Blacks of 1987 and section 1 (4) (b) in so far as it excludes from the application of section 1 any estate in respect of which section 23 of the Black Administration Act 38 of 1927 applies. See generally *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC).

⁴² In South Africa, spouses married according to Muslim rites who were in de facto monogamous marriage have also benefited from the transformative decisions of the Constitutional Court as shown from the case of *Daniel v Campbell NO and Others* 2004 5 SA 331 (CC); Some of the works dealing with the changes in court decisions and law include: Manfred O. Hinz 'Bhe v Magistrate, Khayelitsha, or: African Customary Law before the Constitution' in Manfred O. Hinz (ed) in collaboration with Helgard Patemann, *The Shades of New Leaves, Governance in Traditional Authority: A Southern African Perspective* (2006) 267-283; Knoetze, E 'End of the Road for Customary Law of Succession?' (2005) *THRHR* 515-525; Christa Rautenbach and Willemien du Plessis 'Reform of the South African Customary Law of Succession: Final Nails in the Customary Law Coffin?' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press 336-360.

as envisaged in s 39 (2) of the Constitution.⁴³ The trend as it were in South Africa is transformational given the past history of the country. In the opinion of the present writer, sensitivity to the development of customary law is limited. Rather than develop the law, alternatives in the guise of common law are applied leaving one to wonder how appropriate it is for legislation to be used in modifying cultural practices. Few women have the resources to approach the courts for redress hence the actual impact of the court decisions and legislative changes are not fully integrated in the lives of the people.

4.3.2 Rights of children in South Africa

Having regard to the decision of the Constitutional Court in the *Bhe* case, female children, whether legitimate or illegitimate, can inherit from their deceased father's estate in equal proportion.⁴⁴ In South Africa, female children have benefited from the transformational decisions of the court and by so doing ensured the reversal of the Supreme Court of Appeal in *Mthembu v Letsela*.⁴⁵ In order to recognise the steps taken by the court to ensure that discriminatory aspects of customary law is not applied in this constitutional dispensation; it is relevant to analyse the approach of the courts.

Issues of customary law in South Africa evokes multi-layered approach owing to the status of customary law in the country. Although the constitution granted equal status to customary law in relation to

⁴³ See the minority decision of Ngcobo J as he was then in the *Bhe* case; Himonga Chuma & Bosch Craig 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *SALJ* 306-341.

⁴⁴ *Bhe* case 2004 2 SA 544 at 551.

⁴⁵ *Mthembu v Letsela* 2000 3 SA 867 (SCA) (*Mthembu* 3).

common law, matters relating to application of customary law involving children were applied by choosing common law standards. For example, in the case of *Hlophe v Mahlalela*⁴⁶ involving a custody battle between a father and grandparents of a child. The court held that common law standard of the best interest of the child should be applied because the parents after conducting customary law marriage, subsequently were married by civil rites. The court decided not to consider customary law in dealing with the matter before it because both parties in the case and the court as well could not ascertain the applicable Swazi customary law. The payment of cattle for *lobola* was viewed negatively by the court as a determining factor in the future of the child based on the negative connotations of delivery or non delivery of cows. The Court held that by contracting common law marriage, the parents of the child changed their personal law status hence; the interest of the child was paramount. In other words, the court's approach was to avoid the application of customary law because it is discriminatory than common law. In *Zondi v President of the Republic of South Africa*,⁴⁷ the court also chose to apply common law standards to inheritance of an illegitimate child because according to the applicable customary law, illegitimate descendant of the deceased had been excluded from inheriting. The court dealt with s 81 (5) of the Kwa Zulu Code and 79 (3) of the Natal Code rather than the application of the Kwa Zulu Natal Codes of Zulu Law by which the estate of the deceased was to be administered. In essence, there is inherent discrimination in legal pluralism because in making comparisons on the equal situations of people under different legal

⁴⁶ *Hlophe v Mahlalela* 1998 1 SA 449 (T) at 459.

⁴⁷ *Zondi v President, Republic of South Africa* 2000 2 SA 49 (N).

system results in devaluation rather than preserving the legal system which in this instance is customary law.

The decision of the court in *Bhe* is a welcome outcome because it gave effect to the inheritance rights of female children which indicate progress when compared to the *Mthembu* cases.

4.4 Succession and inheritance in Zambia

4.4.1 Rights of the spouse in Zambia

The law dealing with intestate inheritance in Zambia is the Intestate Succession Act 5 of 1989, Chapter 59 of the Laws of Zambia and the Wills and Administration of Testate Estates Act, Chapter 60. These statutes were enacted in 1989 to uniformly regulate inheritance and succession matters in the country to ensure that dependants and surviving spouse have adequate financial provision. According to the Intestate Succession Act:

'to provide a uniform intestate succession law that will be applicable throughout the country; to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate; to provide for the administration of the estates of persons dying not having made a Will; and to provide for matters connected with or incidental to the foregoing.⁴⁸

The intention of this Act is to avoid the rigours of choice of law that has been responsible for creating challenges for majority of women in inheritance matters. In terms of the Act, section 2 (1) provides that:

⁴⁸ Preamble to the Intestate Succession Act 5 of 1989, Chapter 59 of Laws of Zambia.

'except to the extent specifically provided in the Act, the Act shall apply to all persons who are at their death domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed'⁴⁹

In effect, the Act applies to Africans who had died without a Will. The persons to whom this provision is applicable may be Zambian by origin or they may be foreigners who are living in Zambia at the time of their death.⁵⁰ It is clearly for this reason that the court heard the case of *Charity Oparaocha v Winfrida Murambiwa*⁵¹ who were alleged spouses of Nigeria and Kenya origins respectively to a deceased Nigerian medical doctor who was permanently residing in Zambia at the time of his death.

In the Zambian traditional society, however, membership to a kinship group is mainly; either matrilineal or patrilineal and an individual's right to inherit lies with his membership to an identifiable group wherein his succession would be resolved as part of a composite whole.⁵² In the matrilineal system, children look only to their maternal lineage for inheritance and care. Their father's estate would then be

⁴⁹ Section 2 (1) of the Intestate Succession Act, Chapter 59 Laws of Zambia.

⁵⁰ This was the view of the judge in the case of *Charity Oparaocha v Winfrida Murambiwa*, Supreme Court Zambia judgment NO 15/2004 which held that it is the intention of section 2 (1) of the Intestate Succession Act, according to the drafters to include foreign customary law where parties decide to administer their estates according to Zambian law even though they are not Zambian by origin but are either permanently domiciling in Zambia or naturalised citizens.

⁵¹ SCZ 15 /2004.

⁵² Muna Ndulo 'Women and Inheritance under Customary Law: The Response of the Courts' in Muna Ndulo and Margaret Grieco (eds) *Power, Gender and Social Change in Africa* (2009) Cambridge Scholars Publishing, United Kingdom, 251-270 at 252.

inherited by his mother, brothers and sisters.⁵³ On the other hand under the patrilineal system, children are entitled to inherit from their father's estate. Customary law in Zambia varies amongst the seventy-three ethnic groups where almost all of them (about sixty-nine of these tribes) are matrilineal. In other words, bloodline and lineages are through the female ancestry particularly as it affects inheritance.⁵⁴ Most communities in Zambia practice matrilineal inheritance. In practice, despite the fact that women are central to ancestry matters according to this particular system, unlike their male counterpart in the patrilineal system, they still do not wield power and so suffers the same status issues like most patrilineal society.

In terms of customary law in Zambia and elsewhere in Africa, the wife does not inherit from the estate of her deceased husband though a widow may be allowed to stay on the deceased husband's land until her death or remarriage.⁵⁵ This is because she is not considered a member of the clan of her husband irrespective of the descent of the spouse/husband; that is if he was matrilineal or patrilineal.⁵⁶ Simply

⁵³ Lillian Mushota, *Family Law in Zambia: Cases and Materials* (2005) UNZA Press at 421.

⁵⁴ Richardson, Abby Morrow 'Women's inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform 11 NO 2 (2004) *Human Rights Brief* 19-22.

⁵⁵ Chuma Himonga 'Law of Succession and Inheritance in Zambia and the Proposed Reform' (1989) vol 3 *International Journal of Law and the Family*, 160 at 161; Lillian Mushota *Family Law in Zambia: Cases and Materials* (2005) University of Zambia Press, 421; T. W Bennett *Customary Law in South Africa* (2004) Juta & Co Ltd, 381.

⁵⁶ The ideal bloodline succession flows from these systems; it has been noted that these forms of succession are not entirely defined along biological lines but is also defined in terms of social organisation. See Chuma Himonga 'Taking the Gap-'Living Law Land Grabbing' in the Context of Customary Succession Laws in Southern Africa'

put, all of these inheriting systems however they are practised are not without contestation and conflict. Consider the following case:

Case one

In Zambia, Nyanyiwe Banda (not her real name) has been experiencing pain, torment and rejection at the hands of her in-laws since the death of her husband for more than five years.⁵⁷

Nyanyiwe is currently unemployed, rejected by her husband's family who had taken away her home, cars, and businesses that she established with her late husband after she was accused of killing her husband.

Her husband died of hypertension in 2007 which was also stated in the death certificate but it was not satisfactory to her in-laws. She has engaged the services of about 12 lawyers to help her and all efforts came to nothing. She had also been to the Zambian Human Rights Commission and Women in Law in Southern Africa (WILSA), both claimed not to have jurisdiction or deal with such matters. Nyanyiwe Banda's property is still being held by her in-laws through court attachment documents that she was not a participant in attendance. From this case, it is obvious that the law and its state apparatus have failed Nyanyiwe.

Part of the reason for continued conflict with systems of inheritance particularly with reference to Zambia could be attributed to changes

in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Faculty of Law, University of Cape Town, Juta & Co Ltd, Claremont, 114-139 at 123.

⁵⁷ Agnes Changala 'Widow's Plight' *Zambian Post*, 9th September 2012.

made by reform of customary laws of succession and court rulings.⁵⁸ Some countries in Southern Africa including Zambia, Zimbabwe, South Africa and Malawi have made critical changes to customary law of succession by pieces of legislation with a view to recognising the hardships and strengthening inheritance rights to benefit women and children.

Generally, the changes alluded to above have expanded the customary law rule of succession to grant rights to both spouses and children notwithstanding the customary rule of succession. For example in South Africa, the Reform of Customary Law of Succession and Regulation of Related Matters Act⁵⁹ was enacted after the Constitutional Court invalidated the customary law rule of primogeniture in *Bhe* case.⁶⁰

Amongst the countries that have made changes to their customary law of succession, Zambia has the most experience of 23 years. The Intestate Succession Act 5 of 1989 sought to benefit persons that are not considered bloodline lineage of the deceased and persons of whom customary law did not conceive as blood relative of the deceased for the purposes of succession. In other words, bloodline is no longer the only qualification for accessing inheritance to land under the reformed customary law of succession.⁶¹ Before enacting the legislation in 1989,

⁵⁸ See generally *Zambian Intestate Succession Act 5 of 1989*, Chapter 59 Laws of Zambia.

⁵⁹ *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*.

⁶⁰ *Bhe Case 2005 (1) SA 580 (CC)*.

⁶¹ Chuma Himonga 'Taking the Gap-'Living Law Land Grabbing' in the Context of Customary Succession Laws in Southern Africa' in Hanri Mostert and Thomas Bennett

factors such as loss of community values and trendy lifestyles gave rise to conflict in inheritance matters.

People were agitating for their children to inherit and those who were 'disinherited' through this process resorted to the use of threats and force to take what they consider to be rightfully their own.⁶² Property-grabbing became institutionalised to such an extent that government decided to enact legislation to curb these excesses on the part of the people. The Intestate Succession Act altered some of these conflicting situations where it provides in section five regarding distribution of the estates that the surviving spouse(s) is entitled to twenty per cent in proportion to the duration of the marriage or such consideration as contribution to the acquisition of matrimonial property.⁶³ In terms of the Act, list of beneficiaries according to section five is a closed list though section six provides for other relatives to inherit in special circumstances such as where the intestate is survived by no spouse but by other categories which may include brothers, uncles and aunts.

In Zambia, 22 years down the line since the Intestate Succession Act, property/land grabbing occurs unabated as well as many other conflicting matters regarding inheritance. Obviously, the Act has made significant changes in some ways but has also created principles that seem at loggerheads with both customary law and the intention of the Act itself. For example, in general, the Act individualised property rights as opposed to the communitarian nature of land ownership

(eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) at 125.

⁶² Lillian Mushota *Family Law in Zambia: Cases and Materials* (2005) University of Zambia Press, at 422.

⁶³ Lillian Mushota (2005) *supra* 62 at 425.

under customary law.⁶⁴ Further, the Act created principles regarding the administration of estates not envisaged by customary law whereby the administrator has the duty to only administer and distribute beneficiaries without right to inheriting it. On this basis, the Supreme Court of Zambia held in *Mudenda v Mudenda*⁶⁵ that the deceased brother as executor of the estate could not move into the deceased brother's house while administering the estate. Such an action is deemed illegal in terms of the Act. Another principle created by the Act is that it is not only the surviving spouse or named beneficiaries that are entitled to administer the estate. In other words, anyone may be chosen to be the administrator of the deceased's estate irrespective of whether such an administrator is a kin or stranger. The Supreme Court confirmed this principle in the case of *Chinyanta v Tembo*.⁶⁶ In practice, however, it is the deceased's sibling or parents that are appointed as executor/administrator of the estate and it is usually not obligatory for a person so appointed to consult with the surviving spouse. The third principle created according to the Act is that the duly appointed administrator could pass good title to a purchaser as long as he did not collude with him or her.⁶⁷ In so far as the rights of the surviving spouse is concerned, the position is far from being settled as the principles enumerated above could continue to create occasions of conflict and challenges from the relatives of the deceased. For instance, in the case of *Chansi v Banda*⁶⁸ highlights the challenges that flow from individualising property rights. In this case, the matter was an appeal brought by the deceased man's sister for reconciliation

⁶⁴ Chuma Himonga (2011) *supra* 61 at 127.

⁶⁵ *Mudenda v Mudenda* SCZ /12/ 2006 at J15.

⁶⁶ *Chinyanta v Tembo* 2007 ZR 246 as cited in Chuma Himonga (2011) at 127.

⁶⁷ Chuma Himonga (2011) *supra* 61 at 127.

⁶⁸ *Chansi v Banda* 2003 /SSP/ LCA/145.

which is the local word referring to claims for intervention at the local courts for matters relating to inheritance. The dispute refers to the house left by her deceased brother of which the Local Court held that the surviving spouse has a life interest in terms of the Intestate Succession Act (ISA). Other than the spouse who was entitled to stay in the disputed house, the deceased used to have his mother stay in 'his' house as well and the local court held that the widow should not chase her (the deceased's mother) away. In arriving at this decision, the local court combined two elements here; the individual right of the widow in terms of the ISA and the duty as well as obligation of care towards the deceased's relatives (in this case the deceased's mother) based on customary law.

The case went on appeal where the magistrate decided purely on the individual rights of the widow and found the decision of the local court to be an unnecessary paradigm shift. The Magistrate on appeal held that:

'Section 9 of the Intestate Succession Act is categorical in stating that where the estate left by the deceased comprises one house, the surviving spouse has a life interest in it which determines upon her remarriage or death. If there are any children to the marriage the house devolves upon them subject, of course, to the surviving spouse's interest...there was therefore no need for the local court after having found that the widow was entitled to the house by virtue of her life interest, to direct that she should not chase her mother in law away'.⁶⁹

No doubt this case strengthens the individual rights to inheritance of the widow regarding her deceased husband's house but disregards her family relationship in that she can evict her mother in-law from the house as the latter has no property interest in the deceased's house.

⁶⁹ *Chansi* case as cited in Chuma Himonga (2011) *supra* 61 at 128.

Seemingly, the Act has resolved certain matters that would otherwise create great injustice for a wife of the deceased but the proportion allocated to the surviving spouse is still not based on equal status. The widow only has usufruct right to use and no rights to title to the home; in other words, she can only remain at the house until remarriage or at the discretion or kindness of her in-laws.⁷⁰ Although the individual rights of the widow is strengthened somewhat through her allocation and life interest in the property of her deceased husband, such individualisation of rights could contribute to property-grabbing particularly when relatives are disinherited or are not shown any support as indicated in the *chansi* case.⁷¹ It is generally believed in Zambia and elsewhere in Africa, that property including houses is owned as families and not individuals. Hence, individualisation of property rights runs contrary to group ethics and orientation.⁷² So, where relations are disinherited through this process, they resort to property-grabbing and research supports this finding that even after succession laws have been reformed by legislation; people continue to see inheritance to property as family-owned within the influence of customary law.⁷³ Therefore, individualising property rights in inheritance remains a site for conflict and continues to challenge both rights of the widow and her obligations to her family. Such obligations,

⁷⁰ Richardson, Abby Morrow 'Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform' 11, NO 2 (2004) Human Rights Brief 19-22.

⁷¹ *Chansi v Banda* 2003/SSP/LCA/145.

⁷² Chuma Himonga (2011) *supra* 61 at 129; Refer also T.O Elias, *The Nature of Customary Law* (1956) as discussed in Chapter Two.

⁷³ See generally the report of Women and Law in Southern Africa (WLSA), Zambia 'Inheritance in Zambia Law and Practice (1994) 184.

duty of care and support are provided for in the African Charter of Human and Peoples' Rights underscoring their social and cultural significance.⁷⁴ In defiance to individualisation of property rights, property grabbing takes place under many guises in Zambia mainly to chase away the widow and her children. For example, in *Gabula v Mwanza*,⁷⁵ the widow alleged that the brother in-law who was also the administrator of the estate of his deceased brother chased her and her children from the deceased's house and later occupied the said house with his sister. Further, the widow claimed that the administrator rented some rooms in the house and used the proceeds for himself and his sisters. Fortunately for the widow, the High Court restored to them their benefits under the ISA.

In some instances, the widow is threatened subtly in such a way that she might decide to run away on her own as noted in the famous *Chilala* case. The much publicised case involving Chilala's widow who had been married to the deceased for nearly 30 years. After her husband's death, she remained in their matrimonial home against the will of her in-laws. The deceased husband's relatives then resorted to burying other relatives around her matrimonial home. In other words, the strategy they used was to create a cemetery surrounding her house believing that she will run away on her own accord. The strategy was to traumatise her into surrender.⁷⁶ Other forms of property-grabbing such as state-sponsored legality involve the local courts which has specific jurisdiction in terms of the size of the estate

⁷⁴ Articles 27-29 provides for duties of individuals towards their families and 'to respect his parents at all times, to maintain them in case of need'.

⁷⁵ 1995 / HP/ 3818.

⁷⁶ Chuma Himonga (2011) *supra* 61 at 133.

but nevertheless; they appoint administrators to estates beyond their jurisdiction.⁷⁷ To curb the excesses of these property-grabbers, the state has criminalised the practice under the ISA.⁷⁸ Even the establishment of Victims Support Unit in the Zambia Police Force to enable victims of this practice promptly report cases seem not be enough deterrence.⁷⁹

Furthermore, the enforcement of the ISA requires that cases be brought before a statutory court which is in fact not realistic for majority of widows because of the costs involved; adversarial nature and intricate process that follows a formal court processes which are usually incomprehensible to the rural widow as well as proximity issues. Take for example, the following case:

From Chipata in the East of Zambia, bordering Malawi, Phiri (not real name) was a wealthy man by all standards, owning houses, farms and vehicles. He died intestate. The relatives chased the widow and her children away from the house in which they lived with the deceased. The surviving spouse took the matter to the magistrate court where before the case was concluded, the once thriving farm became dilapidated and the farm equipment were in ruins.⁸⁰

With case such as this one that was even brought before the magistrate, justice for the woman remains a challenge due to the fact

⁷⁷ *Simbule v Simbule* 2001/ HP/ 0783.

⁷⁸ See generally s 14 of the Intestate Succession Act 5 of 1989.

⁷⁹ Report of Human Rights Watch, *Hidden in the Mealie Meal: Gender-based Abuses and Women's HIV Treatment in Zambia* 2007 vol 19 NO 18 at 57.

⁸⁰ The case was narrated to the present author by a Zambian respondent, Brenda Kalenga.

that majority of women are not prepared for the long, drawn out and expensive court case; perhaps also due to element of corruption within the judicial system. In Zambia, customary law is mainly administered by the Local Courts and traditional courts. The local courts which officially derive its authority from the Local Courts Act⁸¹ is enacted and recognised as administrators of customary law and other statutory law. Apart from the local courts, there are also recognised within localities, courts of traditional leaders who preside over conflicts regarding specific customs and practices. The chiefs are tasked with the responsibility of recommending appointees who sit as local court justices. Majority of the chiefs are men and so, it is neither in the interest of women nor the protection of their rights to have mainly men as local court justices. This has put majority of women's inheritance in jeopardy as it is usually difficult to bring matters to a judicial forum of mainly men who in most cases are somehow related to the women.

As shown from above, the Intestate Succession Act is helpful in alleviating the challenges faced by majority of women in terms of inheritance where the aggrieved party can bring the matter to court.⁸² As it stands currently, it is argued by this author that women could be protected by the ISA; however challenges still remain on the fundamental issue of long wait for justice. Also the fact that the primary heirs in a matrilineal society as found in much of Zambia, is

⁸¹ Cap 54 Laws of Zambia.

⁸² The following cases further illustrate the point; *Gumbo v Land and Agricultural Bank of Zambia* (1968) ZR 50 (HC); *Munalo v Vengesai* (1974) ZR 91 (HC); *Mwenya Mulenga Chitika (suing as next friend of Ruth Chitika v Gift Zimba (sued as administrator of the estate of late Sylvia Zimba Chitika)* 2000 / HP / 368; *Charity Oparaocha v Winfrida Murambiwa* SCZ Judgment NO 15 / 2004.

the nephew of the deceased (his sister's male child) which is in direct contradiction to the Intestate Succession Act. The consequence remains the discrimination and disinheritance of women.

4.4.2 Rights of children in Zambia

Prior to the enactment of the Intestate Succession Act 5 of 1989, children did not have the right to inherit from their father's estate particularly under the matrilineal system of inheritance which applies to majority of ethnic groups in Zambia.⁸³ In principle, children can inherit from their father's estate under the patrilineal system however, in practice, because of 'property-grabbing' children are denied share from their father's estate. This is clearly a violation of their rights to inheritance and a situation which often leads to a life of destitution and poverty.

With the advent of the ISA, provisions were made for children and the Act clearly provides that the children of the deceased are to inherit in fifty per cent of the estate in proportion to the child's age or educational needs or both.⁸⁴ In Zambia, poverty is rife and so, the duty of taking care of dependants of the deceased by the heir usually falls by the way side leaving surviving spouse and children very vulnerable. According to the Women for Change Newsletter, a child narrates that:

"I am 10 years old. Mum and Dad died in a bus crash coming from their village in Lundazi. A relative of my dad took all the property and money that my parents had kept. They kept us for a while and later chased my sister and me away. We are both

⁸³ Chuma Himonga *Family and Succession Laws in Zambia: Developments since Independence* (1995) LIT VerLag at 143.

⁸⁴ Section 5 of the ISA; It is noted that the share of the minor child is to be held by the mother, father or guardian until he or she attains majority.

on the street. My sister is sometimes taken by rich men who pay her for sex. I wanted to be a policeman. I wish my parents were alive. It is rough out here. Sometimes big boys beat us up.”⁸⁵

The extent of the limitations of the law in protecting these children is evident in the number of children who had been deprived of their inheritance by relatives. According to COHRE,⁸⁶ it has become normal to find thousands of children in the streets even in Lusaka because when parents die, the relatives take everything and the children are left with nothing.

The implication of the situational analysis of children in Zambia points to the need to expand the norm-making process to take into account the socio-economic needs of the people. The ISA seems to be unable to deal with the endemic poverty that turns people’s duty of care and support into greed and ripping the family apart leading to further destitution.

The courts are very slow in effecting lasting change particularly in Zambia where about 90 % of the land is held under customary land tenure. The decisions are usually in favour of the men. Women and children bear the burden of the system failure due to changes in law that have not taken into consideration the socio-economic changes of the society. It must be noted however, that changes are imminent

⁸⁵ Women for Change Newsletter ‘Women in Touch’ (Jan, 2003); Women for Change is an NGO working in the area of promoting the rights of women in inheritance.

⁸⁶ Centre for Housing Rights and Evictions Publication, *Bringing Equality Home, Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa* at 155.

given the few cases concerning children that have come before the court.⁸⁷

4.5 Harmful traditional / Cultural practices that affect women in inheritance

In many African communities, harmful traditional practices that adversely affect women exist. These practices that are committed against women are undesirable, inhuman and grossly reprehensible. For many women, life after the death of their spouse become hardly worth living because of some traditional practices that take place during widowhood. These forms of harmful traditional practice are not widely spoken about because of the space in which they occur; within the family. The subjugation that women endure under the circumstance grossly violates their dignity and worth as human beings because they are usually not afforded choice. They (women) mostly risk therefore enduring this harmful practice or succumb to a life of poverty and destitution. Among the harmful traditional practices to be discussed in this section of the study are; mourning rites/widowhood rites, sexual cleansing and wife inheritance.

4.5.1 Mourning/ Widowhood practices

Many times, independence and equality are compromised for women because of customary practices associated with widowhood. In many

⁸⁷ See generally, *Gumbo v Agricultural Bank* (1968) ZR 50 (HC) where the court held in favour of the minor child of one Burnett Yafeti Gumbo who had died having several investments. His brother sought to dispossess his widow and child by claiming that customary law should apply whereas at issue was a contract of investment between the deceased and the bank in which he (the deceased) already had named his beneficiaries who are his wife Lantia Mwale and his son Yaphet Gumbo. The court found in favour of the surviving spouse and her son.

African countries, as soon as a woman is widowed through the death of her husband, she is susceptible to forms of discrimination such as being called or referred to as witch for killing her husband; or being chased away as a result of being seen as a witch; being inherited by a deceased husband's relation or being forced to marry same in order to remain the family compound or see her children and being forced to perform inhumane purification ceremonies.⁸⁸ The consequences of these conditions undermine women's rights in inheritance and all other rights that are necessary for the full realisation of gender justice including the right to dignity, right to life and the right to highest attainable standard of health, right to adequate standard of living and freedom from violence.

Among the Igbo of the South East Nigeria, widows are exposed to varied forms of discrimination. In the first instance is the inability of wives to inherit from the estate of their deceased husband. Then, they may not inherit economic plants or trees and has no right whatsoever to them. And it makes no difference whether the widow has a child or not.⁸⁹ It is only in a few communities such as Mbano, Arochukwu and Ohafia that widows may inherit economic trees and plants such as kola nut, pear tree and fruit tree called *udara*. It is widely known amongst the people in the community that these trees could improve the economic conditions of the widow when she sells them in the market. Simply put, it seems that the widow is stripped of any thing or

⁸⁸ Respect, Protect and Fulfill (2009) vol 2, 5-3.

⁸⁹ Mbalewe 'Customary Law of Succession and Inheritance: Anambra and Imo States' in Yemi Osibanjo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) at 420.

resource that is of economic value that could improve her life after the death of her husband.

Also known amongst the Igbos is the practice of wife inheritance. According to Mbalewe⁹⁰ the Customary Manual for Anambra and Imo states indicate that it is not controversial that:

'in all places where it is lawful for a widow to be taken over as a wife by a member of husband's family...' Any child born to a man by a widow he has taken as wife has the same right of inheritance to the man's land and houses as a son born to him by a wife in respect of who he had paid bride price.

It is worthy to note that still under this circumstances, the widow still cannot inherit. It seems that for the widow, it remains a vicious cycle of exclusion and deprivation in the family assets and resources.

Another practice that further discriminates against women involves widows at the hands of their in-laws. In many communities in the South East of Nigeria, widows are made to undergo rigorous rites and some of these rites are at worst dehumanising. For example, a widow who is suspected by the in-laws of being responsible for the death of her husband is made to sit at the head of the corpse for the entire duration of the wake which lasts from evening to early the next morning.⁹¹ There is a general belief that if a man is suspected of dying

⁹⁰ Mbalewe (1991) *supra* 89 at 423.

⁹¹ Uche U. Ewelukwa 'Post Colonialism, Gender, Customary Injustice: Widows in African Societies', *Human Rights Quarterly* vol 24 (2002) 424-486; Leda Haslim Limann (2002) at 195 writes that the Lugbara or Sudanic people found in the Northwest of Uganda conducts family investigation though informal to ascertain the

mysteriously, it is the wife that killed him and she must prove her innocence by keeping vigil with the corpse.⁹² It is believed that if the widow is guilty, she may not survive the night. Many a time, the deceased is handed a broom and a knife to either sweep out his killer or chase them from life beyond with the knife. All of these beliefs are intended to inflict psychological trauma on the widow with the intention of making her confess to killing her husband.

This was the situation Ugo (not her real name) found herself in with her in-laws in 2010. She resides with her husband in South Africa, who died and whose remains were transported back to Nigeria. The widow was mandated to come back to Nigeria to explain herself if she was not responsible for her husband's death.⁹³ It is unimaginable that these beliefs still hold sway amongst people who seem oblivious of diseases such as stroke, heart attack and HIV/AIDS. In fact, the popular view is that the deceased may have been afflicted by these kinds of illness through the activities of the spouse, even when most times they are as a result of the male partner's activities.

It is believed to be mandatory in Igbo land for a widow to shave her hair as a mark of respect on the death of her husband. Shaving of the

causes of death with respect to the deceased. Widows suspected of having a hand in the death of their husbands are ostracized by their in-laws.

⁹² In Nigeria, the practice is common mainly among the Igbo people of South East and there are no policies on this particular practice rather the intervention focuses on empowerment programmes for the widows. Some women are happy performing this practice to clearly send a message that they have nothing to hide about the death of their husbands.

⁹³ This incident was obtained by the present author during an informal discussion with Nigerian women in Pretoria.

hair by the widow, children and close relatives of the deceased and wearing of mourning clothes such as black or white clothing are all part of the mourning rites. The widow is expected to wear this form of clothing for at least six months or a maximum of one year.⁹⁴ The mandatory practice for widows is largely viewed as a humble way of acknowledging the loss in the family particularly for the widow. Also, it may be viewed that a woman who refuses to acknowledge her loss in this manner is wayward and has no respect for the union between herself and her deceased husband. Without the mourning clothes, or any form clothing acknowledging such loss, the woman is deemed free to pursue other interests.⁹⁵ It is usually at this juncture that conflict arises in the family about widowhood because the widow has failed to acknowledge her loss in a manner duly acceptable to both the family and the community.

This practice have been criticised as archaic and demeaning to women by some rights activists.⁹⁶ It has been observed that many women are not unduly influenced by anyone to undertake these mourning rites but that they have determined on their own accord to carry it out freely and completely. This was the situation in the mourning rites for

⁹⁴ The present author observed these mourning rites among the people of Mgbowo in Awgu Local Government Area in 2009.

⁹⁵ Among the Iteso of Eastern Uganda bordering Western Kenya, Widows are not permitted to bathe, eat or shave their hair for the mourning period of three days as evidence that they are grieving. Widows are also taken to the bush and given an axe to cut down a tree showing that they have now assumed the role of the husband and hence may perform masculine activities- Leda Hasila Limann 'Widowhood Rites and the Rights of Women in Africa: The Ugandan Experience' in M. Scheinin and M. Suski (eds) *Human Rights In Development Yearbook* (2002) 193.

⁹⁶ Ewelukwa (2002) *supra* 91 at 424 -486.

Mrs Ndu of Inyi Village in South Eastern Nigeria. Mrs Ndu insisted that she will observe the mourning rites required by custom and would go an extra mile in any way she finds it possible to honour her late husband.⁹⁷ It is also usually expected that the children of the deceased and other relatives observe these mourning rites as a corporate acknowledgment of the loss that the family is enduring. It has however been observed that the children and relatives of the deceased may or not wear the mourning clothes or shave their heads. It may be argued that the shaving of heads and wearing mourning clothes are not in itself degrading or demeaning to the dignity of women. The practice where the widow is made to drink the water used to wash the corpse or to eat with unwashed broken plates and not take her baths for seven days or four market weeks is a violation of the dignity of the widow and a cruel, inhumane and degrading practice.⁹⁸ In terms of testing the validity of customary law, free consent forms one of the

⁹⁷ These sentiments were expressed to the present author in an informal discussion with the widow's children. It was then observed that many women in that community willingly without any form of aggression on the part of their in laws observe these mourning rites. However, it has been noticed that the younger generation of widows particularly those not residing within the community are able to take shorter mourning rites particularly in wearing the dark or white mourning clothes.

⁹⁸ Ewelukwa (2002) *supra* 91 at 424. Seemingly, the position of widows in Uganda where widows do not eat or bath or shave their heads in three days of mourning is almost the same with the community in Nigeria. The difference with Uganda is notable where seven days after burial, widows and their children must sit at the doorway with their backs to the house with legs outstretched whilst senior women pass a calabash or blood from slaughtered animal over their bodies to ward off evil spirit.

basis for the legitimacy of these practices.⁹⁹ It is considered fundamental that no woman should be tricked, coerced or intimidated into submitting to rules of customary law that violates her person. Even in circumstances where judicial notice¹⁰⁰ has been made on rules and practices of customary law, other tests of validity include that a custom must not be:

- (a) repugnant to natural justice, equity and good conscience¹⁰¹
- (b) incompatible either directly or indirectly with any law being in force for the time; and
- (c) contrary to public policy.

The impact of this clause on the majority is not without controversy. In the first place, such discontent mostly comes from judicial officers who consider the clause as a means of effacing the law that is natural to its people. For instance, Nnaemeka-Agu JSC in the case of *Ugo v Obiekwe & Another*¹⁰² said

'I must pause here to register my regret that our customary law is still bogged down by this annoying vestige of colonialism...The result is that our customary law is still

⁹⁹ Ada Okoye 'Sharing the Citizenship of Women: A comparative gendered analysis of the concept legal personhood in Africa', Feminist Knowledge available at www.gwsafrica.org/knowledge/ap3.html [accessed 30 may 2011].

¹⁰⁰ Proof of customary law in terms of the Repugnancy Clause is a matter of fact or to be judicially noticed in terms of the provision of s 14 (2) Evidence Act or s 56 (1) which places customary law on the same pedestal as foreign law.

¹⁰¹ The origin of this clause into Nigeria law is based on Supreme Court Ordinance NO 4 of 1876 which is the applicable English Law in the Colony of Lagos and Gold Coast at the time. This ordinance has been continuously re-enacted through most of the systems of government in operation in Nigeria through the century as may be found in s 16 (3) Supreme Court Act 12 of 1960.

¹⁰² 1989 1 NWLR (pt 99) 566.

treated like foreign law nearly three decades after our independence from colonial rule. This is far from satisfactory'...

It is shown therefore, that in most cases, women would possibly not get the desired benefit of the law since the only way of ascertaining the legitimacy of the law is for all intent and purpose; foreign. Hence, on many occasions, the justification for certain rules and practices rests with the particular society. This is actively played out for example, in widowhood practices wherein a particular family of a deceased African man push vigorously in their quest for answers in coming to terms with the mysterious and untimely death of a relative. The discriminatory nature of the latter kind of practices lies in the fact that no husband is subjected to inhumane treatment at the mysterious death of his wife. Instead, the family ensures that the widower remarries almost soon as the wife has been buried to help him cope with the loss.

The injustice in widowhood rites for the female gender is found in the extremities that are devised for women. When a woman is suspected of foul play in the death of her husband, she is traumatised, not only by the loss of a partner but by inhumane treatment that may leave her destitute and penniless. A man is rarely accused of killing his wife and even when such accusations have been made, he is not demeaned in any way by members of the woman's family. The only treatment he may receive would be ostracism by relatives of the wife.

For example, in a town called Ogbunike in Anambra state, South East Nigeria, Achalaugo (not her real name), a business woman had died in a mysterious set of circumstances. Her husband was being accused by the wife's relatives of murdering his wife, though no charges were

brought against him to substantiate their claim. At her burial in the hometown of the husband in Anambra State, intermittent fights occurred during the Christian wake and burial ceremonies between the relatives of the deceased and her husband. The point of contention was that the husband of the deceased tried to show his community that he loved his wife whereas her family was convinced that his ill-treatment of her during her sickness resulted in her death as she could have been very well taken care of by her relatives if her husband had allowed it.¹⁰³

Evidently, men rarely experience any of the unjust actions that women endure let alone the magnitude of it as could be seen from the Achalaugo case above, the man walked away from it all. No action was taken against him for negligence because the family may not be able to prove it. It is widely observed that women suffer unbearable situations during the loss of a husband. The expectations of the community for the woman are entirely and completely different from the man. There seems to be no valid reason why similarly situated persons would have such wide margin of differential treatment. The women's right to dignity, freedom from discrimination, freedom from cruel, inhuman and degrading treatment and freedom from mental and psychological torture are some the rights violated.

It has been shown that widowhood practices that are discriminatory could be eschewed through changes in socio-economic conditions of the people. Young working widows cannot be expected to observe long mourning periods when they have to return to work to take care of

¹⁰³ The present author observed these family wranglings and confirmed the situation from Uchenna Okonkwo Eneh as one of the respondents.

themselves and their children. In some circumstances, the widow would be advised to go back to her family particularly if her husband passed away without fully completing the marriage and there are no children involved.¹⁰⁴ For example, the case of a woman in Mgbowo:

There is also the story of Chinweokwu, a woman in her early forties whose husband had died suddenly in Abuja, Nigeria. In her own situation, she was also unwed and without children. She lived with her husband in Abuja, Nigeria whom she was traditionally married to in terms of the customary law of Mgbowo people for at least two years. He had passed away suddenly and as a result of the childlessness of the marriage, Chinweokwu would have to return to her father's house after a few months of mourning for her husband. She regains her unmarried status even though they were married according to the customary law of their town; the childlessness of the marriage is a ground for Chinweokwu to return to her father's house.¹⁰⁵

In recent times, reform of the harmful widowhood rites has been averted by the intervention of the church. It has been observed that many of the deceased are also Christians who prefer to be buried according to their faith. As a result of the burden brought to the immediate family of the deceased, it has become imperative to limit

¹⁰⁴ Leda Hasila Limann (2002) *supra* 95 at 193, stated that among the Iteso in Eastern Uganda, stepsons or younger brothers of the deceased husbands inherit the widows. Young widows who do not have grown-up children to cater for them are chased away from the home if they refuse to be inherited.

¹⁰⁵ The position of this woman was narrated to the present author in an informal discussion by Uchenna Okonkwo Eneh, one of the respondents in this study.

the length of time for burial preparation to two weeks.¹⁰⁶ In other words, if a family desires that their deceased relative be buried according to Christian tradition, they must do so within two weeks. Such intervention came with the help of the village heads to ensure that families are not unduly burdened with overspending scarce resources. The intervention has also been seen as limiting the opportunity for unwanted interference in the lives of the widow and her children, particularly as it concerns their property and other inheritable property left behind by the deceased. This sort of intervention was achieved in alliance with the community leaders to reduce the problematic tendencies of property grabbing and forceful stripping of the widow's inheritance.

The status of women under Islamic law in Nigeria is however different because sharia law impacts women differently and thus remains an integral part of the legal architecture in that country.¹⁰⁷ According to Islamic law, no one can deprive a woman of her share in estates left by a parent or nearest close relative. The Qu'ran states that:

¹⁰⁶ In Nigeria, the Catholic Church is widely known to frown at long burial processes and insists that if persons want the church to be involved, then they must comply with the two weeks notice. The essence of the rule is to stem unwanted family wrangling and unnecessary burial expenses. The church through this means in my opinion makes an impact on how the widow is treated after the death of the husband.

¹⁰⁷ Sharia law as practiced currently in Nigeria was first proclaimed in Zamfara State by Alhaji Ahmed Sani in Zamfara on 25 October 1999. The State House of Assembly passed the Sharia Penal Code Law in 2000. Other eleven states in the Federation enacted similar laws. Example Kano State Sharia Penal Code 2000, Kaduna Sharia Courts Law 2000, Kebbi State Sharia (Administration of Justice) Law, 2000. For full details of specific titles to the various laws indicated see Rudolph Peters *Islamic Criminal Law in Nigeria* (2003), Spectrum Books 51-53.

'From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property be large or small-a determinate share'.¹⁰⁸

Though this does not precisely meet the equality principle, it appears the interests of women seem to have been captured by this Islamic injunction which has been argued to be the first legal system to grant women a determinate portion in inheritance as a mother, wife, daughter and sister.¹⁰⁹ Although women inherit in Islamic law, it is divided in portions that may seem to be discriminatory even though it has been argued that it is only in Islamic succession that one of the most comprehensive and detailed systems of succession could be found.¹¹⁰ The share that a male gets is sometimes double to that of the female share. This Islamic rule does not apply in every circumstance; however, it may be viewed as discriminatory because there is no stated reason why the male should have a double share. It is inconsistent with international human rights law according to the right to equality. However, in the case of in Islamic law where women receive portion less than men, the position of women therein clearly does not advance gender justice.

It has been argued that the double portion rule does not apply in all circumstances. There are occasions where the female gets the same share as the male, and could even in other circumstances receive a

¹⁰⁸ Quran 4:11 as cited in Centre for Islamic Legal Studies, 'Promoting Women's Rights through Sharia in Northern Nigeria' (2005) at 7.2.

¹⁰⁹ Mashood A. Baderin *International Human Rights and Islamic Law* (2003) Oxford University Press, 147.

¹¹⁰ Moshood Baderin (2003) *supra* 109 at 146.

double share.¹¹¹ This is an indication that in Islamic law of inheritance, allegations of discrimination against women must be qualified as there are justifications for the position tilting in favour of both men and women. In other words, the double share rule for the male is not a firm indication of male superiority above the female or some form of sex discrimination.¹¹² The double share rule according to Baderin may appear unequal arithmetically; it proves, however, to be morally equitable when financial responsibilities of men and women are properly analysed. Badawi justifies the double share rule as follows:

'The variation in inheritance rights is only consistent with variations in financial responsibilities of man and woman according to the Islamic law. Man in Islam is fully responsible for the maintenance of his wife, his children and in some cases of his needy relatives, especially the females. This responsibility is neither waived nor reduced because of his wife's wealth or because her access to any personal income gained from work, rent, profit, or any other legal means. Woman, on the other hand, is far more secure financially and is far less burdened with any claims on her possessions. Her possessions before marriage do not transfer to her husband. She has no obligation to spend on her family out of such properties or out of her income after marriage. She is entitled to 'Mahr' [dowry] which she takes from her husband at the time of marriage. If she is divorced she may get alimony from her ex-husband. An examination of the inheritance law within the overall framework of the Islamic law reveals not only justice but also an abundance of compassion for women'.¹¹³

Islamic inheritance law as depicted above takes into consideration the family structure. It, however, reveals that other circumstances in the

¹¹¹ Chaudry Z 'The Myth of Misogyny: A Re-analysis of Women's Inheritance in Islamic Law' (1997) 61 *Albany Law Review*, 511 at 512-515.

¹¹² Mashood A. Baderin (2003) *supra* 109 at 147.

¹¹³ Badawi J, *The Status of Woman in Islam* (1971) 8 *Al-Ittihad*, 33 as cited in Mashood Baderin (2003) at 147.

family structure are not taken into account such as female headed household or single parenthood. It must however be acknowledged that placing financial responsibilities of the family on the man is not prejudicial to the financial independence of the woman.

It is commendable that Islamic law in matters of inheritance has raised the status of women to such an extent that if properly applied, no woman would be left destitute. It may also be argued that Islam has released a woman from economic and social bondage by stipulating her shares in inheritance.¹¹⁴

Notwithstanding the provisions made by Islamic law on inheritance for women, many women are ignorant and are barely literate to assert their rights hence they are in practice being denied their inheritance rights or given a much less share than they should get.¹¹⁵ It is argued by this author that it is at this juncture that expanded access to justice system as a tool must be employed to bridge the gap between rights and justice. One of the reasons for the huge chasm is that women are not considered appropriate for the administration of estates. Under native law and custom, female administrators are rarely appointed to administer deceased estates.¹¹⁶ So, it may be argued that where there is no female representation in estate administration, inheritance rights

¹¹⁴ Yahaya Mohammed 'The Legal Status of Muslim Women in Northern States of Nigeria' (1967) *Journal of the Centre for Islamic Legal Studies*, Ahmadu Bello University, Zaria, at 1.

¹¹⁵ Ige T, *Women and Inheritance Law in Nigeria* (1993) Legal Research and Resource Development Centre, Lagos at 7.

¹¹⁶ M. Tilly-Gyado 'Inheritance and Administration of Estates in Northern Nigeria' in Akua Kueneyhia (ed) *Women & Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (1998) WaLWA, 186.

for women are usually compromised. The same applies to women under Islam where women are found to be incapable of managing property.¹¹⁷ Such deviations in upholding gender equality sustain discrimination and injustice in matters of inheritance and succession.

4.5.2 Sexual cleansing

In many parts of Southern Africa, many women undergo a purification ceremony referred to as sexual cleansing (*Kusalazya* by majority of Tonga speaking people of Zambia). So, in its original form, sexual cleansing involves the surviving partner having sex with a relation of the deceased or in most Kenyan cultures by a 'hired healer' for the purposes of appeasing the spirit of the deceased husband.¹¹⁸ Though the actual sexual act may no longer be mandatory requirement, nevertheless, sexual cleansing is, in its different forms, a belief deeply entrenched in the minds of many African communities. Local members of the Ndanga village in Malawi insist that 'sexual cleansing of widows is an indispensable custom and that it is a tradition worth upholding'.¹¹⁹ There is a strong belief among the villagers that if the widow is not sexually cleansed the widow will be haunted by the ghost of her deceased husband while the community would endure some form of harm either through diseases or bad luck. In this instance, the health and sanity of the village as a whole is paramount to any right of the individual to dignity, freedom and adequate standard of living.

¹¹⁷ Yahaya Mohammed (1967) *supra* 114 at 16.

¹¹⁸ Centre for Human Rights, University of Pretoria publication, *The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in Six Selected Southern African Countries: An Advocacy Tool* (2009) at 41.

¹¹⁹ Kenneth K. Mwenda 'African Customary Law and Customs: Changes in the Culture of Sexual Cleansing of Widows and the Marrying of a Deceased Brother's Widow' *Gonzaga Journal of International Law* at p 4-8 [accessed 30th May 2011].

There are different variations of this culture across communities in Africa. Sexual cleansing and inheritance of a surviving female spouse is widespread, though rarely does this custom involve the sexual cleansing of a male spouse. The moral value and legality of many cultural practices have been questioned by human rights activists and women's movements. This is even more pertinent where the women involved strive to engage with practices that have negative implications for them. For example, in the Monze district of Southern Zambia, about 200 miles south of the capital, Lusaka; Monica Nsofu stated that "it is very difficult to end something that was done for so long", women have the mortal fear of flouting tradition which often even outweighs the fear of AIDS.¹²⁰

Consider the situation of Paulina Bubala, a leader of HIV positive residents near Monze district.¹²¹ In 1996, her husband died of what seemed like AIDS related illness. Immediately after the funeral, Mrs Bubala and her husband's second wife covered themselves in mud for three days. Then afterwards, they each bathed, stripped naked with their dead husband's nephew and rubbed their bodies against his. After several weeks have passed, the village headman told them that the particular cleansing ritual they engaged in would not suffice. They must have sex with the nephew of their dead husband otherwise they would not be clean even the stool they sat on would be regarded as unclean. They complied even though they were humiliated. Later, the nephew died. The second wife showed symptoms of AIDS and Paulina discovered that she was also infected with HIV in 2000.

¹²⁰ Mwenda *supra* 119 at 4.

¹²¹ Mwenda *supra* 119 at 4.

This situation described above in my view is regrettable in that the village headman is yet to understand the value of protecting human dignity and equality. In this instance, change did not come through culture evolving but rather the change that is slowing the practice of this culture is HIV/AIDS.¹²² Sexual cleansing remains one of the reasons why HIV has spread through sub-Saharan Africa, killing about 2.3 million people each year. About 6 out of 10 women are infected because they cannot exercise control over their sexuality.¹²³ Now, tribal leaders and political leaders are speaking out against the practice of sexual cleansing given the HIV/AIDS pandemic. In what was referred to as the 'Masiye Declaration', senior chiefs and chiefs from the Central Province of Zambia resolved to condemn and banish sexual cleansing from their chiefdoms.¹²⁴ They resolved that they would encourage other methods or alternatives of cleansing widows to reduce the danger and risk of diseases to anyone.¹²⁵ This may be seen

¹²² Brenda Kalenga, one of the Zambian respondents expressed the same sentiment that change to sexual cleansing was not because of evolving culture but rather through health consciousness. It was however stated that practices that are deeply entrenched in the mind-set require an organic paradigm shift effected thorough human rights education and enacting gender-sensitive legislation.

¹²³ Mwenda *supra* 119 at 4. See also, Malungo, JRS 'Sexual Cleansing (Kusalazya) and Levirate Marriage (Kunjilila mung'anda) in the Era of Aids: Changes in Perceptions and Practices in Zambia' (2001) 53 *Elsevier Journal of Social Science & Medicine* 371-382.

¹²⁴ Mwenda *supra* 119 at 4.

¹²⁵ This form of change is what is being argued in this study, where as a result of the sensitisation of the traditional leaders, chiefs and headmen, the 'Masiye Declaration' in the view of the present author became the basis for modifying attitudes and paradigm shift. For example, it has also been noted that in some Bemba and Tonga dialects of Zambia, sexual cleansing is being substituted with sprinkling of the widow

as developing the custom of sexual cleansing that adapts to the changing socio-economic conditions of the society. In this instance, this proposed living law came into being because the culture was evolving as result of its interaction with other agents which in this case was health consciousness on the consequences of HIV/AIDS. It is argued that this alternative would allow women to have control of their sexual and reproductive rights.

4.5.3 Wife inheritance / *Ikuchi Nwanyi*/Ukupyana¹²⁶

In Nigeria for example, the practice of widow inheritance stems from the culture and society that places high premium on children. In instances where the widow has no children with the deceased, the family of the deceased husband insists on fulfilling the procreative role of the spouse by asking her to marry a male relative to beget children for the family. Previously, *iku chi nwanyi* (wife inheritance) is relatively common amongst the Igbos. These days, the practice is taking a new turn that if it is the wife that is deceased; the surviving spouse could take for a wife a sister or close relation of his deceased wife. Also Christianity and changing socio-economic conditions, affect the practice of *ikuchi nwanyi* or wife inheritance.¹²⁷

with *impemba* or white powder and blessing of the widow. Smearing an individual with whitish powder in African custom is significant as it denotes things such as blessings on the person. The Bemba speaking people now purify the widow with *impemba* and incantations showering blessing on the widow and putting beads on one of her wrists.

¹²⁶ Wife Inheritance is called *Ikuchi Nwanyi* in some parts of Igbo land whilst in the Northern part of Zambia; it is referred to as *Ukupyana*.

¹²⁷ See also Leda Hasila Limann 'Practices and Rites Related to Widowhood and the Rights of Women in Africa' in Martin Scheinin and Markku Suksi (eds) *Human Rights in Development Yearbook* (2002) Martinus Nijhoff Publishers & Nordic Human Rights Publication, 187-223 at 192 in which the author indicated that this culture of rites for

A widow who had been inherited by a male relative by implication becomes a co-wife with another woman whose bride-price was paid by the man inheriting a wife. In this situation, the incumbent wife would not have the option of refusing the imposition of another woman as this form of inheritance is usually a family decision from which there may be no derogation.

In Umuna, Onuimo Local Government Area of Imo State, wife inheritance is practiced. The justification for the practice rests with many factors such as:

- ▶ Preventing moral and sexual laxity on the part of the woman particularly where she is very young;
- ▶ Certain economic trees are owned communally such as palm tree. It is usually harvested at least once a month. In Igbo land, a woman does not climb palm tree and thus requires the services of a known male to help her with these kinds of services.
- ▶ Most times the widow requires protection against unscrupulous persons. It is generally believed that being inherited by a male relative affords her some kind of protection. Although there is

widows including wife inheritance is also found amongst the Baganda people found mainly in Central Uganda. In that country, widows are expected to wear a topless garment and tie a piece of bark cloth to indicate their status of being newly widowed. This practice is dominant with Christians whereas Muslim women in Uganda are exempt from being topless and weeping loudly.

very little indication of the prevalence of the practice, many women suffer greatly from the adverse effect of this practice.¹²⁸

Previously, the practice of taking a wife from the same family of the deceased wife is based on the understanding between the families that they have enjoyed a good relationship with their son-in-law hence the need to allow the healthy family ties to continue. This was the case in a certain village near Okigwe Nigeria; a marriage alliance took place between the families where a man took as wife, the sister to his deceased spouse. The wife of Nduka (not real name) died and they have been married for over 20 years. After her death, Nduka expressed his intention to make the sister to his deceased wife his spouse. The families still enjoy a healthy relationship.¹²⁹ The communities expressed no objection to the alliance as it was a valid action under customary law.

In other circumstance, this kind of marriage alliance (wife inheritance) may lead to break up of family ties as it happened with the families of well known individuals in a village near Enugu State, Nigeria. Beauty (not her real name) was married and lived with her husband in Abuja, Nigeria. She died in 2008 and her older sister Dora (not her real

¹²⁸ Ifeoma Offor as one of the respondents corroborated this practice, which in other parts of Nigeria; wife inheritance seems to merely serve family intention of procreation as opposed to the practice in Southern Africa where the practice is accompanied by sexual purification that is usually forced upon the widow. See generally Centre for Human Rights, University of Pretoria publication *'The Protocol on the Rights of Women in Africa: Its Impact on Violence against Women'* (2009).

¹²⁹ The present author was told this story in an informal discussion with Barrister Chinelo Emeruwa as one of the respondents in 2009.

name) insisted that one of her young daughters must marry Beauty's husband to benefit from the success of her late sister's business. Dora's husband was vehemently opposed to his daughter entering such liaison. This caused huge family fight between Dora and her husband. Unfortunately, each party maintained their stance. As a result, Dora's husband left her citing abhorrence to such marriage.¹³⁰

In some African communities, decisions taken regarding the value in wife inheritance are largely based on the need to maintain and sustain the family and ancestral lineage after the death of the husband or head of household. In this instance, a woman who had lost her husband through death is taken by his male relative or a step-son. The decision on who exactly takes on the role of husband or 'inherit' the widow is usually made by the family of the deceased husband. By way of definition, wife /widow inheritance is a practice in which a widow marries the brother of her deceased husband or another male relative.¹³¹ Having consideration for a woman married in this fashion may not necessarily capture the exact nature of this union because majority of the time as already mentioned above, the male relative who marries this widow may already have a wife and children of his own. This practice is known among some groups in sub-Saharan Africa. For example, among the Luo people in Kenya (*ter* as it is called), the union is not considered as a marriage because the relative of the deceased man who marries the widow retains his own wife and family and if he is single, is still expected to marry and have children of his own.

¹³⁰ The present author was told this story by a family member.

¹³¹ Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS (2009) *Canadian HIV /AIDS Legal Network* Volume 2 at 1-13.

As a practice, widow inheritance originally began as a social institution aimed at a male relative being responsible for the wife and children of a deceased brother.¹³² By engaging in this union, the widow is somewhat protected from unscrupulous property-grabbers and other social and economic hindrances. In some countries where property inheritance is restricted or non-existent as seen from Nigeria and Zambia, widow inheritance may be the only way for a widow to stay connected to her children, her community and the land as well as the home they were living in.¹³³

For many widows, the options available to them are very limited leading to an increase in their vulnerability. In the first place, the decision to be inherited is an imposition on the widow. She cannot

¹³² The Nigerian case of *Chukwuemeka Ojiogu v Leonard Ojiogu & Others* 2010 (3) NILR 52 exemplifies the issues that arise from wife inheritance. In this case, a woman was married to a man according to Nnewi customary law in 1963. The man died without having children with the woman but he left a house in which they were living as man and wife. The deceased's brother, in terms of Nnewi customary law performed two sets of ceremony to marry the spouse of his late brother. He performed first the '*Inye mma*' which indicates that the surviving wife is not ready to be inherited. He also performed the '*Itugha Nkwu*' ceremony which is mandatory if a brother is to marry his late brother's wife. After they were married, seven years after the death of her original husband, the woman had a son for his brother who married her later. The case before the court was the son they had wanted to be declared the heir to his father's estate. The court struck down the '*Itugha Nkwu*' ceremony as being repugnant to natural justice, equity and good conscience. What remains interesting in this type of case is that it is still based on the discretion of the judge if he finds it repugnant; not according to human rights.

¹³³ Welshman Ncube and Julie Stewart (eds) *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) Women and Law in Southern Africa Research (WLSA) Jongwe Printers, Harare at 25.

decide for herself freely and without coercion whether she wants to be inherited and to whom. Second, the man who marries the widow, often times already has an existing marriage hence their union is not considered a marriage. This kind of position is a vicious cycle of passing a woman from one hand to another. And in all these circumstances, she lacks protection. As far as it relates to the actual status of the woman, she cannot be said to be married, hence describing her as a co-wife as may be found in polygamous marriage is also not an option. Meanwhile for all intent and purpose, the children born of this union would have the same rights as other children of the man. In a real sense, it is argued that the perceived protection a widow might have under this arrangement is actually superficial.

The practice of wife inheritance exposes the widow to contraction of sexually transmitted diseases such as HIV / AIDS.¹³⁴ One of the reasons why women remain the face of poverty is the vicious cycle of poor socio-economic conditions created in part by lack of access to equitable property distribution and lack of access to justice. It is argued that change would come also to eradicate or at the very least change attitude towards wife inheritance just like it is happening with sexual cleansing. The two cultural practices are two sides of the same coin that erodes the dignity of women and contribute to loss of citizenship.

4.6 Divorce / Maintenance in Customary Law

Under statutory law, divorce can take place where either of the party brings a divorce proceedings based on one or more grounds such as

¹³⁴ Catherine Sweetman 'How Title Deeds Make Sex Safer: Women's Property Rights in Era of HIV' (2008) *Oxfam International* Background paper.

irreconcilable differences. In customary law however, divorce takes place where attempts at reconciliation by the family had failed.¹³⁵ It is noteworthy in African customary law that just as the entire family is an integral part of the marriage; so also do they have a stake in its dissolution. This indicates one of the positive aspects of family order and relationship in customary law that attempts at protecting the family unit where women and children are protected.

Divorce under customary law however; in its processes tend to disadvantage the woman because marriage is usually dissolved at the insistence of the man that he no longer wishes to stay married.¹³⁶ The inequality and lack of gender justice that women experience under customary law is most evident at divorce. Before a woman can allege divorce in the local courts or traditional courts in Zambia for example, she requires proof of an allegation of adultery or matter of a tangible nature and if the man contests it, the marriage will not be dissolved.¹³⁷

Under customary law, a woman may have series of complaints or grounds for divorce against her husband which may be tabled before the elders of the family or in a court, among them are adultery, childlessness, illness, separation, laziness, and bad behaviour to name a few. The status of women under customary law continues to be threatened from issues such as adultery where it is acceptable for a

¹³⁵ Lillian Mushota *Family Law in Zambia: Cases and Materials* (2005) University of Zambia at 273.

¹³⁶ Mushota (2005) *supra* 135 at 273.

¹³⁷ *Nkhoma v Nkhoma* 2004 (ZHC), a case where the High Court held that it had no jurisdiction to hear a matter regarding parties who had married according to customary law in 1991, and had the marriage dissolved by local courts at the Boma Courts in 2002.

man to be adulterous and his wife cannot divorce him on such a ground unless the adultery is persistent.¹³⁸ The disparity in law and benefits of the law is huge and does not in any way engender rights and justice.

In Igbo land, such complaints are taken very serious and the husband in question may be fined cattle or other things as compensation.¹³⁹ It is rare that a woman is encouraged to leave her husband's home because of ill-treatment or irreconcilable differences. It must be remembered that the union of families at the onset of the customary marriage sometimes act as a barrier to any permanent separation. This is because the bride wealth / lobola paid at the time may not be possible to be paid back by the woman.

It is commonly known amongst the people of Mgbowo and surrounding areas that under Igbo customary law, that only the repayment of the bride wealth or what is referred to as *ugwọ enwe* in Mgbowo dialect extinguishes or dissolves the customary marriage.¹⁴⁰ In some instances, the *Ugwọ enwe* is a token, hence years of giving gifts to the wife and family had to be repaid. It is usually at this juncture that many women face challenges to the realisation of gender justice because there are no reciprocal payments for the years the woman

¹³⁸ The extent of the disparity in the benefit of the law regarding adultery is notable in a research conducted in six provinces in Zambia in 1993/4 showed a huge gender bias in courts where as much as 100 % of cases of sampled women were thrown out of court for the reason that their husbands had not committed actionable offences.

¹³⁹ This information is according to Chief Ume Okwoaka in an informal discussion with the present author in 2012.

¹⁴⁰ Chief Akuluo-uno II of Mgbowo confirmed this in an informal discussion with the present author.

had endured hardships during the subsistence of the marriage. It is mostly under these circumstances that the whole question of the value of bride wealth comes under scrutiny; particularly when the woman and her family cannot afford to repay whatever amount the husband or his family demands.

Also, hardly are cases of divorce or related matter of maintenance brought before local courts.¹⁴¹ Although there is success with regards to the case of *Chibwe*, the position is different for many others among them, those married in terms of Lozi customary law. This was the position in the case of *Martha Myiwa v Alex Myiwa*.¹⁴² According to Lozi customary law, nothing within that law compels a husband to either share property acquired during the existence of the marriage upon divorce or support his divorced wife throughout her life. The appellant failed in her appeal for sharing of the property and on maintenance. It must be stated that changing social and economic conditions have altered this position having regard to the decision in *Chibwe*. For children generally, maintenance depends largely on the party that has custody. In Zambia, it follows that if the party is matrilineal, then the

¹⁴¹ Few of the cases that came before the courts in Zambia are *Rosemary Chibwe v Austin Chibwe* SCZ Appeal NO 38 /2000. This is a case of parties married under Ushi customary law that dealt primarily with maintenance and property adjustment after divorce for adultery and unreasonable behaviour brought by the husband of the appellant. During the subsistence of the marriage, the respondent had five children with the appellant and acquired lots of immovable property which amounted to large sums of money in terms of the valuation by government valuers. The court held that the appellant was to receive lump sums paid out to her and that maintenance and her children are protected with property adjustments in favour of the appellant;

¹⁴² (1977) ZR 113 (HC) as cited in *Mushota* (2005) *supra* 135 at 325.

wife's family takes care of the children and the converse is the case with patrilineal.

In general terms, it follows that women at almost every turn cannot get equality and fairness under customary law, be it in marriage, succession and inheritance and divorce. As a result of this stagnation in every sphere of their lives, many women pay the ultimate price because they could not get away fast enough. For example:

Nkechi Ngene is mother of two minor children and eight months pregnant with her third. She lives with her husband Chuks at GRA, Enugu State, Nigeria and they both hail from Akwuke Community in Nkanu/ Enugu South LGA. On January 31 2012, she confronted her husband about his incessant infidelity. In response to such query, her husband beat her so badly that she was unconscious and he left her in the pool of her own blood. Nkechi and her unborn baby died on arrival at the hospital. Her husband ran away leaving their minor children. When this matter was taken to the police and Enugu State National Human Rights Institution, there were efforts to drop the charge of double homicide against Chuks so that the matter can be dealt with in the family.¹⁴³

Unfortunately for Ms Nkechi Ngene, settling the matter within the family came a little too late and she paid for it with her life. This happens to many women in Africa, because if she had the opportunity to leave her husband on the ground of infidelity, perhaps she would have been alive. Under customary law, it is rare and difficult to dissolve a marriage on any ground let alone on the ground of infidelity.

¹⁴³ Story sent via email to members of the Enugu State Association of Greater Washington DC Metro Area by Ike Ezekwu on Wednesday 8 February 2012.

Conclusions

In this chapter, it has been shown that women face many obstacles with regards to property inheritance under the various practices that exist in African customary law. The law in terms of primogeniture has changed in some countries such as South Africa. The changes seen in Nigeria in terms of inheritance is largely based at the discretion of the particular judge or if the woman was ready to approach the courts for redress. Most times, the length of time a case takes makes it impossible for them coupled with the expenses involved in pursuing such matters. In some instances, reform of the Intestate Succession Laws has been instrumental in driving the changes that have taken place we have been noted in Zambia and South Africa. In other areas, such as sexual cleansing and wife inheritance, changes have occurred because of the adverse health consequences. No doubt, there is a correlation between property inheritance and HIV/AIDS, due to the numerous practices that take place after the death of a husband.

The vulnerability of the woman is most times not clearly understood unless through intervention of human rights education and enacting pieces of legislation that would promote gender justice. As has shown in this chapter, promoting gender justice in African customary law of succession and inheritance requires approaches that put traditional leaders in the processes as leaders who are accountable for the social, economic, and cultural development of their people.

Evidently, as shown in this chapter, when their husbands die, women face enormous threat and challenges at the hands of the in-laws or other relatives of the husband. Some are shamed and accused of killing their husbands and they have to prove otherwise; some more

are made to engage in sexual intercourse that will only bring them disease and death. To ensure that concrete paradigm shift occurs in this area of African customary law, gender justice entails engaging with the social and legal relationship between men and women. In social terms, women struggle with unequal power relations. The advantages that men gain by being in the public sphere afford them more resources whilst women engage in activities that rarely benefit them financially. Legally, many countries have enacted pieces of legislation to ensure substantive justice to women, yet in practice women still face discrimination.¹⁴⁴ It is obvious that balancing rights and justice is still a challenge for many countries in Africa particularly where it concerns women, human rights and culture. Developing a culture of human rights and sustaining a rights-based approach to issues of culture and tradition requires a strategic shift with the view to bringing human rights home to the grass root level where both village men and women, with their traditional leaders are stake holders in upholding rights and justice.

¹⁴⁴ Notable among them is Recognition of Customary Marriages Act 120 of 1998 in South Africa; Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 in Africa; Married Person's Equality Act of 2006 in Lesotho; Domestic Violence Bill has been on hold in Nigeria for a few years now. It is yet to be passed into law; Anti-Gender-based Violence Act 1 of 2011 which prohibits customary practices related abuses such as forced / early marriage, sexual cleansing, and spousal inheritance.

Chapter Five

Correlation between gender justice,
citizenship of women and
development

5.1 Introduction

Many times, the inequalities that exist between men and women are never examined with a view to finding the root of the inequalities that consistently put women in the position of dependency and subordination often located within the social arena. From the previous chapters, it has been established that the roles men and women perform in the society are remarkably different. Women are greatly disadvantaged and face multiple sites of discrimination and inequality because among other things they lack access to resources and also they hardly engage in activities that provide them with financial reward.

It follows, therefore, that in many circumstances women lose the essence of their personhood. The social and legal position in which many women find themselves conspire against them to strip them of the opportunities and benefits of being an active member of their society; in other words they lose their *raison d' être* and dignity.

This chapter, therefore, discusses identity and entitlement as foundational towards the realisation of gender justice. The essence of identity in a particular society is a determining factor in who one actually is and the kind of entitlement that they have claims to. For women who constitute the majority of the population in some countries in sub-Saharan Africa, ensuring that they are active citizens and partners in development are essential to their socio-economic development. For the majority, access to resources such as land, credit and access to justice are largely limited due to institutional gaps in addressing these challenges. As already alluded to in chapter four, many women continue to struggle to gain control of property through

inheritance and other family resources. It has also been established that even where such inheritance of property exists; there are usually huge challenges for the widow with in-laws and other family members for the control of the property.¹ In addition, many women cannot access credit or loans without the consent and signature of their husband or a male head to act as a guarantor.² In simple terms, the woman has no anchor without the benefits of a man. The consequence is that as far as gender is concerned, women are not participants in any aspects of their lives.

It is imperative, therefore, that structures that sustain women's experience of gross inequality in their socio-economic and political lives must be addressed through strategic engagement with factors that challenge women's citizenship. Lack of access to justice, lack of women empowerment, custom, religion and inequalities within the family are problematic for active citizenship of women in pursuing responses to gender justice.

Hence, this chapter discusses the need to address formal citizenship as the pivotal base for the realisation of gender justice. By drawing on the correlation between gender justice and citizenship towards the overall development of all aspects of women's lives; this chapter takes a

¹ See generally Chuma Himonga 'Taking the Gap-Living Law Land Grabbing in the Context of Customary Succession Laws in Southern Africa' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd, at 131.

² Michelo Hansungule 'Harmful Cultural Practices that Constitute a Threat to Human Security in Africa' (2010) at 13, a paper presented at the Centre for Human Rights, University of Pretoria.

critical view of the institutional neglect in eliminating some of the factors that challenge women's substantive rights.

5.2 Formal and substantive citizenship

Formal citizenship is conferred on an individual by the state. In other words, it refers to the relationship between the state and the individual as a member of that particular state.³ Through this form of identity, an individual gains recognition and is conferred with legal personhood and is able to function in that capacity.

In some countries in Sub-Saharan Africa, however, women cannot be fully recognised as having legal personhood let alone conferring such on another.⁴ For example in Nigeria, citizenship is conferred and recognized through three categories:

³ Celestine Nyamu-Musembi "Addressing Formal and Substantive Citizenship: Gender Justice in Sub-Saharan Africa" in Maitrayee Mukhopadhyay and Navsharan Singh (eds) *Gender Justice, Citizenship and Development* (2007) Zubaan, an Imprint of Kali for Women, India & International Development Research Centre (IDRC) Ottawa, Canada.

⁴ See generally the case of *Aumeeruddy Cziffra & 19 Others v Mauritius* (2000) AHRLR 3 (HRC 1981) brought before the Human Rights Committee (HRC) in respect of the violation of art 2 on non-discrimination of the Covenant on Civil and Political Rights (CCPR), the case based on communication 35 / 1978 dealt with the discrimination faced by 20 women as a result of the enactment of immigration (Amendment) Act 1977 and Deportation (Amendment) Act 1977 by Mauritius which constituted discrimination based on sex against Mauritian women. Prior to the amendments, both men and women of Mauritian origin married to foreign spouses had status to right of residency in the country. After the amendments, foreign husbands on Mauritian women lost their right to residency and could be deported anytime by the Minister of Interior. In other words, Mauritian women could no longer confer citizenship on their foreign husbands; See also Felicia Anyaogu, *Access to*

- (a) citizenship by birth
- (b) citizenship by registration
- (c) citizenship by naturalisation

Citizenship by registration is framed in such a way that the right of a Nigerian woman married to a non-Nigerian is violated. According to the provisions of s 26 (1) and (2) (a), it states that:

- (1) Subject to the provisions of section 28 of this constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria if...
- (2) The provisions of this section shall apply to
 - (a) any woman who is or has been married to a citizen of Nigeria
 - (b) Every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.⁵

The implication of this s 26 2 (a) is that whereas a man can register his non-Nigerian spouse as a citizen, a woman cannot confer the same to her foreign spouse. It may be argued that the basis for this provision came from the cultural belief that a woman belongs to her husband and his people after marriage hence no need for a woman to confer any form of identity to a spouse. In other words, it must be the woman who follows the man and not the man following the woman. The basis for this kind of idea is the patriarchal nature of the African society where majority of the social, political and economic spheres are conducted and seen through the male eyes. This status quo was the main challenge in the Botswana case of *Unity Dow*⁶ which gained

Justice in Nigeria: A Gender Perspective (2009) Ebenezer Productions Ltd, Enugu, 84.

⁵ Section 26 (1) and (2) (a) of the Nigerian Constitution.

⁶ *Attorney General v Unity Dow* (2001) African Human Rights Law Reports 99 (BWCA 1992); *Modise v Botswana* 2000 (AHRLR) 30 (ACHPR 2000); Botswana has since reformed its citizenship laws.

public profile in 1993. At the time in Botswana, it was illegal for a woman to confer citizenship right to her foreign spouse. Such laws come from the view that children follow their fathers. The mother in this instance, Unity Dow could not claim to citizenship for her own child born in Botswana because she is married to a foreigner. Clearly, such patriarchal notion of citizenship is discriminatory and violates the right not to be discriminated against on grounds of sex guaranteed in International law as well as in some country's constitution.⁷

It is clear that women struggle to be recognised as equal members of the society hence the need to expand the notion of citizenship to take into account other markers of belonging. Women's position and experiences in the economy, social and political levels of the society is also a determinant of their inclusiveness. It is therefore pertinent that any form of exclusion is challenged and it must be based on the understanding of such exclusion in the lives of women.⁸

In challenging the formal exclusion of women from full citizenship status, the substantive concept of citizenship aims at recognising women's right and the need to protect them and also acknowledge women's contribution to the national economy. However, women are consigned to 'second-class citizens' because their rights are not

⁷ Article 2 of the Convention of all forms of Discrimination against Women (CEDAW); Art 18 (3) of the African Charter on Human and Peoples' Rights, s 42 of the Nigerian Constitution, s 23 of Zambian constitution and s 9 of the South African Constitution.

⁸ Charmaine Pereira 'Understanding Women's Experiences of Citizenship in Nigeria: From Advocacy to Research' (2002) www.Codesria.org/IMG/pdf/pereira-1.pdf (accessed May 2010).

protected and there are systematic failure to do so.⁹ Two key areas where the lack of protection of women's rights are notable include in the exempt of religious and customary practices dealing with family law from constitutional scrutiny;¹⁰ and the lack of definition within the region of what constitutes sex discrimination.¹¹ It is notable that whereas all other aspects of law could be adjudicated upon as a rights issue, when it concerns family or personal status, it is not a right issue.

The focus should therefore be on rights because equality remains core component of the principle of justice. In terms of inclusive citizenship therefore, the process of defining rights, interpreting, and

⁹ See for example, the case of *Edith Zewelani Nawakwi v Attorney General, Zambia* (1991) ZMHC 6. In this case, Edith challenged the letter of consent of the father to her children to be given before her children can be endorsed on her own passport as a single parent. She claimed that such rule is discriminatory as a Zambian citizen, a rule which also violates art 23 of the Zambian Constitution on non-discrimination. The matter went all the way to the Supreme Court who ruled in her favour; *Pereira* (2002) *supra* 8.

¹⁰ Countries such as Zambia in sec 18 (3) puts customary law above the constitution in that issues pertaining to customary law cannot be brought or adjudicated upon in the constitutional court. Zimbabwe has the same kind of provision in s 23 (4). In Nigeria, matters pertaining to socio-economic rights are set in the Directives of State Principles which in terms of s 6 (6) (c) are not justiciable. Matters that are crucial to the livelihood of women are not adjudicated upon hence the lack of security and vulnerability of women at critical times of their lives such as in divorce or at the death of their husbands.

¹¹ Some countries do not explicitly prohibit sex discrimination as was the case in Kenya, Botswana and Zimbabwe prior to 1996. Guaranteeing the equality of men and women are not even mentioned in the Constitution of the following countries- Zambia, Niger, Lesotho and Swaziland. The implication of such exclusion points to the institutional failure in ensuring gender equality.

implementing it is very pertinent to the framing of any gender justice agenda. Against this backdrop, substantive citizenship means removing all forms of constraints by state institutions or social norms or relationship that affect people's experiences regardless of gender.¹² For the majority of women, full citizenship status is elusive because of the multifaceted sites of constraints against them for example; religion, custom, gender inequality within the family and lack of access to justice.

5.3 Custom and religious norms and practices

As already mentioned in chapter two, religion and custom have direct impact on how women are seen within their society and in some circumstances how women perceive themselves. Though religion and custom impact women differently, the outcome of some its practices is however still discriminatory for women in both systems. In the first instance, religion poses the most serious challenges to any gender justice agenda due to the conservative nature ascribed to it by the adherents. This is evidently shown in the application of Sharia law in some states in Northern Nigeria, notable was the much publicised case of Amina Lawal. Since 1999, immediately following the country's return to democratic rule after a total of almost 26 years of military rule saw the extension of conservative Sharia law to matters of family law.¹³ As a result, sexual activities became criminalised in twelve states of the federation. Mainly, women were the ones at the high risk of being stoned to death for adultery whilst the men were acquitted.

¹² Celestine Nyamu-Musembi (2009) *supra* 3.

¹³ Charmaine Pereira 'Understanding women's Experiences of Citizenship in Nigeria: From Advocacy to Research (2002) Codesria series, www.codesria.org/IMG/pdf/Pereira-1.pdf (accessed May 2010).

Through the cases of Saffayatu Hussein and Amina Lawal, the international community joined in condemning the harsh sentences of stoning to death of women for the crime of *zinah* (adultery). It is now thirteen years since this form of Islamic law took root in some parts of Northern Nigeria, the current 1999 Constitution is still grappling with the constitutionality of the practices. The practice seems to adversely affect mostly poor, rural women. Others also adversely affected are persons languishing in jail for small offences. Serious judgments on the penal criminal codes cannot be executed unless and until the executive governor of the state has expressly given his consent. Many of the harsh sentences such as stoning and amputations¹⁴ have not been carried out, not because of constitutional imperative but on other technical grounds such as the fact that the state governor who must accede to it is a politician who wants to be viewed as not being a fundamentalist but a person capable of holding public office. The critical action of questioning the system given the gender bias in operation of the law has been met with violence in states like Kaduna.¹⁵

Further, new threat to engendering gender justice in that part of the country comes from the rise of Islamic extremists-*Boko-Haram* (against western indoctrination).¹⁶ It is common knowledge in Nigeria that the objective of this sect is to Islamise the entire nation. Already

¹⁴ Amnesty International Report 2003: Nigeria AI Index: POL 10/003/2003 available at www.africanreview.org/forum/docs/ai/nigeria.pdf (Accessed May 2013).

¹⁵ Eyene Okpanachi 'Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi States' 25 *Emory International Law Review* (2011) 897 – 919 at 907.

¹⁶ BBC Service 2011; See generally the news archives on Nigeria at www.bbcnews.com/nigeria (accessed May 2012).

towards that objective, they have twelve states out of the thirty-six in the country practicing the extreme form of Sharia, if plans to adopt Sharia law in ten more states succeed, and then the issue would no longer be confined to a few states in the north but will become a national and international disaster.¹⁷ As it stands, it is women that are bearing the greater burden of this challenge to constitutional guarantees.

As already alluded to in the previous chapter on inheritance as one of the critical challenges to the rights of women; certain aspects of African customs are discriminatory and have adverse implications for the realisation of gender justice. Custom as a hallmark of identity also has the potential to address institutional failures.¹⁸ By its nature, custom adapts to socio-economic changes and its interaction with other forces most likely produces positive effect.¹⁹ The essence of such change is to re-define issues with a view to changing an already pre-determined position that causes conflict. The challenge that still remains is that custom with its traditional leaders seen as custodians of culture are yet to harness the inherent potential in custom as a basis for promoting substantive citizenship by way of being

¹⁷ See generally the work of BOABAB for Women's Human Rights in some parts of Northern Nigeria.

¹⁸ Ann Laquer Estin 'Family Law, Pluralism and Human Rights' 25 *Emory International Law Review* (2011) 811- 828 at 824.

¹⁹ For example in Nigeria, it has been widely said that the killing of twins stopped when missionaries in the health care began to interact with people on God's intricate plans in the making of twins. The dominant view then was that many women died giving birth to twins; according to custom, no child should kill the mother who wants to bring her into the world. So, twins were viewed as bringing bad luck because two human beings are not supposed to come out from the same womb at birth.

accountable for cultural protection of both men and women within their society.

5.4 Systematic inequalities in family relations

The family as a unit has undergone tremendous changes in the last two or three decades in the African continent. The notion that the male is the head of household is being challenged by new forms of family make-up.²⁰ For example, It is no longer about the relationship between the man and woman and their relations but now relationships such as civil union,²¹ female-headed or child head household²² and co-habitation are other various forms of family unit. It is often very difficult for persons in these categories to access bare necessities such as government /municipal housing or social security. The challenges faced by the group of people are most visible when disputes arise. The resulting effect are huge as the law most times fail to take into account these changes; in other words, the formality of law renders wives, widows and orphans powerless and more vulnerable.

²⁰ The African Charter in art 18 (1) recognised the family as the natural unit and basis of society which requires protection from the state; It further provides in art 18 (3) that 'The State shall 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'.

²¹ Civil Union Act 17 of 2006 changed the common law definition of marriage in South Africa to guarantee rights for same sex relationships.

²² These forms of family unit has become widespread in sub-Saharan Africa due to the HIV/AIDS pandemic where the male spouse dies or both parents of children are dead because of HIV/AIDS leaving the kids orphaned and with no kinsmen.

Much of the efforts by NGO merely address individual or group circumstances. It is still a huge challenge to tackle any institutional reform at both formal and informal levels. For example, there is no gender-specific legislation dealing with domestic violence in Nigeria; where much of the pieces of legislation in the statute books are still from the colonial past or military regimes.²³

In the region, some aspects of the problems arising from family relations are being tackled. For example, some gains have been made in succession and inheritance.²⁴ Judicial practices are also dealing with the issue of equitable distribution of marital property where law and judicial practices have questioned why women's contributions to acquisition of family property are not recognised or in instances where a husband's adulterous conduct is not taken into account in division of family property but that of the wife is taken into consideration by the court.²⁵ One outstanding aspect, however, remains the status of widows which is directly impacted by family relations and the division of scarce family resources. The actual definition of family is being affected by other factors such as HIV/AIDS, hence the inclusion or exclusion from family property of certain groups such as widows and orphans are critical to the survival of the family and the society in general.²⁶ The inequality experienced by many women within the

²³ Carol Arinze-Umeobi *Gender Rights Law in Nigeria* (1) (2008) Folmech Publishing Onitsha, Anambra State.

²⁴ Note the following cases: South African case of *Bhe & others v Magistrate, Khayelitsha & Others, Shilubana v Nwamtiwa*; Nigerian case of *Mojekwu v Mojekwu*.

²⁵ Cynthia Bowman and Akua Kuenyehia (eds) *Women and Law in Sub-Saharan Africa* (2003) Sedco Publishers, Ghana 71.

²⁶ Richard Strickland 'To have and to Hold: women's property and inheritance rights in the context of HIV/AIDS in Sub Saharan Africa (June 2004) ICRW working Paper.

family is exacerbated by domestic violence and other gender-based violations. In addition to suffering violence within the family, many informal trading systems undertaken by women are not recognised as contributing to the economy.²⁷ All of these challenges are hardly addressed at the institutional level of local and provincial governments. As a result of inaction towards institutional transformation, gender imbalance in critical aspects of women's lives persist with a vicious cycle of pain and poverty. Challenges faced by many women in enjoying their sexual and reproductive rights exacerbate the already dire situation.

5.5 Challenges to sexual and reproductive rights of women

In much of Africa, issues relating to sexual and reproductive rights are private, controversial in some instances and at best treated with varying degrees of urgency. Sexual and reproductive issues present different challenges for men and women, but women are mostly faced with issues that would adversely affect them. For example, for the male gender, it is important that their family lines are protected hence the dominance and preference for sons whilst for the female gender; it is lack of control or autonomy over their bodies.²⁸ It is unimaginable that the male gender shows preference for what can only be determined from the body of the woman hence the perceived control of female sexuality. Subsequent to this parochial attitude is the control over the decision of when to have sex, when to have children and how

²⁷ Rachel Rebouché 'Labour, Land and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women' 19 (2006) *Harvard Human Rights Journal* 235-256.

²⁸ Celestine Nyamu-Musembi (2009) *supra* 3 in Maitrayee Mukhopadhyay and Navrashan Singh (eds) *Gender Justice, Citizenship and Development*.

many to have, forms of contraception and what to do in cases of infertility.

With regards to sexual and reproductive health, it is evident that in many instances women seem not to have control over their bodies. It could also be said that many women contribute to their powerlessness and in that manner encourage the already existing patriarchal tendencies. For example, it was found by this author among some local Igbo women in eastern Nigeria that, a married woman who has only girl children would insist that she will keep conceiving until she has got a male child.²⁹ It may not be obvious that these women are under pressure from their families but the conduct is an indication of the stability that comes from having a male child. Unfortunately, the implication of this attitude on the health of the woman is disastrous. Current issues dealing with sexual and reproductive health and rights revolve around matters relating to HIV/AIDS and infertility.

About fifteen years ago, the plan was to control the population in some countries among them are about seven countries in English-speaking West Africa including Ghana. The policy was to reduce total fertility

²⁹ It is notable that in Nsukka, Enugu, and Awgu many women insist that their lives within their marriage would mean very little in terms of share of family property if they do not have male children hence the immense pressure they put on their health to have a male child and protect themselves within their marriage. This attitude cuts across the board in that both educated and uneducated have the same attitude towards having male children. For example, V. Eze is the wife of a university professor at Nsukka, who insists that her husband is an only child and therefore, she will continue conceiving until she has got a male child even though she already has four girls. Her husband does not seem to bother about this decision as he indicated that it was her decision.

rate from about 5.5 per cent to 3 per cent and to reduce the number of women who marry before the age 18 to about 80 per cent by 2020.³⁰ It has not been shown so far how much this form of population control worked given that young people whether married or not may still have children from even the age of 15 because abortion is illegal in many of these countries.³¹ Although there has been a shift in some southern African countries such as Kenya, South Africa and Zimbabwe, English-speaking countries are yet to make the balance between personal autonomy and population control.

In many Anglo-phone countries of Africa, women face some level of infertility which invariably affects their access to resources particularly in their family relationship. In Nigeria, through informal discussion with some women spoken to by the present author in Lagos and other cities such as Jos, and Enugu, it was observed that they are experiencing some form of reproductive failure. A major constraint to their marital relationship remains their inability to provide their family with children, which is further exacerbated by the high cost or non-existent medical care required for their reproductive health.³² Many indicated the poor relationship with their mothers-in law and the whole family as one of

³⁰ Centre for Reproductive Law and Policy (CRLP), *Women of the World: Laws and Policies affecting their Reproductive Lives* (1997 & 2001), New York.

³¹ Centre for Reproductive Law and Policy, *Women of the World: Laws and Policies affecting their Reproductive Lives* (2001) New York.

³² It was also disclosed during the discussions that many women have resorted to some form of alternative medical care for their reproductive failure which includes attending miracle churches and use of herbs and herbal drinks as well as taking fertility medication not prescribed by a doctor. The impact of this form of self-help programme to deal with infertility has lead to other problems for the women who take this route.

friction and psychological pain which has a direct impact on their overall well being.

In sub-Saharan Africa, the impact of the HIV/AIDS pandemic is of such immense proportion that it has become a national as well as international crisis. According to the UNAIDS Global Report for 2012, women bear the greater burden of care and responsibility for HIV/AIDS infection; in addition, violence, abandonment and cultural attitudes contribute to the challenges that women face in Sub-Saharan Africa.³³ Unequal power relations and some times what is referred to as 'survival sex'³⁴ are some factors that increase the risk for women in contracting HIV/AIDS.

For many women, being infected with HIV/AIDS has huge ramifications on the means of their livelihood. Firstly, some do not find out that they have been infected until they lose their husbands to AIDS or its related sicknesses at a stage where they are unable to make appropriate decisions for their livelihood. Second, the stigma surrounding the disease is so debilitating that most women are stripped of all dignity through discrimination that they endure within their communities. Third, it is mostly women that bear the burden of care for HIV/AIDS patients in their family, a job that further puts them at risk of infection

³³UNAIDS Global Report (2012) available at www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Reports_2012_en.pdf (accessed May 2013).

³⁴ Survival sex is where one engages in sex in exchange for material gain irrespective of whether it is as a sex worker or not. For this and other related concerns on women, see generally Centre for Human Rights, University of Pretoria Publication, *The Impact of the Protocol on the Rights of Women in Africa in six selected Countries in Southern Africa: An Advocacy Tool*.

if they are not already; without remuneration of any kind and worse still at the risk of being sent away from their husband's home or left to die without care. Generally, many women have been dispossessed as a result of being infected or affected with HIV/AIDS by their families leaving their means of survival to charity.³⁵ It is very clear that there is a correlation between access and control of resources and HIV/AIDS which has the ripple effect on many levels for women.

There have been efforts to remove stigma of HIV/AIDS and the associated the cycle of poverty and vulnerability for women through counselling, awareness campaigns, and project to support women and orphaned children.³⁶ It is argued that these efforts are yet to yield results within the broader context of custom, religious beliefs and insufficient access to resources.

5.6 Lack of access to justice for women

For many women in most countries in Africa, it is commonly known that access to justice is hugely limited by a number of factors including the adversarial nature of the formal court system. Access to justice relates to ensuring that there are no barriers to quality of justice received and how the outcomes attained at the end of a judicial process is both just and equitable.³⁷ In other words, it is not just about

³⁵ See Richard Strickland 'To have and to hold: Women's Inheritance rights in the context of HIV/AIDS in Sub-Saharan Africa, ICRW working paper.

³⁶ Notable in this instance is the advocacy of the Treatment Action Campaign (TAC, South Africa) which has successfully sued the state for provision of ant-retroviral drugs and other related challenges of HIV /AIDS.

³⁷ UN WOMEN-United Nations Entity for Gender Equality and the Empowerment of Women Report on Progress of the World's Women: In Pursuit of Justice (2011-2012) at 9.

the formal process but to what extent justice is deemed to have been served in both process and law. The Human Rights Committee noted in its General Comment 32 on article 14 of the International Covenant on Civil and Political Rights (ICCPR) that:

'availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way'³⁸

Ensuring that justice is accessible to all is difficult in most countries within the African region. Issues of cost or affordability, proximity to courts, language have been identified as well as legal assistance and awareness for women.³⁹ In my view, it is necessary to move beyond the formal court structures to expand justice and to include informal court systems that would improve women's access to justice. There are huge investment and resource allocation gaps in the institutions that are most relevant for women and their quest for justice such as the traditional court system. There is therefore a need to critically assess the current system with a view to addressing such matters such as skills in dealing with religious and customary practices,⁴⁰

³⁸ General Comment of the Human Rights Committee, a treaty-based body for the International Covenant on Civil and Political Rights on art 14 dealing with the right to equality before the courts and tribunals and the right to a fair trial.

³⁹ Florence Butegwa 'Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-Level Action' in Abdullahi An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) Zed Books, London.

⁴⁰ Abdul-Fata Kola Makinde & Philip Ostien 'The Independent Sharia Panel of Lagos State' 25 *Emory International Law Review* (2011) 921- 944 where the authors in this article discussed extensively the operation of an Independent Sharia Panel to adjudicate for Muslims in Lagos State. It is public knowledge in Nigeria that core

representation of women in judicial administration and gender-budgeting initiatives. In addition, seeking alternative methods of dispute resolution is a key element in ensuring greater access to justice for women. Within the traditional arena, traditional courts are not uniformly operative in many countries. Where they exist, it is fraught with challenges that are based on gender hierarchies that obtain in much of Africa. It is however argued in this study, that access to justice is imperative in realising the rights of women; processes involved in ensuring greater rights where there are challenges such as under customary law requires strategic linkages between formal and informal justice system.

5.7 Women and economic empowerment

For the majority of women particularly in the three countries under study; Nigeria, South Africa and Zambia, and in Africa in general, land is a resource that signifies economic empowerment and freedom.⁴¹ It has been stated in this study that majority of women do not engage in activities that provide them with economic or financial rewards. The effect of such unrewarding activities is dependency and a vicious cycle

Muslim Northerners do not take seriously Yoruba Muslim in the South. In South Western areas of Nigeria, there seem to be no Sharia courts for Muslims. So, those who desire to have cases of divorce, inheritance or other civil matters of Muslims to be adjudicated on would have to use Yoruba customary law or English law. The Independent Shariah Panel therefore, seeks to fill in the gap by asking Muslims to bring cases to them as a private arbitration panel.

⁴¹ Anne Griffiths 'The Changing Dynamics of Customary land Tenure: Women's Access to and Control over Land In Botswana' in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011) Juta & Co Ltd, 83- 113 at 83.

of poverty.⁴² The value of recognising works done by women at home and in informal sector is very important and points to the need to develop responses to eradicating gender inequality which is at the root of lack of gender justice. Unfortunately, according to the UNDP Human Development Index for 2010, much of sub-Saharan Africa has not improved the position of women by either investing in their skill development or their participation in decision-making.⁴³ In Africa, according to the UNDP index, it has been observed that there are few women in most decision-making apparatus of government such as parliament or the judiciary. For example in Nigeria, the percentage of women having seat in Parliament is less than 8 per cent; Zambia has about 15 per cent and South Africa has nearly 60 per cent.⁴⁴ This is an indication that the majority has no idea on how decisions affecting them are reached and they are rarely consulted for their opinion, a mechanism that most times work against any implementation of

⁴² Such high levels of poverty among women deepens notwithstanding the provisions in international human rights law such as the Protocol on the Rights of Women in Africa which provides in art 13 that: 'State parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall...

(e) create conditions to promote and support the occupations and economic activities of women, in particular within the informal sector;

(h) take the necessary measures to recognise the economic value of the work of women at home...

⁴³ See generally the 2010 Human Development Index Report at www.undp.org [accessed March 2011].

⁴⁴ The percentages are based on the UNDP 2010 Human Development Index; The disparity between the percentage of women in parliament in South Africa and those in Nigeria and Zambia is an indication of where more work needs to be done in having women in decision-making organs of government.

programmes that are seen or perceived to be contrary to custom or traditional belief

Most times, women who work long hours in factories earn very little which does not ameliorate their living standards notwithstanding the huge profits posted by companies that employ them. Although it has been shown that more women are gainfully employed, the conditions of service attached to their employment are less than adequate. Further more, governments are reluctant to intervene in proper regulation of these companies because of the investment interests brought by these companies. For example, in Kenya and Zimbabwe Export Processing Zones (EPZs), it has been shown that women face numerous forms of injustices in the sector such as lack of occupational and health safety; low pay, lack of skill development and career advancement and job security.⁴⁵ For women in this sector in Kenya, there is no job security in terms of maternity benefits; where they are subjected to routine pregnancy tests and if they fall pregnant in the course of employment, they cannot be reassigned to lighter jobs or can take leave for medical and family emergencies. In addition, there is no job guarantee if a woman returns from child-bearing, as she is made to sign a new job contract.⁴⁶ Also in Kenya, routine safety and health inspections are not taken at the EPZs hence any injury on women cannot be proved let alone be compensated. In addition to poor health and safety measures, the remuneration is considered as 'poverty wages' by some of the workers. In the first instance, statutory minimum wage is low at 3000 Kenyan Shilling which is roughly about

⁴⁵ Prisca Kamungi and Steve Ouma *Manufacture of Poverty: Untold story of EPZs in Kenya*, Kenya Human Rights Commission (KHRC), Report 2004 at 45.

⁴⁶ Kenya Human Rights Commission Report (2004) *supra* 45 at 45-46.

£22, so even an increase to 11 per cent would not improve the standard of living of the workers. It is worse still for women who are made to work in specific area that does not allow them any career advancement. Whilst men working in this sector earn higher and the highest paying positions are reserved for them, women are mainly restricted to those kinds of jobs where they cannot earn higher wages such as working night shifts or operating machines.⁴⁷ Evidently, women working in this sector would hardly escape poverty since neither their employment remuneration nor career advancement is consistent with rights-based approach to development.

5.8 Development

Ensuring gender equality is a core principle of justice whose end product would be development in political as well as socio-economic condition of men and women. Women, however, face numerous challenges in accessing basic resources and opportunities on an equal basis with men. The development of women through the protection of their human rights remains elusive for the majority. Development as a concept is controversial and has been the subject of much debate in Africa and around the world. For most people in sub-Saharan Africa, particularly women, development is intrinsically linked to the broader context of balancing unequal power relations between the sexes; access to resources and opportunities. Simply put, ensuring gender justice. Against this backdrop, this study discusses development as a right and to what extent it has been advanced through the agency of the United Nations.

⁴⁷ KHRC (2004) *supra* 45 at 34-37.

5.8.1 Development as a right

Development is specifically for the African woman enshrined in section 13 of the Protocol on the Rights of Women in Africa which provides: equality of access to employment,⁴⁸ right to equal remuneration for jobs of equal value for women and men;⁴⁹ ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;⁵⁰ create conditions to promote and support the occupations and economic activities of women, in particular in the informal sector;⁵¹ take the necessary measures to recognise the economic value of the work of women in the home;⁵² recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children.⁵³

Regrettably, in sub-Saharan Africa it is common knowledge that many people live on less than a dollar a day. In other words, poverty is rife; infrastructure is poor or grossly inadequate and worst still conflict and diseases ravage many on the continent. It is also well known that Africa is endowed with great natural resources such as gold and platinum in South Africa and Zimbabwe; cocoa in Ivory Coast and Ghana; Oil in Nigeria and Angola and diamond in Democratic Republic of Congo (DRC) and Sierra Leone. Despite all of these endowments, education is still poor and beyond the reach of many; health facilities are without doctors and medications are insufficient or not readily

⁴⁸ Art 13 (a) of the Protocol on the Rights of Women in Africa.

⁴⁹ Art 13 (b) of the Protocol on the Rights of Women in Africa.

⁵⁰ Art 13 (c) of the Protocol on the Rights of Women in Africa.

⁵¹ Art 13 (e) of the Protocol on the Rights of Women in Africa.

⁵² Art 13 (h) of the Protocol on the Rights of Women in Africa.

⁵³ Art 13 (k) of the Protocol on the Rights of Women in Africa.

available or even when it is, it remains unaffordable for many of the citizens. So, why has natural endowments with its trade and investments in global markets not translated into gains for the proper development of the people and an increase in their standard of living?

Perhaps, governance has a lot to do with creating conditions necessary for improving the standard of living as well as securing the lives of its citizens. To ensure that its people in Africa are well protected, presidents and heads of government made a commitment towards making development a right. According to art 22 of the African Charter on Human and Peoples' Rights (ACHPR or 'African Charter'), adopted in 1981 by the Heads of Government and Presidents of African states of the then Organisation of African Unity (OAU) now replaced with African Union (AU):

- (1) all peoples shall have the right 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;
- (2) states shall have the duty, individually or collectively, to ensure the exercise of the right to development.⁵⁴

The above provision creates the normative framework of guaranteeing the right to development irrespective of any controversy surrounding its meaning, context and objective.⁵⁵ It is obvious, however, that in

⁵⁴ Art 22 of the African Charter on Human and Peoples' Rights (ACHPR) adopted in 1981.

⁵⁵ There are divergent views on what actually constitutes the right to development and who or what is the content of the right. These views are predominant in Western countries. For more on the right to development, see Arjun Sengupta 'On the Theory and Practice of the Right to Development' *Human Rights Quarterly* 24 (2002) 837-889 at 857; Mohammed Bedjoui 'The Right to Development in International Law:

terms of the African Charter, the right to development is explicitly stated hence the imperative that peoples of Africa must have and enjoy adequate standard of living, access to resources and opportunities, freedom from poverty. It is, however, very difficult to reconcile this lofty ideal with the levels of poverty seen by many in Sub-Saharan Africa particularly women.

Development as a concept has a variety of meanings. Some define it in terms of economic indicators; others view it as matters that relate to human rights. According to Sen:⁵⁶ 'Development means the ability of the people to express themselves, to be able to voice their opinion and must also have improvement in their material well-being. Hansungule equates development to infrastructural development and community progress based on the statements of most politicians in Africa.⁵⁷ Other views on development indicate that it occurs when an individual has skill and capacity that would improve his standard of living; that people have proper healthcare, ability to feed themselves and that 'people no longer live in poor unventilated mud houses that leaks during rain'.⁵⁸ In much of Africa, looking at these definitions of

Achievement and Prospects (1991) 1117, also excerpted in Henry J. Steiner & Philip Alston, *International Human Rights in Context* (1996) 1117; Stephen Marks 'Misconceptions about the Right to Development' at www.worldbank.org [accessed 05-02-2009] also on file with author; Stephen Marks 'The Human Right to Development: Between Rhetoric and Reality' *Harvard Human Rights Journal* vol 17 (2004) 137-168.

⁵⁶ Amartya Sen *Development as Freedom* (1999) Alfred A. Knopf, New York.

⁵⁷ Michelo Hansungule 'The Right to Development' A paper presented at the Human Rights and Development Course of the Centre for Human Rights, University of Pretoria, December 2009 at 7 (On file with author).

⁵⁸ Nsongurua Udombana 'The Third World and the Right to Development: An Agenda for the Next Millennium' *Human Rights Quarterly* 22 (2000) 753-787 at 756.

development, it is obvious that majority still live in leaking houses or ones that cave in or overflowing with water during storm. For example, it is common knowledge in South Africa that lots of people including women and children live in 'shacks' that are always filled with water during rain. Notwithstanding the promises that most party candidates make during election campaigns that if elected they would improve the standard of living of the people; in other words, their development.

It was five years after the African Charter was adopted that the international community under the United Nations made a Declaration on the Right to Development (RTD).⁵⁹ At this stage, there was a shift in conception of development and its link to other principles such as equality and citizenship. The Declaration confirmed that 'the right to development is an inalienable human rights and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations'...⁶⁰ One essential element of RTD is participation by both individuals and nations hence the paradigm shift in which development discourse was expanded against the backdrop of creating a generic model citizen that is not based on social relations but rather on the basis of good governance.⁶¹ It is, however, not

⁵⁹ Declaration on the Right to Development (1986) adopted by the General Assembly Resolution 41/128 of December 1986.

⁶⁰ Paragraph 16 of the Declaration and art 1 provides that 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.

⁶¹ Maitrayee Mukhopadhyay 'Situating Gender and Citizenship in Development Debates: Towards a Strategy' in Maitrayee Mukhopadhyay and Navrashan Singh (eds) *Gender Justice, Citizenship and Development* (2009).

applicable in many African countries as social relations still determine many benefits of people particularly women and many governments do not adhere to good governance. In order to create this model citizenship it was clear that the conceptual idea of citizenship need to move beyond mere formal entitlement. The reasons for this shift may be found as a result of two interconnected purposes:

1. meaning and practice of people's participation
2. the common purpose of protecting and promoting human rights whether it is based on development studies or on human rights.

The basic premise on development is that it is about people. This is the reason why the UN Human Development Agenda placed the focus on the human person as the central subject and beneficiary of development.⁶² It is therefore pertinent that women are equal partners with men in development. The lack of access to resources and opportunities for women, lack of access to justice, invariably leads to loss of citizenship and under-development. There is also the link between the cycle of poverty faced by majority of women and the right to development.⁶³ Poverty is degrading and erodes the dignity of those dealing with its vicious impact hence the importance of eradicating poverty with the language of human rights. Anything that violates human dignity is a human rights issue. As a result, appropriately framing this right in a language that would be empowering is of utmost importance in a variety ways for vulnerable people particularly

⁶² Urban Jonsson Human Rights Approach to Development Programming (2003) UNICEF, Kenya.

⁶³ Irene Hadiprayitno 'Poverty, the Right to Development and International Human Rights Law' November 2004, *Civitas* Paper 3.

those bearing undue burden of not realizing their full human potential.⁶⁴ The Right to Development (RTD) becomes, therefore, a composite right from which other rights are realised. In fact, Algerian Scholar, Mohammed Bedjaoui said of the right to development: 'it is a right *erga omnes* to development and also a *jus cogens* permitting no exception in so far as states obligations are concerned'.⁶⁵ For example, the right to equality, the right to adequate standard of living, and the right to property can be addressed within the right to development; where this right is viewed as a right to the process of development.⁶⁶ The essence of this right therefore is that for the majority in sub-Saharan Africa, living in slums and terrible conditions must be eliminated, hunger and malnutrition faced by poor women and children must be eliminated, children must never be out of school because they could not afford the fees and no child under the age of five should die because of lack of doctors and nurses or medicine or that the nearest healthcare facility is 10 km away.

The relevance and importance of the right to development have been pursued vigorously under the United Nations (UN). Since the 1990's, the right has been confirmed in various forums of the UN with the commitment to ensure that people not only have adequate material well-being but also the means of sustainable development.⁶⁷ One of

⁶⁴ Jessica Moe 'The Right to Development: Can the Language of Human Rights add Force to Development Goals' *Peace and Conflict Monitor*, July 2008.

⁶⁵ Mohammed Bedjaoui 'Some Unorthodox Reflections on the Right to Development' in Francis Snyder & Peter Slinn (eds) *International Law of Development: Comparative Perspectives* (1987) 69-86.

⁶⁶ Irene Hadiprayitno (2004) *supra* 63 at 11.

⁶⁷ The Right to Development has been confirmed in the following conferences: Art 10 of the 1993 Vienna Declaration; 1994 International Conference on Population and

the means of pursuing this agenda under the UN came as the Millennium Development Goals (MDGs) which was undertaken by countries of the world during the millennium development summit in 2000.

At this summit, there were key critical areas that demanded serious consideration by the nations such as maternal mortality, education, equality and poverty. A cursory look at the conditions faced by people particularly women and children in most countries of the world including those in sub-Saharan Africa necessitated setting of concrete goals aimed at curbing the negative effects of diseases, hunger and under-development.

There are eight Millennium Development Goals to be achieved by 2015⁶⁸ and they are as follows:

1. eradicate extreme poverty and hunger
2. achieve universal primary education
3. promote gender equality and empower women
4. Reduce child mortality
5. improve maternal health
6. combat HIV/AIDS, malaria and other diseases
7. ensure environmental sustainability
8. develop a global partnership for development

Development; 1995 World Summit for Social Development; 1995 4th World Conference on Women; 1996 World Food Summit and 2001 World Conference against Racism.

⁶⁸ See generally <http://mdgs.un.org> (accessed 15 March 2012) wherein the Millennium Development Goals Report 2011 can also be found.

All of these goals are imperative for the growth of nations and most particularly for the growth and development of both men and women. Countries in sub-Saharan Africa are particularly vulnerable to issues of poverty, diseases and conflicts, so having specific targets aimed at achieving these goals are a matter of necessity and thus require reasonable urgent actions. In as much as all of these goals are critical for the benefit and development of women, however, for the purposes of this study, the author focuses on goals three, five and six. It is argued that these three goals are specific to the issues militating against realisation of gender justice and full citizenship of women in political, social and economic spheres.

The target of goal three is to “eliminate gender disparity in primary and secondary education and in all levels no later than 2015”.⁶⁹ To empower women and bridge the disparity gap between men and women, it is envisaged that education is the key to unlock potentials that would ultimately improve or promote paid employment and afford women the opportunity to participate in the political arena by having seats in parliament. According to the report,⁷⁰ major gains have been made in primary/secondary/tertiary schools; employment; and number of women in parliament⁷¹ but they are still very far from achieving the desired objectives.

In sub-Saharan Africa, according to the report cited above, the enrolment ratio rate of boys for primary education in relation to girls

⁶⁹ See <http://mdgs.un.org> (accessed 15 March 2012)

⁷⁰ 2011 Millennium Development Goals Report at 20-22.

⁷¹ These are the key three areas that are considered in terms of the 2011 Millennium Development Goals Report as indicators for gender equality and empowerment.

remains wide apart. Primary school is the very basic and starting point of education, many girls from rural and semi-urban villages and towns in Africa are greatly disadvantaged. Most times as a result of poor socio-economic conditions, these girls are made to work within the family to assist in providing for the family.

In 1998/1999, for every 100 boys enrolled for sub-Saharan Africa, there were 85 girls. After 10 years, there was an improvement of an index of about 6 where the ratio became 92 girls for every 100 boys between 2008/2009. The target of gender parity index for primary school enrolment is between 97 and 103.⁷² The gap between the target and the achieved enrolment at an index of 5 is at par with those in Northern Africa. One would have expected a higher index rate for sub-Saharan Africa than Northern Africa because of the influence of religion on girls in the former; it is indeed pertinent to note that their index is the same and in fact Northern Africa surpassed with secondary and tertiary education. It is a worrying situation that sub-Saharan Africa may not meet the target set for 2015 of eliminating gender disparity at all levels in less than four years from now. It is a major concern because the trend is not any better in secondary and tertiary enrolment as it is still largely tipped in favour of boys. The overall impact is the vicious cycle of poverty for many women that start at the very basic of life where many are not enrolled in primary, secondary or tertiary education. In instances where students dropped out at the level of secondary or tertiary, it is more difficult for them to get back to school in Nigeria than it would be in Zambia.⁷³ The consequence of

⁷² MDG Report *supra* 69 at 19.

⁷³ 2011 Millennium Development Goals Report at 19 where it was stated that three quarters of primary school age children who are out of school are most unlikely to be

this poor participation rates which is largely skewed in favour of boys remains the inability of many to access services relevant to improving their socio-economic conditions simply because of illiteracy.

The other consequence arises from the fact that as a result of illiteracy, many can only engage in agricultural employment. Evidently, roles within the family which is largely unremunerated coupled with illiteracy make paid employment difficult for many women. The percentage of women in paid employment or non-agricultural in sub-Saharan Africa remains below 40 per cent compared to those in Central Asia and Latin America which is at about 45 per cent. Although, it seems that sub-Saharan Africa is making progress, this is undermined by the poor working conditions that do not allow for career advancement, financial security and social security.⁷⁴ The conditions were not made any better for women as the world witnessed the 2008/2009 global economic melt down. Men and women were affected in the workplace by this situation however, it must be noted that the percentage of women in paid employment is far less than that for men. So, even as recovery gained momentum from 2010 according to public opinion, women would struggle most of all because many of those severely affected were those employed in industries.

exposed to any form of education at all. In other words, the barriers to education are so ingrained and of such a pattern that it remains very difficult to overcome in that country.

⁷⁴ See generally 2011 Millennium Development Goals Report, *supra* 564 at 19-20, where it was also observed that many women in private paid employment in Nigeria do not have any form of future savings from their jobs in terms of Provident Fund, they do not have medical aids let alone a subsidized one and they also do not have over time payment.

Another indicator of ensuring gender equality and empowerment of women is through the political participation of being members of the Parliament. Equal participation of women and men in politics has remained wide apart despite significant progress being made to bridge the gap. Worldwide, the number of women parliamentarians in single or lower houses of parliament by end of January 2011 was at 19.3 per cent compared to 11.6 per cent 15 years ago.⁷⁵ Certainly, the progress is very slow even though the statistic shows some remarkable progress of the numbers being at an all time high at the current rate. This is an indication that the political arena is still largely male dominated and so it may be argued that it is very unlikely that many countries would have pieces of legislation that would promote and improve the status of women. For example, in Nigeria, the status of domestic violence bill aimed at protecting women from domestic abuse and violence has been stalled in the parliament for more than 10 years. Whilst waiting for the Senate to confirm and adopt the Bill, domestic violence continues in many places in Nigeria unabated.

In sub-Saharan African, few countries have made significant progress in recognising women and the positive roles that they play in the development of the society. For example, at the level of government, South Africa has been able to achieve remarkable progress within a short period of time with about 44.5 per cent, second to Rwanda at 56.3 per cent.⁷⁶ Mozambique and Tanzania elected their first female women speakers and Malawi has joined Liberia to be exemplary countries in sub-Saharan Africa with female heads of state. The world-wide rate is not ideal but remains a huge progress in the right

⁷⁵ See generally <http://mdgs.un.org> (accessed 16 March 2012)

⁷⁶ MDG Report *supra* 69 at 23.

direction with about 10 countries having female heads of state and 13 countries with female heads of government. Evidently, women are breaking new grounds in the political arena; however, an obvious setback lies in the manner society value women and the roles they play in them.

One of the factors that contribute towards women's participation in the political arena is the quota system adopted by many governments. For example in South Africa, the ruling African National Congress (ANC) adopted a 30 per cent quota system which has been increased to 50 per cent in terms of the Polokwane Resolutions.⁷⁷ It must be stated that quota system alone is incapable of improving the participation of women. There are other inhibitors to their participation such as inadequate finance⁷⁸, poor electoral process⁷⁹ and in some instances political intimidation within the political parties.⁸⁰ For example in Nigeria, it was observed that women are rarely nominated as party

⁷⁷ Generally stated in the SABC News as part of the government and its alliance partners plan at the elective conference of the ANC in Polokwane in 2008.

⁷⁸ At a breakfast meeting for Nigerians in Diaspora in 2007, the then president-elect Umaru Musa Yar'Dua said that his party, Peoples' Democratic Party (PDP) reduced the fees required to enter into the race to vie for position for women to enable them actively participate in the elections. It is clear from this statement that ordinarily, the fees are at a price where even well qualified women are unable to secure finance.

⁷⁹ Many countries in Africa have no proper electoral system that are gender-sensitive and are understandable to the majority of women who may want to participate but are not literate enough.

⁸⁰ In instances where some women may want to actively contend for a position, they do not have enough media exposure and in some cases may have people who make attempts at their lives as a scare tactic for them to forgo their plans of being contenders with mainly men in the party.

flag bearers for political position and in fact in the nation's 52 years of existence, a woman has never been appointed a deputy president.

In most societies, women are hardly viewed as equal partners in development and based on this premise many developmental programming do not take into account specific conditions relevant to women. This is evident in the next Millennium Development Goal critical to women's citizenship which is about improving maternal health.

By divine providence, it is only women who can fall pregnant. Unfortunately, pregnancy poses considerable risks to the lives of women in several regions of the world. In sub-Saharan Africa, maternal mortality remains a huge burden and has in fact become one of the leading causes of death.

The target of goal five is to reduce by three quarters, the maternal mortality rate by 2015 and unfortunately, sub-Saharan Africa and Southern Asia together account for 87 per cent of deaths globally in 2008.⁸¹ For women in Africa, it is a frightening situation that can irrevocably alter the lives and future of the women and their families. For example in Nigeria, according to the 2010 Human Development Index, the maternal death per 100,000 live births is at 1100 compared to 400 in South Africa.⁸²

⁸¹ 2011 Millennium Development Goal Report *supra* 69 at 29.

⁸² See generally 2010 Human Development Report at www.undp.org (accessed 2011).

There are several reasons for this high mortality rate such as haemorrhage before or after delivery, complications arising from unsafe abortion, and pregnancy-induced hypertension. Other factors include proximity of health care facilities, adequate medical staff and trained personnel and availability of medicines and equipment. Given the importance of women's reproductive roles, it should be a matter of national priority to create conditions necessary to save lives and improve the lives of women. Unfortunately, in some countries in Africa such as Nigeria with its huge revenue from oil, government's total allocation for health in 2004 was 0.8 per cent.⁸³ It is a ridiculous percentage given the high population of the country; in other words the standard of health in the country is at the barest minimum according to this revenue allocation by government. Such inadequate budgeting is in sharp contrast to the amount of revenue derived by the government in petro-dollars.⁸⁴ It is also an indication of how government view the health and lives of its people.

In most African countries, promoting and protecting sexual and reproductive rights remains a huge challenge. It is common knowledge that in many communities in Africa, discussions about sex hardly take place let alone whether there are rights attached to sexuality and reproduction. It is therefore no wonder that at many births in Sub

⁸³ Frans Viljoen *International Human Rights Law in Africa* (2012) 2nd edition, Oxford University Press: Oxford; Frans Viljoen *International Human Rights Law in Africa* (2007) Oxford University Press at 570.

⁸⁴ 'Petro-dollars' as used here refers to the amount of revenue derived by the government of Nigeria from oil which is an abundant natural resource in that country. It is widely known that Nigeria is the biggest oil producer in Africa and is ranked between 8th and 10th place worldwide according to the Organization of Oil Producing Countries (OPEC).

Saharan Africa, there are hardly skilled health professionals in attendance. It has been argued that having a skilled health professional such as nurses, midwives and doctors at delivery is critical to reducing maternal deaths. Sadly, the percentage of skilled health workers at birth in sub-Saharan has remained below 50 per cent for almost 20 years.⁸⁵ Simply put, sub-Saharan Africa lags behind in improving the overall socio-economic conditions of its people. It is argued in this study that one of the reasons for this state of affairs would be attributed to the manner in which governments approach development. In much of Africa, the word 'development' is well known by politicians according to Hansungule.⁸⁶ Poverty, malnutrition and diseases persist in Africa because governments use 'development' as a political bargaining chip rather than as a human right and also one that requires the use of right-based approach.⁸⁷ It is nothing new to hear politicians tell the electorate and other opposition groups that 'they are denying themselves development if they do not vote in the right party'. It means therefore, that the politicians are aware that the village must have good roads, clean drinking water, hospitals with adequate staff and medicines. The fact that some of these basic necessities still elude many communities in Africa is a matter of poor governance and lack of political will on the part of governments.

⁸⁵ According to the 2011 Millennium Development Goals Report, sub-Saharan African only made gains of about only four percent between 1990 -2009 at 42 and 46 per cent as opposed to Northern Africa that made significant gains from 45 per cent in 1990 to 81 per cent in 2009.

⁸⁶ Michelo Hansungule 'The Right to Development' a paper presented at the Human Rights and Development Course organised by the Centre for Human Rights, Faculty of Law, University of Pretoria (2009) at 7.

⁸⁷ Urban Jonsson *A Human Rights-based Approach to Development Programming* (2003) UNICEF, Kenya.

Conclusions

In this chapter, it has been established that there is a correlation between citizenship, property, and HIV / AIDS. The overall development of women is impacted by how they are viewed as members of the society. In the instance where they cannot even confer citizenship is an indication of the inability of the system to protect women as *bona fide* members of society with a stake in its growth and development.

It has also been established that citizenship has ripple effects in other aspects of women's lives regarding their entitlements in property, social and cultural aspects of their livelihoods. In Africa, women still bear huge burdens in their families and in the community. The impact of the burden is largely felt in their participation as active citizens who have rights to confer citizenship rights on their spouses and children; participate on an equal basis in employment opportunities and remuneration. The challenges are further exacerbated by the responsibility that many women face under the ravages of HIV /AIDS in sub-Saharan Africa particularly in the three countries under study.

For many women, they lose their homes when their spouses are deceased through HIV / AIDS related family disputes; being chased away when their spouses die of HIV / AIDS related illnesses; left to bear the burden if they happen to contract the disease and generally suffer abuse and violence. Simply put, it is impractical to seek a society that is progressive where women are not viewed as equal partners. In key critical areas of the family, women face abuse, neglect and suffer immeasurably; in terms of economic empowerment, many women are unable to actively participate in improving their lives

because they are poor, illiterate and unable to secure independent credit facilities that might make them self-sufficient. In much of Africa, the numbers of women in government remains low and the numbers in private enterprises are much lower, where very few women are in management positions. So, women pass through life having very little to say on the property they have lived most of their lives, not being able to confer citizenship to their spouses in their own right nor to freely approach the court for the realisation of their socio-economic rights as well as their right to development.

For many, life remains a vicious cycle of struggle against poverty. The efforts of governments to eradicate extreme poverty, reduce maternal mortality and improve education in terms of the Millennium Development Goals still fall short in virtually all the critical areas. In this chapter, it has been established that development is not an unknown concept. In fact, Africa realised the implications for development as early as 1981 when the African Charter on Human and Peoples' Rights was adopted by virtually most African countries. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa confirmed the right to development through its provision in art 13 guaranteeing all aspects of socio-economic development. Yet, very few women are in decision-making organs of governments let alone private enterprises. A majority of women are still facing many challenges in education, health and politics. It is argued here that the right to development should no longer be an unnecessary and elusive concept on the continent because poverty is a daily reality for many women and children.

Chapter Six

Global and regional responses to gender justice

6.1 Introduction

This chapter discusses both regional and global responses to human rights and how they have contributed in and have potential towards the promotion and protection of the rights of all persons. On the African continent, the chapter focuses on the African Commission's efforts at giving content to the rights contained in the African Charter particularly with regards to the right to equality and non-discrimination. Also discussed here is the role of other agencies that make up the African human rights architecture. In addition, other sub-regional efforts at protecting human rights will also be analysed with the viewing to capturing Africa's efforts in responding to human rights. The prospect envisaged in ensuring gender justice through these international human rights instruments is inspiring because non-discrimination remains the basis for any enjoyment of all the rights guaranteed in the entire African human rights architecture.

6.2 Global Rights

The global response to international human rights, which are inalienable and interdependent, is exemplified by the following instruments: The Universal Declaration of Human Rights (UDHR),¹ the International Covenant on Civil and Political Rights (ICCPR),² and the International Covenant on Economic, Social, and Cultural Rights

¹ Adopted by the United Nations General Assembly in terms of Resolution 217 A (III) of 10 December 1948; ; See also Michelo Hansungule ' On shared values: Conflict resolution and peace and justice in Africa', in Sharack Gutto, *Shared Values, Constitutionalism and Democracy in Africa*(2011) University of South Africa, Pretoria, 85-102.

² Adopted in 1966, and entered into force in 1976.

(ICESCR).³ This trio makes up the International Bill of Rights.⁴ In addition, in order to give visibility to women's challenges and to renew the vigour to deal with specific violation of the rights of women, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁵ came into being. In order to bring these instruments home, state parties to these international human rights instruments saw the need to also act within their various regional blocs by establishing human rights system for their specific regions. Hence, on the African continent, we have the African system of human rights. Among the global responses to human rights as already alluded to are: UDHR, ICCPR, ICESCR and the CEDAW. Specific provisions of these instruments regarding women, rights and justice are dealt with in this section.

UDHR

The UDHR generally guarantees universally acclaimed minimum human rights for all regardless of socially and naturally prescribed distinctions or factors. Briefly, in articles 1 (all human beings are born free and equal in dignity and rights...), 2 (everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political, social origin, property, or any other status) and 7 (equal before the law and

³ Adopted in 1966 and also came into force in 1976.

⁴ Elvira Dominguez-Redondo 'Role of the UN in the Promotion and Protection of Human Rights' in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010) Martinus Nijhoff Publishers, Leiden, Boston, 119- 144 at 128.

⁵ Adopted in 1979 and entered into force in 1981. It has Optional Protocol designed to ensure individual complaints against State Parties. The Optional Protocol into effect in 1999.

equal protection against discrimination) provided the basis for the protection of human rights globally. The rights protected are equal rights, equal rights before the law without discrimination and equal protection against discrimination.⁶ The impact of these provisions in the UDHR finds resonance on the African continent, having regard for example on the provisions of section 9 of the South African Constitution.⁷

The relevance of Art 27 (1) providing for the right to freely to participate in the cultural life of the community ..., underscores the moral value attached cultural identity giving rise for its legal claim in national laws.⁸

These provisions in the UDHR marked the beginning of a universal standard from which other rights would flow in the protection of human rights. In fact between the time the Declaration was adopted in 1948 and 1976 when the two Covenants came into force, was 28 years before the two international covenants came into force. So, the UDHR was the only broad-based human rights instruments available within that intervening period. This was why it was frequently invoked and broadly known amongst nations. Accordingly:

⁶ Article 2 dealing with discrimination underscores the importance of ensuring gender justice. Clearly, other formulations of human rights law 'borrowed' from the core concept in the UDHR which is to eliminate discrimination on grounds of race, sex, birth, nationality, religion, language or any other status.

⁷ Section 9 of the South Africa Constitution provides for non discrimination on the basis of sex, birth, gender, religion, sexual orientation and any other status.

⁸ Section 30 and 31 of the South African Constitution guarantees the right to cultural life.

'It has retained its place of honour in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole...The declaration expressed in lean, eloquent language the hopes and idealism of a world released from the grip of World War II. However self-evident it may appear today, the Declaration bore a more radical message than many of its framers perhaps recognised. It proceeded to work its subversive path through many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace'.⁹

The core aspects of the UDHR relates to non-discrimination, equality, and freedom from want including housing, food, medical care and other essential social services. For the majority of women in Africa, these are basic necessities that they struggle to gain access to at the national level. Despite the struggles, evidently, UDHR remains the basis for global responses towards the realisation of gender justice.

The ICCPR and ICESCR contributed in creating binding legal obligations on State Parties by imposing on them four main tiers of obligation-governments must 'respect', 'protect', 'fulfill', and 'promote' human rights. These obligations apply to all rights and require States to refrain from interfering with enjoyment of these rights.¹⁰ The obligation to 'respect' is understood to demand immediate action on the part of the state, for example to stop torture or inhuman or degrading treatment does not require any form of resource allocation.

⁹ Henry Steiner 'Securing Human Rights: The First Half-Century of the Universal Declaration and Beyond' (1998) Harvard Magazine (September-October), at 45 as cited in Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) Oxford University Press at 139.

¹⁰ Frans Viljoen *International Human Rights Law in Africa* (2012) 2nd edition, Oxford University Press: Oxford at 7.

The obligation to 'protect', and 'fulfill' human rights resonates with the majority of women in Africa who, despite these international human rights law cannot have full enjoyment of the rights contained in them. From the above provisions, it is clear that the ICCPR bears striking resemblance to those in the UDHR. Between the two Covenants, it is also clear that there are rights that are common to both of them. An example is, art 1 on self-determination of peoples and on the right to cultural life (art 15 (1) (a) of ICESCR and art 27 of ICCPR). In other words, there are rights that the individual is protected as a member of a group and such group rights must not be denied on grounds of race, religion, gender and ethnicity.

The General Comment (GC) of the Committee on Civil and Political rights give effect to the realisation of the right provided in the Covenant through determining the scope, nature and obligation of State Parties to the Covenant. For example, justice is viewed as a political right and in terms of the General Comment on art 14 requires State parties to ensure that all forms of adjudication process whether in a court of law or in a tribunal must comply with the proper administration of justice. In other words, right to a fair hearing, impartiality of the processes and engendering justice to all individuals remain paramount at whatever the forum. This is instructive for South Africa particularly in the controversy surrounding the Traditional Courts Bill regarding equal rights of women. Thus far, in South Africa, women who had brought matters to the courts have received redress for violations of their rights. The challenge however, lies in promoting equal access to justice for the majority who resides in the rural areas, who for reasons including knowledge of formal court processes and available resources cannot seek redress.

Undoubtedly, non-discrimination is critical to the realisation of gender justice. In terms of the General Comment 28 of the CCPR on the equality of rights between men and women:

‘State parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Further, they are mandated to ‘take all necessary steps to put an end to discriminatory actions in the public and private sector’¹¹

The prohibition of discrimination in all its ramifications is fundamental to the enjoyment of all rights in the Covenant. However, eliminating discrimination in the private sector proves much more difficult to deal with in most countries in Africa as already seen in Chapters three and four. To show the importance of adhering to their obligations, it was imperative to specifically indicate to State Parties the extent of their obligations. To this extent, General Comment 31¹² in paragraph 6 clearly points out the nature of the general legal obligation imposed on State Parties to the Covenant which includes both negative and positive obligations. So, to refrain from interfering is negative action that requires immediate response while positive obligation would require resource allocation- for example, ensuring schools, clinics and hospitals. Further, the obligation of the State Parties in terms of art 2 of the Covenant is binding on every state party, so no organ of government is excluded from the applying the principles of non-

¹¹ Paragraph 4 General Comment 28 adopted on 29th March 2000- CCPR/C/21/Rev.1/Add.10, General Comment 28.

¹² See the case of *Aumeruddy Cziffra and Others v Mauritius* dealing with discrimination of Mauritius women married to foreign spouses; CCPR General Comment (GC) 31 (2004) replaces GC 3 and must be read with GC 18 and 28, all dealing the principle of non-discrimination.

discrimination; and such obligation to respect and ensure the rights contained in the Covenant are immediate.¹³ The immediacy of civil and political rights has been used as basis for progressive realisation of socio-economic rights. In other words, there are no huge resources involved in immediately stopping a violation. Although this seems to be the general idea, the fact remains that for most, particularly those in Africa; immediate elimination of violation of the principle of non-discrimination has taken longer than envisaged in the instrument.

For women, CEDAW specifically addresses the numerous challenges women faced globally and in specific countries. Hence, CEDAW marked a clear departure from an instrument of a general nature to one that specifically deals with women's rights. Key provision of CEDAW critical to understanding the challenges that majority of women face in Africa in order to appreciate the nature of the prospects aptly captured in Art 1, which states that:

the term 'Discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural civil or any other field.

The core object of CEDAW is to eliminate discrimination against women in all spheres by using appropriate means which includes law reform (art 2 (a), legislative measures (2 (b), education and

¹³ Paragraph 4 and 5 of General Comment 31 highlights the legal obligation imposed on State Parties to the Covenant.

awareness-raising programmes (12 (2) and to ensure that redress for discrimination is equally available (2 (c)).

In CEDAW, there is clearly a grand design by the international community to mandate countries to protect the human rights of women. It is one of the fastest ratified Conventions compared to other human rights instruments, because it entered into force almost two years after its adoption. However, it is also the human rights instrument with the most reservations, of which many relate to conflict between custom and or religion and human rights standards.¹⁴ Although there has been some objections to the reservations made by many countries, it is evident that succession to the throne in places such as Lesotho, Spain, Bahrain and other Islamic states as well as personal status concerning nationality of married women, children, inheritance and so on are as political as they are cultural. As aptly commented upon by Jessica Neuwirth, Director of New York based organisation, Equality Now:

'Culture is male-patrolled in the way that it is created and transmitted, people who control culture tend to be the people in power, and who constitutes that group is

¹⁴ Henry J. Steiner and Philip Alston *International Human Rights in Context: Law, Politics, Morals* (2000) 2nd edition, Oxford University Press at 439; Frans Viljoen *International Human Rights Law in Africa* (2012) 2nd edition, Oxford University Press: Oxford 127-129 where the author mentioned that eleven African countries entered reservation on CEDAW including Malawi that entered a broad reservation to the effect that 'in case of conflict, traditional customary practice rather than CEDAW is to be upheld'. This particular reservation by Malawi was withdrawn in 1991. CEDAW reservation list is available at

www.un.org/womenwatch/daw/cedaw/reservations.htm (accessed November 2013).

important. Until we can break through that, we can't take the measure of what is really representative'.¹⁵

Clearly, the status of women in many African countries remains precarious as a result of the limitations that they face in key social, economic, political and cultural aspects of their lives. CEDAW, therefore, aims to ensure that attitudes, conduct and practices that have adverse effect on the social, economic, political and cultural lives of women are modified or eliminated. Clearly, CEDAW covered in detail critical areas of women's lives. Further, it was necessary to monitor compliance of State Parties; hence the Committee on the Elimination of Discrimination against Women was established. It also has the power to make general comments or recommendations based on examination of reports and information received from State Parties.¹⁶

The definition of discrimination in art 1 for example is very broad to cover the effect and purpose of discrimination, whether it is direct or indirect; and whether the discrimination was intended or unintended.¹⁷ Simply put, the section seeks to prohibit discrimination in all its form, manifestations and consequences. Art 3 of CEDAW mandates State Parties to take measures including legislative to ensure the full development and advancement of women on the basis of equality with

¹⁵ Jessica Neuwirth, Honorary President, Equality Now as cited in Henry J. Steiner and Philip Alston *International Law in Context: Law, Politics, Morals* (2000) 2nd edition, at 438.

¹⁶ See generally articles 17 – 22, particularly art 21 (1).

¹⁷ Mmatsie Mooki, Rita Ozoemena and Michelo Hansungule 'Women's Rights in International Law' in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010) Martinus Nijhoff Publishers, Leiden, Boston at 78.

men.¹⁸ To give effect to this mandate, countries such as South Africa and Zambia have enacted key gender-sensitive legislation aimed at promoting equality and combating gender-based violence.¹⁹ Art 5 captures the essence of the contentious nature of equality *vis a vis* culture and human rights norms where it requires:

'State Parties to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices...'²⁰

Clearly, the language of this particular provision of CEDAW suggests the influence of culture and tradition in the formation of gender roles and in particular reveals the multiple sites of discrimination of women as emanating from the privacy of family, community, and the society in general. For example, Female Genital Mutilation (FGM) is a cultural practice that is deeply entrenched in many African countries. It is internationally recognised as a violation of the human rights of women and the girl-child. The prevalence of this practice is such that even African immigrants into other parts of the world export these practices.²¹ In order to stem the effect of practices such as FGM,

¹⁸ Art 3 of CEDAW.

¹⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), South Africa is a progressive piece of legislation in that it creates Equality Courts. This specialised court operates to give redress to violations of the non-discriminatory clause in the Constitution; Anti-Gender-based Violence Act 1 of 2011, Zambia which is also intended to eliminate discrimination against women gave rise to the creation of Victims Support Unit (VSU).

²⁰ Art 5 (a) of CEDAW.

²¹ See Equality Now, a New York based Organisation working for the elimination of discrimination against women, among their thematic issues include traditional

CEDAW became the first United Nations treaty body to make recommendation on the elimination of FGM in terms of General Recommendation No 14.²² Based on the reports it received on the continuous practice of FGM, the Committee recommended in paragraph (a) (iii) that professionals, academics, religious and community leaders should co-operate to eliminate the practice of FGM. In my view, this call is in recognition of the importance of collaborative efforts in dealing with negative aspects of cultural practices.

The political nature of some of the practices that constitute discrimination against women cannot be over-emphasized. For this reason, it is argued in this study that women's representation in parliament is essential to enacting gender-sensitive legislation that would protect the interests and rights of women with regard to cultural practices. For example, in South Africa, women constitute 44 % of parliamentarians which could be attributed to the progress made by the ruling party in promoting gender equality.²³ Ensuring the equal protection of women in public and political life is provided in art 7

practices such as FGM. www.equalitynow.org/sites/default/files/annualreport-2011.pdf (accessed 11 May 2013).

²² General Recommendation NO 14 called on State Parties to 'eradicate the practice of female circumcision'.

²³ According to the Concluding Observation of the Committee on the Elimination of all Forms of Discrimination against Women at its 48th session, 17 January -4 February 2011 in the combined third and fourth reports on South Africa, the country has made significant progress in achieving gender equality; though there are still some challenges. Questions and responses are found in CEDAW/C/ZAF/Q/4 and CEDAW/C/ZAF/Q/4?Add.1. See also www.peopletoparliament.org.za/focus-areas/womens-rights/resources/key-documents/CEDAW-C-ZAF-CO-/%20concluding%20Observations.pdf/view (accessed 11 May 2013).

wherein State Parties are obliged to eliminate discrimination against women in public and political life. Socio-economic rights of women are provided for in art 10 dealing with equal rights in education; art 11 dealing with right to work and same opportunities in employment on an equal basis with men. One area of particular concern for women regarding the socio-economic rights is poverty and the ripple effect of poverty is so enormous for women as a result of unequal opportunities and unequal power relations. The health and reproductive well-being of women are paramount to their enjoyment of all other rights in CEDAW. For this reason, art 12 provides for the elimination of discrimination against women in health care services including those related to family planning. In addition, it obliges State Parties to take extra measures to ensure the safety of women during pregnancy, confinement, nutrition during pregnancy as well as pre / post natal care.²⁴ To ensure that adequate programmes are in place to protect the health and reproductive rights of women, CEDAW in its General Recommendation No 24 encouraged states to report on the most critical health issues affecting women in their various countries; and such reports should detail plans, policies and health legislation relevant to the health of women.²⁵ It is common knowledge that HIV /AIDS are ravaging women, men and girls in sub-Saharan Africa particularly in countries such as Zambia, South Africa and Swaziland. Some of the sexual practices are also embedded in culture which constitutes

²⁴ Art 12 (2) of CEDAW; Many countries in Africa are still struggling with cultural issues regarding the health women and children. For example in Nigeria according to the 2010 Human Development Inequality index Report, maternal mortality in 1100 to 100,000 live births; It is also public knowledge that polio which has been eradicated in most countries in Africa is still widespread in Northern Nigeria because of the belief that vaccination is a western plan to reduce population.

²⁵ General Recommendation No 24 paragraph 9 (20th session, 1999).

challenges for women on two or more fronts. HIV/ AIDS and other sexually transmitted diseases are central to the rights of women and adolescent girls' sexual health, a fact underscored by General Recommendation 24:

'as a consequence of unequal power relations based on gender; women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices such as female genital mutilation, polygamy and marital rape may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases'.²⁶

Closely related to health matters, is the elimination of discrimination against women in rural areas. Women in rural areas received particular attention in CEDAW as a result of the roles that they play in their societies that are hardly recognised as valid economic pursuits, in their families as well as difficulties that they face in accessing health care facilities,²⁷ credit and financial loans.²⁸ In fact, art 14 recognises that rural women are a disadvantaged group hence the obligation on the part of State parties to ensure that women are involved and actively

²⁶ General Recommendation No 24 paragraph 18. It is also commendable that the African Commission has now adopted a General Comment in relation to article 14 (1) (d) and (e) of the Protocol on the Rights of Women in Africa which specifically addressed the issue of HIV/AIDS. In paragraph 35 of the General Comment, State Parties are obliged to create enabling legal and policy framework to remove any discriminatory laws and policies particularly those emanating from traditional practices. Paragraph 46 also seeks to remove barriers to sexual and reproductive health rights of women. For the majority of women in Africa, steps taken by governments to remove barriers to women's enjoyment of their rights are grossly ineffective as shown elsewhere in the study.

²⁷ Art 14 (2) (b)

²⁸ Art 14 (2) (g)

participate in rural development planning.²⁹ The equal rights of men and women before the law is prerequisite to legal autonomy; a right that many women are denied when they lack contractual capacity or cannot obtain loan or credit without the concurrence or guarantee of a male relative.³⁰ Art 15 and 16 elaborate on protecting the right to equal benefit of the law between men and women, and their rights in marriage. As already alluded to in previous chapters, women face many challenges in marriage ranging from consent, to property rights. Art 16 requires State parties to eliminate discrimination against women in all matters relating to marriage and family matters. Unfortunately, this is one of the most reserved articles underscoring the constant clash of family relations, culture and human rights.

In General Recommendation 21,³¹ CEDAW enjoins State Parties to desist from validating child marriages which has the potential to destroy the future and development of girls thereby affecting their skills development and employability. Despite creating mechanisms to ensure compliance and individual complaint mechanism in terms of the Optional Protocol,³² CEDAW is still faced with many shortcomings which invariably affect the extent of its reach in protecting women.

²⁹ Art 14 (2) (a) of CEDAW

³⁰ See General Recommendation NO 21 (13th session, 1996) paragraph 7.

³¹ General Recommendation 21 of 1994. It is regrettable that Nigeria, as a State Party to CEDAW and other International human rights law took a retrogressive step when the Senate indirectly endorsed child marriage in terms of section 29 (4) (b) of the Constitution which deems a married girl to be of full age in the eyes of the law.

³² Optional Protocol is a legal instrument relating to an existing treaty aimed at addressing issues not sufficiently covered in the treaty. It is 'Optional' because State parties are not obliged to become party to it which does not affect their ratification of the original treaty. CEDAW Optional Protocol was adopted in 1999.

6.3 Regional responses to the realisation of gender justice

Regional responses to human rights on the African continent, by way of the African human rights architecture developed through an era of struggle for independence and pan-Africanism to new institution of the new Millennium; strengthening regional integration, human rights and development. Though it has been bitterly criticised for ignoring and even trampling on human rights with impunity, according to Hansungule,³³ it was during the same period of a complete deficit of human rights that the OAU took the giant step to adopt the premier human rights instrument: the African Charter on Human and Peoples' Rights.

The Organisation of African Unity (OAU) had since been transformed to a new institution of the African continent, referred to as the African Union (AU).³⁴ The Constitutive Act of the AU,³⁵ through its objectives and principles, expanded on the very important issues relevant to the African continent such as economic integration, human rights, good governance and the rule of law. Of the 16 guiding principles of the

³³ Michelo Hansungule 'On shared values: Conflict resolution and peace and justice in Africa', in Sharack Gutto, *Shared Values, Constitutionalism and Democracy in Africa*(2011) University of South Africa, Pretoria, 85-102.

³⁴ Frans Viljoen *International Human Rights Law in Africa* (2012) 2nd edition, Oxford University Press: Oxford at 157- 169 where the author chronicled the transition from Organisation of African Unity (OAU) to the Constitutive Act of the African Union which is a merger of the Charter of the OAU and the African Economic Community (AEC) Treaty.

³⁵ The OAU leaders adopted the AU constitutive Act on 11 July 2000 generally referred to as the Sirte Declaration. It entered into force on 26 May 2001 replacing the OAU Charter. See also CAA Packer and D. Rukare 'The New African Union and Its Constitutive Act' (2002) 96 *American Journal of International Law* (AJIL) 365.

Constitutive Act, promotion of gender equality,³⁶ respect for democratic principles, human rights, the rule of law and good governance,³⁷ and the promotion of social justice to ensure balanced economic development³⁸ are most notable. One of the objectives of the AU is the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter or ACHPR) and other relevant human rights instruments.³⁹ The African Charter remains, therefore, the main instrument on the continent indicating for the realisation of gender justice.⁴⁰ On the African continent, the human rights architecture is fairly developed with the African Charter at the apex.⁴¹ The African Charter was adopted on the last day of the eighteenth Assembly of Heads of State and Government on June 1981 and it entered into force on 21 October 1986.⁴² The African Commission on Human and Peoples'

³⁶ Art 4 (l).

³⁷ Art 4 (m).

³⁸ Art 4 (n).

³⁹ Art 3 (h).

⁴⁰ The position of the African Charter as the bedrock for the realisation of gender justice was made clear in the case of the *Egyptian Initiative for Personal Rights v Egypt*, Communication 323/06. An Egyptian NGO brought the complaint against government officials under President Hosni Mubarak for the violation of articles 1, 2, 3, 5, 7 (1) (a), 16, 18 (3) and 26. The African Commission held that Egypt failed to honour its obligation under the Charter by violating the complainants' rights to non-discrimination and equality before the law. The African Commission urged Egypt to ratify the Protocol on the Rights of Women in Africa.

⁴¹ Heyns C and Killander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2010) 4thed at 29.

⁴² Frans Viljoen *International Human Rights Law in Africa* (2012) 2nd edition, Oxford University Press: Oxford at 161 where the author briefly described the slow process leading up to the adoption of the Charter. It must be stated however, that despite

Rights (herein after referred to as AU Commission or African Commission) has been the main operations system of the African Charter mandated with the promotion and protection of human rights on the continent.

Since the African Charter came into force more than three decades ago, the protection of human rights on the African continent remains a constant struggle. Although there have been remarkable decisions taken by the African Commission, States have been less enthusiastic in complying with the recommendations given by the Commission.⁴³ Other factors that militate against the effectiveness of the Charter include war and conflict, corruption and lack of good governance.

It must, however, be stated that the African Charter remains the bedrock for protection and promotion of human rights on the continent hence the provisions in article 60 and 61 requiring the African Commission to 'borrow' principles and policy from international law⁴⁴ and in art 66, to make additional Protocol or supplements to the

the shuffling of feet and stagnation, Africa was on the path to making a commitment to human rights protection.

⁴³ Frans Viljoen (2012) *supra* 42 at 289 where the author was of the view that the African Commission's work though weakened by fluctuation of commission members as well as lack of institutional memory has made significant progress to dispel ideas that human rights protection in Africa is a pipe dream.

⁴⁴ In Chapter four of the Charter dealing with applicable principles, art 60 and art 61 provide that 'the Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United Nation, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights ...'

Charter.⁴⁵ To this end, the African system of human rights broadly comprises the following:⁴⁶

- (a) the African Charter on Human and Peoples' Rights with its operational arm; The African Commission;
- (b) the African Charter on the Rights and Welfare of the Child;
- (c) the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights;
- (d) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
- (e) The African Peer Review Mechanism.

A cursory glance at the mandate given to the African Commission indicates the zeal by African leaders to protect human and peoples' rights.⁴⁷ In fact, the African Charter as an international treaty places high regard on the importance of African culture and tradition; duties and responsibility of individuals and groups towards the community. As pertinent as the regard for culture and tradition may be, it remains a rather controversial area. Many have criticised the African Charter for 'lending insufficient protection to women' and also for being pro-traditional and as such reinforcing patriarchy to the detriment of the equal rights of women.⁴⁸ Hansungule,⁴⁹ nevertheless, makes a

⁴⁵ Art 66 provides that 'Special Protocols or agreements may, if necessary, supplement the provisions of the present Charter.'

⁴⁶ Michelo Hansungule 'African System of Human Rights' Key Note Address delivered on 25th October 2007, Johannesburg, South Africa.

⁴⁷ The African Commission derive its protective and promotional mandate from art 30 of the African Charter.

⁴⁸ M.S. Nsibirwa 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) Vol 1 *African Human*

pertinent observation that women themselves have not vigorously risen up to the occasion by utilising either the Protocol on the Rights of Women in Africa or the CEDAW procedure to protect and advance their rights.

6.3.1 Substantive rights in the African Charter

In the African Charter, the guiding principle was to draft a legal document that embodies the African philosophy of law and to reflect African conception of human rights. The African Charter, therefore, possesses unique features and sets the human rights standard by guaranteeing specific rights to individuals in its articles and certain rights to groups of people. There are thus legally recognised civil and political rights, social, economic and cultural rights and what is commonly referred to as solidarity rights such as the right to self-determination, right to freely dispose of natural wealth and resources and the right to development.

In the African Charter, individual civil and political rights are guaranteed from art 2 to 13. Some of the rights and freedoms include: the right to life,⁵⁰ right not to be exploited, enslaved or tortured,⁵¹

Rights Law Journal at 47; J. Oder 'Reclaiming Women's Social and Economic Rights in Africa: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2004) 5 (4) *Economic and Social Rights Review* at 5; C. Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State Law Review* 687-688; Corrine Parker *Using Human Rights to Change Tradition* (2002) Intersentia, Utrecht at 116.

⁴⁹ Michelo Hansungule 'CEDAW and the Protocol on the Rights of Women in Africa, taught master's class, University of Essex, United Kingdom, February, 2013.

⁵⁰ Art 4.

⁵¹ Art 5.

right to freely participate in the government of the country,⁵² and the right to property.⁵³

Art 2 provides for the right not to be discriminated against based on a number of grounds such as race, nationality, ethnic group or clan, sex, birth, religion and belief. This is not an exhaustive list as the Charter also provides for non-discrimination based on 'other status' which would include age, disability and sexual orientation. Art 3 on the other hand affirms the right to be equal before the law and equal benefits of the law.

The case-law brought before the African Commission have grown considerably, however, no case has been decided yet concerning women's rights until the case of the *Egyptian Initiative for Personal Rights v Egypt*.⁵⁴ Egypt was found in violation of article 2, 3, 18 (3), 16 (1) and 26 of the African Charter. Certainly, this is a welcome development particularly given that Egypt is yet to ratify the Protocol on the Rights of Women in Africa.

However, other cases decided on the continent such as in Botswana and Zambia that relied on international human rights law; include the case of *Attorney-General v Dow*,⁵⁵ and the case of *Sara Longwe v Intercontinental Hotel*.⁵⁶ Both cases dealt with discrimination against

⁵² Art 13.

⁵³ Art 14.

⁵⁴ Rashida Manjoo 'Women's Human Rights in Africa' in Manusuli Ssenyonjo (ed) *The African Regional Human Rights System: 30 years after the African Charter on Human and Peoples' Rights* (2012) Martinus Nijhoff Publishers Leiden: Boston at 143.

⁵⁵ *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992).

⁵⁶ *Sara Longwe v Intercontinental Hotels, Limited* [1993] 4 LRC 221.

women based on sex and gender. The *Unity Dow* case brought about some reform on nationality laws in that country. Although, *Unity Dow* brought changes to nationality laws in Botswana, it is disheartening to find that other countries who are State Parties to the Africa Charter still have discriminatory nationality laws. For example, in terms of section 26 (2) (a) of the citizenship law applicable in Nigeria, Mary a Nigerian woman born in Kogi State of Nigeria and married to a Spanish man who resides with her in Abuja, Nigeria cannot confer a Nigerian citizenship on her Spanish spouse and if he wishes to be conferred with Nigerian citizenship, he would have to renounce his birth country.⁵⁷ This situation is untenable given that Nigeria is the only country in Africa that has domesticated the African Charter in terms of the Enforcement Act.⁵⁸ It is my view that Nigeria should emulate Botswana and make the necessary reforms to the law regarding nationality. In addition, the provisions relating non-discrimination in the African Charter could be used to seek redress given that Nigeria domesticated the African Charter in full.

It is common knowledge that in Africa, patriarchy is deeply entrenched resulting in sex and gender discrimination. The attitude is so widespread that little or no value is accorded to women. A man can confer citizenship and a woman may not do so; a man can sell family or clan land if he so desires but a woman may not do so even if her life depends on the proceeds from the sale. The Tanzanian High Court made reference to international human rights law particularly the non-discrimination clause in article 18 (3) of the African Charter in the case

⁵⁷ The present author had an informal discussion with Mary in Abuja, Nigeria in September 2011 after her marriage to the Spanish man in 2010.

⁵⁸ Enforcement Act Cap 10 Laws of the Federation 1990.

of *Ephraim v Pastory*⁵⁹ concerning Haya customary law where the court reiterated the need for elimination of all forms of discrimination against women by declaring that a woman may alienate clan land if the proper processes were followed just like any other member of that clan.

For many in Africa, particularly women, enjoyment of equal benefit of the law is a mere illusion. Other vulnerable groups suffer immeasurably from discrimination. For example, many in Africa considers being gay un-African. In communities across Africa, people of sexual minority face abuse, rape and death, as noted in South Africa and Uganda.⁶⁰ These violations of human rights occur despite the non-discrimination clause in the African Charter on the ground of 'other status' which would include sexual orientation. No doubt, 'other status' as a ground is far reaching and could be used to fight discrimination in its entire ramification in the region.

In addition, the right to equality and non-discrimination remains the cornerstone for civil and political rights which is directly related to other rights such as the right to life.⁶¹ In Nigeria, the Islamic sect *Boko*

⁵⁹ *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990).

⁶⁰ See the case brought in the US state of Massachusetts in terms of the Alien Torts Statute (ATS) by the sexual minorities group against a US church minister- Sexual Minorities Uganda v Scott Lively; available at <http://ccrjustice.org/ourcases/current-cases/sexual-minorities-uganda-v-lively>

(accessed 12 May 2013); see also

www.oxfam.de/sites/www.oxfam.de/files/the_status_of_sexual_minorities_in_southernAfrica_final.pdf detailing the status of sexual minorities in four Southern African countries of Mozambique, Zambia, South Africa, and Zimbabwe.

⁶¹ Art 4 of the African Charter.

Haram has claimed responsibility for the death and injury of at least five hundred thousand people including women and children in the last two years.⁶² Also, the African Charter prohibits slavery and exploitation.⁶³ In Africa, women and young girls face sexual exploitation and some form of modern day slavery. For instance, in Kwa Zulu Natal, South Africa, 16 young girls were held against their will and used for sexual exploitation.⁶⁴ The respect for human dignity implies that no one may be enslaved, pawned or sold into bondage or slavery. For instance, it was found out recently that a group of men have abducted about 47 Ethiopians and kept them prisoners with the promise for jobs in Musina, Limpopo, South Africa.⁶⁵ All across Africa, cases of sexual exploitation of women are rife signalling the emergence of modern day slavery for Africans.

For many within the African continent, it is significant to find the inclusion of socio-economic rights alongside civil and political rights in the African Charter such as the right to work under equitable and satisfactory conditions (art 15), right to health (art 16), and right to education (art 17). These socio-economic rights guaranteed in the African Charter are very important for women, although some key rights have been clearly omitted such as the right to housing, water,

⁶² See more information on the deadly attacks on this Islamic sect in Nigeria against men, women and children where on 7 May 2013, fifty-five people including women and children were killed in an attack in Borno State that lasted for five hours. See generally www.bbc.co.uk/news/world-africa-22444417 (accessed 12 May 2013).

⁶³ Art 5 of the African Charter.

⁶⁴ News 24 of 19th February, 2012, www.news24.com.

⁶⁵ SABC News 9th May 2012.

social security and food.⁶⁶ Another unique feature of the Charter is found in art 18 guaranteed as follows:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral;
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community;
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions;
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

The provision covers many aspects of human life and relationship by indicating the importance of the family in sustaining society; keeping custody of traditions and moral values; ensuring the elimination of discrimination against women and the child, as well as protecting the aged and the disabled. On the face of it, this particular provision encompasses all that must be protected within the society. Criticism have been made against the Charter that it lumped the rights of women and children together with maintenance of African tradition and morals, which, in many instances have been used to abuse and

⁶⁵⁸ In the *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoniland case*); the African Commission read into the right to a general satisfactory environment favourable to their development in terms of art 24 of the African Charter; the right to shelter and the right to food. It is somewhat surprising that the socio-economic rights contained in the African Charter are not made subject to 'progressive realisation, or subject to available resources, in other words, not hortatory. However, in the case of *Purohit and Another v The Gambia*, the Commission made reference to the progressive realisation of the right to health (para 84).

violate the rights of women.⁶⁷ In many instances, women in Africa are treated as minors and not capable of owning land on their own, accessing credit or dispensing justice. It has been stated that art 18 reinforces outdated stereotypes about women and the role of women in society and so has been partially responsible for the drive to adopt the Protocol to the African Charter on the Rights of Women in Africa.⁶⁸

It is argued here that the provision envisages a society that respects and protects its people, namely, women, children, the aged and disabled. Despite the criticisms, there are many possibilities and potentials in the provisions of art 18 that would be sufficient to engender rights and freedoms contained therein.⁶⁹ In art 19 to 24, the Charter makes a radical shift to guarantee not only individual rights but the rights of groups as well. For a majority of women, being part of a group may be a site for discrimination. In my view, that the Charter failed to explicitly state the meaning of people is in no way a confirmation that group or collective rights trumps the individual rights of women. Also, in most African societies, the people comprises the entire community; the living, the unborn and the dead hence the need to abandon individual interests whilst surrendering to the general

⁶⁷ Christof Heyns and Magnus Killander 'The African Regional Human Rights System' in Felipe Gómez Isa and Koen de Feyter (eds) *International Human Rights Law in a Global Context* (2009) University of Deusto, Bilbao, at 865.

⁶⁸ Fareda Banda *Women, Law, and Human Rights: An African Perspective* (2005) Hart, Oxford.

⁶⁹ Lois L. 'Article 18 of the African Charter on Human and People's Rights: A Progressive Approach to Women's Human Rights' 3 (1996) 1 *East African Journal of Peace and Human Rights* 92-114; Winston Langley 'Rights of Women, The African Charter, and the Economic Development of Africa' (1987) *Third World Journal* 215; Ebou Bondzie-Simpson 'A Critique of the African Charter on Human and People's Rights' 31 (1988) *Howard Law Journal* 643.

order of peace and harmony for all within the society.⁷⁰ In effect, the African Charter succeeded here in maintaining the link between the individual as a composite whole of a group in a society and that one does not exist in a vacuum but exists as a complement of the other giving rise to the need for a contextual approach to human rights.⁷¹ Although no formal definition exists in the Charter, there is growing consensus amongst jurists based on a study undertaken by UNESCO that characterise the notion as follows:

1. An enjoyment by a group of individuals of some or all the following features:
 - (a) common historical tradition;
 - (b) ethnic group identity;
 - (c) cultural homogeneity;
 - (d) linguistic unity;
 - (e) religious or ideological affinity;
 - (f) territorial connection;
 - (g) Common economic life.

2. The group on a whole must have the will to be identified as a people or the consciousness of being a people.⁷²

Also, group or collective rights in the African Charter, provided in art 21, 22 and 24 are very relevant to the protection of socio-economic

⁷⁰ Keba M'Baye, 'The Organisation of African Unity' in Karel Vasak & Philip Alston (eds) *International Dimension of Human Rights* (1982) at 589 quoted in Nmehielle *The African Human Rights System: Its Laws, Practice, and Institutions* (2001) at 138.

⁷¹ Theo van Boven, 'The Relations between Peoples' Rights and Human Rights in the African Charter' 7 (1986) 2-4 *Human Rights Law Journal* 183 at 186.

⁷² UNESCO Meeting of Experts on International Law, Paris, February (1990) quoted in Nmehielle (2001) at 140.

rights of women.⁷³ In most post-colonial African countries particularly those from British rule such as Nigeria, Zambia and Zimbabwe socio-economic rights are not justiciable and thus cannot be enforced by the courts.⁷⁴ In art 21 (1), the African Charter provides:

'All peoples shall freely dispose of their wealth, and natural resources. This right shall be exercised *in the exclusive interest of the people*. In no case shall a people be deprived of it'... (Emphasis mine)

The people of Niger-Delta in Nigeria have been seeking for appropriate benefits and compensation for the oil revenue generated by the government of Nigeria in their homeland. This agitation gave rise to one of the famous decisions ever made by the African Commission in relation to socio-economic rights.

In Communication 155/96, the *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*, it was alleged that the government of Nigeria with its state-owned Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC) have violated an array of socio-economic rights of the people of Ogoni. The Complaint alleged that Nigeria and SPDC as the main company that exploited oil from did so without any regards

⁷³ Michelo Hansungule 'The African System of Human Rights Recollected in Dares Salam' An unpublished paper (2004), (on file with author); Danwood Chirwa 'Toward Revitalizing Economic, Social, and Cultural Rights in Africa: *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria*' 10 NO 1 *Human Rights Brief* 14 (2004).

⁷⁴ Danwood Chirwa 'Towards Revitalizing Economic, Social, and Cultural Rights in Africa: *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria*' 10 No 1 *Human Rights Brief* 14.

to the health and the environment of the local communities. Toxic wastes were deposited into the soil and water ways leading to serious health concerns such as respiratory ailments, skin infection and reproductive failure for women.⁷⁵ Further, the Nigerian government was found in complicit with the oil company because they failed to protect its citizens from activities of private actors that were harmful to their community.

The African Commission's findings in the *SERAC* case, is in my view, one of its best decisions because of the extensive violations which it found against the Nigerian government in terms of articles 2, 4, 14, 16, 18 (1), 21 and 24 of the African Charter. The Commission went further to include right to food and housing, which, although was not explicitly provided in the Charter formed the mainstay of the livelihood of the people of riverrine Ogoni particularly women who trade in salt and fish. It was evident that the toxicity of the environment had emasculated the peoples' opportunity to sustain their environment and their livelihood as fishermen / fisherwomen.

Although the African Commission in their decision was reluctant to designate the Ogoni as a 'people' as envisaged in the African Charter and they failed to make explicit pronouncement on the definition of 'people', the African Commission by implication considered the Ogoni population as a 'people' in view of the extensive damage done to their lives and the environment without adequate material benefit to the

⁷⁵ Social and Economic Rights Action Centre *Perpetuating Poverty, Consolidating Powerlessness: Oil and the Niger-Delta*, (2005) 10-11.

local population.⁷⁶ It is my view that gender justice would remain unfulfilled as long as the oppression of certain groups continues to take place within many independent African states.⁷⁷ It must also be stated that the African Commission has been proactive in ensuring that the rights of men, women and children are protected. However, criticism made against the African Charter as being inadequate in protecting women, created the need to establish a protocol in terms of art 66 to remedy the inadequacies.

6.3.2 The Protocol to the African Charter on the Rights of Women in Africa

Africa has complemented the global human rights instruments relating to women by establishing the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁷⁸ as a supplementary to the African Charter.⁷⁹ As already alluded to, the African Charter is inadequate in the protection of women given the myriad of abuses faced by this vulnerable group in many African countries. Violence against women, discrimination, harmful traditional and cultural practices, sexual and reproductive rights issues are some

⁷⁶ Social and Economic Rights Action Centre *Perpetuating Poverty, Consolidating Powerlessness: Oil and the Niger-Delta* (2005) at 143.

⁷⁷ Most times, the victims in many cases of oppression and conflict are women and children. For example, the government of Nigeria has sent many Niger Delta militants to various countries including South Africa to gain skills that would aid their reintegration into society but nothing has been done for many women and children who are also victims of the activities of the oil companies.

⁷⁸ Michelo Hansungule 'CEDAW and the Protocol on the Rights of Women in Africa' taught Master's class, University of Essex, United Kingdom, February, 2013.

⁷⁹ Art 66 of the African Charter on Human and Peoples' Rights provides that: 'special protocols or agreements may, if necessary, supplement the provisions of the present Charter'. The Protocol was adopted in 2003 and it came into force in 2005.

of the challenges to the rights of women in Nigeria, South Africa, Zambia and in fact in many countries in Africa.

As at January 2013, almost a decade to the adoption of the Protocol on the Rights of Women in Africa, 36 out of 54 countries have ratified the Protocol.⁸⁰ The Protocol on the Rights of Women in Africa is aimed at giving the women on the continent a life-line. As already shown in previous chapters in the study, the majority of women face multi-levels of discrimination and gender-based violence of such extreme that the remedies available to them are inadequate. The African Charter on the other hand, seems too narrow and deeply traditional to be relied upon by majority of the women. Fareda Banda aptly described the confidence showed in the Protocol as a trailblazer in Africa.⁸¹ The key elements of the Protocol seem to strike at the heart of the multifarious challenges facing women in Africa from enjoying their human rights.⁸² Although the Protocol borrowed a lot and was in fact modelled after CEDAW, it, however, made significant shift by guaranteeing rights that are critical for African women. The innovation

⁸⁰ Faiza Juma Mohamed, Director, Nairobi Office of Equality Now, 'Celebrating a Decade of the African Women's Rights Protocol' July, 2013. Countries that are yet to ratify the Protocol are: Algeria, Botswana, Burundi, Central African Republic, Chad, Egypt, Ethiopia, Eritrea, Madagascar, Mauritius, Niger, Sahrawi Arab Republic, Sao Tome & Principe, Sierra Leone, Somalia, Sudan, and South Sudan.

⁸¹ Fareda Banda 'Blazing a Trail: The Protocol on the Rights of Women in Africa Comes into Force' (2006) 50 (1) *Journal of African Law*, 72; Fareda Banda *Women, Law and Rights: An African Perspective* (2007) Hartland Publishers: Oregon.

⁸² CEDAW as an instrument protecting the rights of women seems inadequate in a number of issues critical to the survival of African women hence within Africa, the substantive rights enshrined in that instrument are generally viewed as a Western construct that has failed to speak directly to the practical concerns of the African Woman.

is evident in sexual and reproductive rights, the legal prohibition of female genital mutilation (FGM) and reversing inequality and discrimination in inheritance and for widows.⁸³ The Protocol on the Rights of Women in Africa currently remains the first international human rights treaty to explicitly refer to HIV/AIDS.⁸⁴ It has also been established in this study that disinheritance, discrimination and poverty are fuelled further by HIV /AIDS which has continued to decimate Africans with women and children being most vulnerable.

The Protocol on the Rights of Women in Africa has taken care to ensure that women in Africa should no longer be faced with discrimination, harmful cultural practices and disinheritance. So, the Protocol obliges State Parties to undertake measures including legislation, training, information dissemination and education of the people as well as provision of resources to ensure the protection of the rights of women.⁸⁵ Article 2 of the Protocol on the Rights of Women in Africa clearly stipulates the obligations of the State Parties to move beyond the public sphere and extend into the private sphere where the majority of women face discrimination. Essentially, State Parties'

⁸³ Article 5 of the Protocol on the Rights of Women in Africa addresses the impact of cultural practices that are harmful to women particularly FGM, further, it makes clear the rights to health and sexual and reproductive health of women, by specifically addressing self-protection against HIV/AIDS due to the adverse impact of HIV/AIDS in Africa, art 20 and 21 deals with widows and inheritance to property.

⁸⁴ Centre for Human Rights, University of Pretoria Publication *The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in Six Selected Southern African Countries: An Advocacy Tool* (2009) at 3.

⁸⁵ Rachel Mayanja 'The Protocol on the Rights of Women in Africa' in A.A Yusuf & F. Ouguergouz (eds) *The African Union: Legal and Institutional Framework. A Manual on the Pan-African Organisation* (2012) Martinus Nijhoff Publishers: Leiden. Boston 455-476.

obligations are two-fold: first is to ensure the elimination of discrimination against women and second, to modify cultural and social patterns of behaviour of men and women with a view to achieving the elimination of harmful cultural practices and all other practices which are based on the idea of inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.⁸⁶ Clearly, the objective of the Protocol on the Rights of Women in Africa to eliminate all forms of discrimination against women is underscored by ensuring that violations of the rights are redressed by competent authority provided by law.⁸⁷ Undoubtedly, the Protocol on the Rights of Women in Africa have taken steps to ensure that women do not have to face discrimination in pursuance of their political, social, economic, and cultural development.

6.4 The Protocol on the Rights of Women in Africa and institutional frameworks in Nigeria, South Africa and Zambia

In art 2 of the Protocol on the Rights of Women in Africa, it envisages that discrimination against women must be eliminated in all its ramifications through the use of all kinds of measures including legislative, regulatory, educative and corrective.

⁸⁶ Article 2 (1) provides a list of actions to be undertaken by State Parties in order to meet those obligations under the Protocol on the Rights of Women in Africa.

⁸⁷ Article 25 provides for remedies to be awarded to any woman whose rights under the Protocol have been violated. Accordingly, State Parties shall undertake to: (a) provide appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;

(b) ensure that sure remedies are determined by competent judicial, administrative or legislative authorities or by any other competent authority provided by law.

The three countries under review in this study (Nigeria, South Africa and Zambia) all have the equality clause in their constitutions. For South Africa, equality is both a right and a value given its apartheid past history.⁸⁸ In its constitution, section 9 provides for equality on a number of grounds including sex, birth, gender, religion, sexual orientation or any other status. Nigeria also has non-discrimination clause in its constitution in section 42 and Zambia in section 23.

To ensure that State Parties use every resource at their disposal, art 2 (1) (b)-(d) of the Protocol on the Rights of Women requires that measures be taken to eliminate discrimination including the use of affirmative action and having gender policy frameworks. South Africa in complying with the provisions of the Protocol has enacted several pieces of legislation aimed at engendering equality. Among them is the Prevention of Unfair Discrimination Act of 2000 under which the Equality Courts were also established to adjudicate on cases of discrimination and violations of equality rights.⁸⁹ Other gender specific legislation include the National Health Act of 2004 which seeks to promote equal access to health care, and the National Education Policy Act of 1996 providing a framework to achieve equal education.

South Africa has made remarkable strides in promoting gender equality through its extensive National Policy Framework for Women's Empowerment and Gender Equality, as well as Adult Basic and Education Training Centres which are established to deal with women's empowerment through education and training.

⁸⁸ Preamble to the 1996 South African Constitution.

⁸⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Further more, in South Africa, to ensure that women are protected from sexual abuse and violence as well as other forms of violence, the government has established 365 days National Action Plan to end Violence against Women and Children.⁹⁰ The country also actively participates in the human rights campaign of 16 Days of Activism to end Violence against Women. Also to deal with the ravages of HIV/AIDS, the government initiated the South African National HIV/AIDS Strategic Plan 2007-2011. The aim of this intervention on HIV/AIDS is to encourage changes in the attitude and conduct of men and women. The National Policy (1999) also envisages attracting behavioural changes in learners and educators in public schools as well as students and educators in Further education and training.

The institutional measures taken by South Africa to promote and protect gender equality include the establishment of the Office on the Status of Women and Gender Focal Points. The Commission on Gender Equality (Gender Commission) is one of the institutions established to support democratic processes in the country. The Gender Commission is pro-active in disseminating information on gender-based violence that takes place in the country.⁹¹ The main purpose of the Gender Commission is to ensure a free society that is free from gender discrimination and inequality.

⁹⁰ The Action Plan to end violence against women was launched on the 8th of March 2007 by the then Deputy President, Phumzile Mlambo-Ngcuka. See full document at www.info.gov.za/view/DownloadFileAction?id=72515 and www.genderlinks.org.za/articles/south-africa-national-action-plan-2009-06-20 (accessed November 2013).

⁹¹ See generally the activities of the Commission on Gender Equality, www.cge.org.za.

It is my view that South Africa indeed has made remarkable progress in terms of institutionalising gender equality.⁹² However, a deep-set notion of the roles of women in society is maligned against women leading to ineffective institutional measures on the ground where it matters mostly. In 2009, the Ministry for Women, Children and People with Disabilities was created by government.⁹³ A barometer of the works undertaken by this government department has not shown any remarkable progress.

Zambia, like most other African countries, has a non-discrimination clause in its constitution. It is, however, one of those restricted legal systems where there is a claw-back clause in the same provision with non-discrimination.⁹⁴ It remains, therefore, very difficult to address issues of inequalities in such a legal system. The inequalities are reinforced largely by the fact that about 90 per cent of all land in Zambia is controlled by traditional leaders who manage the land according to customary law of primogeniture.⁹⁵ The constitution is dominated by customary law in areas concerning personal status such as marriage, inheritance, adoption and so on.⁹⁶ In other words, the constitution protects the traditional system to the extent that it sustains inequalities. Although Zambia has poor legal measures to promote gender equality, its institutional measures could be seen as

⁹² The South African Human Rights Commission is a body charged with the mandate of investigating violations of the equality guarantees of the Constitution. See generally their programmes and activities at www.sahrc.org.za.

⁹³ See generally the departmental website, www.dwcpd.gov.za.

⁹⁴ See generally art 23 of the Zambian Constitution.

⁹⁵ Centre for Human Rights, University of Pretoria Publication (2009) at 18.

⁹⁶ Zimbabwe and Lesotho are also other countries in Africa that have this kind of claw back in its constitution.

commendable. For example, the country has gender focal points in all its ministries as well as Human Rights and Gender Matters in the Legislature. Zambia also adopted a National Gender Policy in 2000 and a Strategic Plan in 2004 with the view to increasing the intake of girls in science colleges and to facilitate easy access to financial loans by women.

One of the critical steps Zambia has taken to ensure implementation of the Strategic Plan is to organise a Gender Consultative Forum which brings together government and all other stakeholders to review the progress made on the National Gender Policy. Also, Zambia for Change, an NGO working to effect behavioural change particularly amongst traditional leaders on issues concerning women such as sexual cleansing and widow inheritance has made in-roads in institutionalising gender justice at the grassroots.

Nigeria, in section 42 of its constitution provides for freedom from discrimination, stating that 'a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person

- (a) be subjected either expressly, or in the practical application of, any law in force in Nigeria, or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or
- (b) ...
- (c) Any privilege or advantage that is accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinion;
- (d) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth...'

The grounds of non-discrimination in the above provision are an indication of the diversity that obtains in Nigeria. The non-discrimination guarantee of the constitution is somewhat a closed list as it did not make provision for non-discrimination on grounds of gender or any other status. It is my opinion that if gender or any other status were to be included, it would have been able to deal with the numerous challenges to gender equality particularly in the area of custom and inheritance.⁹⁷ To ensure that the equal rights of women and men are protected, the country has adopted legislative measures such as the Matrimonial Causes Act⁹⁸ which in terms of s 72 (1) enables a woman to be settled with respect to property which is entitled to whilst that may be under legal proceedings. The essence of this provision is to cushion any harsh realities arising from such proceedings which most times are long and intractable. Also, by the enactment of the Prohibition of Infringement of a Widow's Fundamental Rights Law, it was envisaged that the numerous degrading treatments that a majority of women face at the death of their husbands will be eliminated.⁹⁹

⁹⁷ *Akinubi v Akinubi* [2001] CHR 176 at 218 in which the Supreme Court of Nigeria held that 'it is a well settled rule of native law and custom of the Yoruba that a wife would not inherit her husband's property. Indeed under the Yoruba customary law, a widow under intestacy is regarded as a part of the estate of her deceased husband and to be administered or inherited by the deceased family ...'

⁹⁸ See generally M 7 Laws of the Federation, 2004.

⁹⁹ See generally, Prohibition of Infringement of a Widow's Fundamental Rights Law, 2001. The Supreme Court has also held that to forcefully make a widow shave her hair against her faith is a violation of her fundamental right to freedom of worship and religion. And further, men are not made to undergo such treatment. See the following cases; *Onwo v Oko* [1996] 6 NWLR 587; *Agbai v Okagbue* [1991] 1 NWLR (pt 204) 391.

At the institutional level, the government has established a number of programmes and policies to combat discrimination. This includes the National Commission for Women¹⁰⁰ which was established to promote the advancement of women and eliminate discrimination on grounds of sex. In 1993, the Ministry of Women Affairs was created to carry out programmes that would empower women. This Ministry also exists at the state level to ensure that women at the grassroots are included in any development programmes.

Nigeria has a National Policy on Women.¹⁰¹ As a handbook for government's commitment, the purpose of the policy is to grant women full and active citizenship by being part of national development plans in order to remove gender inequalities in the society.¹⁰² Evidently, the three countries under study have made progress by enacting gender-specific legislation aimed at removing discrimination and inequalities. The challenge lies with implementation

¹⁰⁰ This Commission was originally established by a military decree NO 30 in 1989. Other women-specific programme that were established by the wives of the military ruler at the time include Better Life for Rural Women by Maryam Babangida in 1992; Family Support Programme (FSP) which was started by the wife of Late Sani Abacha, Mariam Abacha in 1994.

¹⁰¹ One of the Objectives of the National Gender Policy of the Federal Ministry of Women Affairs and Social Development, Abuja is to 'defend and advance women's rights. Further information available at <http://cewhin.org.pdf/national%20gender%20policysituation%20analysis.pdf> (accessed 12 May 2013). See also the report commissioned by the UK Department for International Development and British Council, Nigeria available at www.britishcouncil.org.ng/files/2012/12/genderreport_summary.pdf (accessed 12 May 2013).

¹⁰² Felicia Anyaogu *Access to Justice in Nigeria: A Gender Perspective* (2009) Ebenezer Productions Nigeria Ltd: Enugu, at 49.

which, in my view requires political will on the part of governments and judicial activism lead by judges in the judicial system.¹⁰³

6.4.1 The Protocol and the African Child

Generally, issues of women in Africa would also involve the position of the girl-child. To this extent, the Protocol on the Rights of Women in Africa is relevant to the girl-child and it also has an obvious overlap with the African Charter on the Rights and Welfare of the Child (hereafter, the African Children's Charter).¹⁰⁴ The Protocol on the Rights of Women in Africa in art 1 (k) refers to the female gender without setting any age limitations and the African Children's Charter deals with "every human being below the age of 18 years."¹⁰⁵ The 'girl-child' is therefore, increasingly relevant and thus requires further protection in view of both of these human rights instruments.

For the child, the age of majority is very important to virtually every aspect of his / her development. For instance, the African Children's Charter sets the minimum age of marriage at 18 years of age, the

¹⁰³ See generally the *Bhe* case in South Africa; *Mojekwu v Mojekwu*; and *Mojekwu v Ejikeme* in Nigeria.

¹⁰⁴ See Art 1 (k) of the Protocol on the Right of Women in Africa reproduced in Heyns C and Killander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2010) 4th edition, Pretoria University Law Press (PULP); The African Charter on the Rights and Welfare of the Child was adopted in 1990 and entered into force in 1999.

¹⁰⁵ Frans Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 11 *Washington & Lee Journal of Civil Rights and Social Justice* at 24. The Protocol on the Rights of Women in Africa without setting limit for age of women in my view is an endorsement that at any age, the child is treated as woman of full age. This flies in the face of the problems of forced and/ or child marriages that is rife on the continent.

same threshold as the Protocol on the Rights of Women in Africa and same applies to the provision that such marriages should be recorded in writing.¹⁰⁶ Art 21 (2) of the African Children's Charter further prohibits child marriage and betrothal of girls and boys. However, despite these provisions, too often children particularly the 'girl-child' are exposed to situations that violate their rights including forced and / or early marriage, male preference,¹⁰⁷ and sexual exploitation and trafficking.

Many countries particularly those with Islamic law like Nigeria have in practice forced girls to marry at earlier times.¹⁰⁸ In Islamic law, the consent of the girl is immaterial as the father, having the power of *Ijbar* according to the law can validly contract a marriage on behalf of his virgin daughter without consideration for her age.¹⁰⁹ Thus, many

¹⁰⁶ Art 21 (2); Art 6 (b) of the Protocol on the Rights of Women in Africa; art 1 of the UN Convention on the Rights of the Child (CRC).

¹⁰⁷ Carol Arinze-Umobi *Domestic Violence against Women in Nigeria: A Legal Anatomy* (2008) Folmech Printing & Publishing: Onitsha, at 58 in which the author stated that 'Male /Son preference can be traced to patrilineal system of many communities in which inheritance is according to male descent. The girl-child in this instance is regarded as less than desirable. Consequently, less emphasis is placed on her life, her education and she may be married off quite early without even her consent. Males are preferable because of the economic contributions they make by working outside of the home whilst even though girls work longer and harder, their work is largely unremunerated in the family or at home.

¹⁰⁸ Felicia Anyaogu *Access to Justice in Nigeria: A Gender Perspective* (2009) Ebenezer Productions Ltd: Enugu, 96.

¹⁰⁹ Carol Arinze-Umobi *Domestic Violence against Women in Nigeria: A Legal Anatomy* (2008) at 89 in which the author stated that various Declarations of Native Law and Custom Orders in the Northern States range thus: for girls in Biu, it is fourteen years; Tiv at puberty; Borggu is thirteen and Idoma-twelve years. See also *Emeakuna v Umeojiako* Suit NO AA / I A/ 76 Unreported case at High Court Awka,

times in communities in Africa, the meaning of a child is culturally determined. Social and economic circumstances may result in a child being treated by the community as an adult and taking the responsibilities that are too burdensome but notwithstanding such status is still by law; a child.¹¹⁰

For many African girls, regular attendance at school may be hampered by poverty; inability to procure other relevant items for schools; and pregnancy-related incidents. Most times dealing with sexual maturation could act as a hindrance to attaining highest physical and mental development for girls. Evidently, when such girls fall pregnant at school, it remains an uphill battle to reabsorb them at school as other socio-economic difficulties take centre stage rather than their education. Another issue that affects girls at school in terms of performance and well-being is proper sanitation and health care. Lack of adequate sanitary protection erodes the girls' confidence and as such their ability to concentrate and perform maximally at school. According to Dengu-Zvobgo:

'Almost half of the menstruating girls interviewed use [ordinary] cotton wool for menstrual protection. The schools and teachers often give girls this form of protection [if it exists at the school]; they argue that it is the best material but some medical doctors say the way the cotton wool is used is unhygienic and could cause infection. Additionally, the distraction of a pile of cotton wool between the legs that has to be kept there by complex "leg work", presents a problem for girls when

October 15 1976 where it was held that the second respondent was fifteen years when the marriage was contracted.

¹¹⁰ Michelo Hansungule 'Protection of Children's Rights in Africa with Specific Reference to the African Charter on the Rights and Welfare of the Child' (June 2003) A paper presented at the Southern African State Reporting Workshop for State Officials, Cape Town at 3.

walking or standing up in class as the material may change position and result in the spoiling of one's uniform. In rural areas where some girls lack underpants, the inability to maintain the wad in place may force some girls to absent themselves from school. Only two out of 20 menstruating rural secondary school girls could access commercial disposable sanitary pads which are recommended as the most suitable form of protection'.¹¹¹

Clearly, education is critical in the formation of the life of any child hence the need to create the enabling environment for growth and development. The African Children's Charter as an international treaty and the only regional children's rights instrument in the world,¹¹² places obligation on State Parties. It requires that they 'recognize the rights enshrined in the Children's Charter; take steps in accordance with Constitutional processes and to adopt legislative or other measures to give effect to the provisions of this Charter'.¹¹³

In recognition of these obligations, South Africa has established the Family Violence, Child Protection and Sexual Offences Unit (FCS, Unit) under the South African Police Service (SAPS), some of the legislative measures taken by South Africa include Children's Act No 38 of 2005

¹¹¹ Dengu-Zvobgo K.C. 'The Impact of School Management on Menstruation' in J.E Stewart (ed) *Life Skills, Sexual Maturation and Sanitation: What's (not) happening in our schools- An exploratory study from Zimbabwe*, (2004) Weaver Press and Women's Law Centre, UZ, Harare as quoted in Julie Stewart 'I Can't go to School Today' in Anne Helleum, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga (eds) *Human Rights, Plural Legalities and Gendered Realities: Paths are made by Walking* (2007) Southern and Eastern African Regional Centre for Women's Law (SEARCWL) UZ: Harare & Weaver Press: Harare, at 301.

¹¹² Sheila B Keetharuth 'Major African Legal Instruments in Anton Bösl & Joseph Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) Macmillan Education Namibia, at 203.

¹¹³ Art 1 (1) of the ACRWC.

which sets out the principles relating to the care and protection of children; Sexual and Related Matters Amendment Act 32 of 2007 which sought for expanded statutory offence of rape, applicable to all forms of sexual penetration without consent regardless of gender. Zambia, also has established the Victims Support Unit (VSU) in all police station to deal with cases of sexual abuse and other related offences.¹¹⁴ In terms of domestication, Nigeria, for example, has domesticated the Convention on the Rights of the Child as part of the Nigerian Law.¹¹⁵

To further ensure compliance by State parties, a Committee was established to 'promote and protect the rights and welfare of the child in terms of art 32 of the African Children's Charter. The Committee of Experts on the Rights and Welfare of the Child was established as a supervisory mechanism related to this Charter with the mandate to ensure the protection and promotion of the rights contained in the African Children's Charter.¹¹⁶

Clearly, the African Children's Charter made significant advance on the existing human rights law, and the Protocol on the Rights of Women in Africa by restating these provisions, improves and reinforces the progress already attained.

¹¹⁴ Centre for Human Rights, University of Pretoria *The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in six Selected Countries: An Advocacy Tool* (2009) 15.

¹¹⁵ CRC has been domesticated in Nigeria and is referred to as Child's Rights Act 1 of 2003.

¹¹⁶ Sheila B. Keetharuth 'Major African Legal Instruments' in Anton Bösl & Joseph Diescho (eds) *Human Right in Africa: Legal Perspectives on their Protection and Promotion* (2009) Macmillan Education, Namibia, at 206.

6.4.2 The Protocol and Solemn Declaration on Gender Equality

Members of the African Union adopted in 2004, a Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration) placing emphasis on elimination gender-based violence through implementing measures to deal with HIV/AIDS and economic, social and legal dimensions of violence against women.¹¹⁷ Specifically targeting the domestic law and practice of state parties, the Solemn Declaration addresses nine areas that resonate with the Protocol. For instance, (a) the promotion of women's rights, and in particular, the right to development;¹¹⁸ the prohibition of the abuse of women as wives and sex slaves;¹¹⁹ the implementation of legislation to guarantee women's land, property, inheritance, and housing rights;¹²⁰ and the impact of HIV/AIDS on women.¹²¹

¹¹⁷ Solemn Declaration on Gender Equality in Africa adopted by the AU Assembly of Heads of State and Government in Addis-Ababa, Ethiopia in July 2004. Declaration is reproduced in Heyns C and Killander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2010) 4th edition, Pretoria University Law Press (PULP) at 173.

¹¹⁸ AU Solemn Declaration, art 6, ("ensure the active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation where necessary."); art 19 of the Protocol provides that "women shall have the right to fully enjoy their right to sustainable development."

¹¹⁹ Compare AU Solemn Declaration, art 2, 3 with the Protocol, Art 3(3), 3(4), 4 (2) (g).

¹²⁰ Compare the Protocol art 6, 16 dealing with property in the context of marriage and art 21 dealing with inheritance, and AU Solemn Declaration art 7.

¹²¹ AU Solemn Declaration art 1 ("accelerate the implementation of gender specific economic, social and legal measures aimed at combating the HIV/AIDS pandemic and effectively implement both Abuja and Maputo Declarations on Malaria, HIV/AIDS, Tuberculosis and Other Related Infectious Diseases."), compare art 14 of the Protocol that focuses on self-protection and right to be informed of the status of a sexual partner.

To further advance gender justice within the sub-region, the Southern Africa Development Commission (SADC) adopted the SADC Gender Protocol to deal with domestic law and practice within the sub-region. There are similarities and some notable difference between the Protocol on the Rights of Women in Africa and the SADC Gender Protocol.¹²² It is commendable in my view that the sub-region made serious commitment to ensure the realisation of gender justice within their sub-region having regards to the challenges that majority of women face in Southern Africa.

6.5 Enforcement of global and regional rights

Clearly, an effective enforcement mechanism for the protection of women's rights and human rights in Africa is essential. With its unique processes in ensuring the protection of human rights generally in Africa, it is imperative to have an African Court on Human and Peoples' Rights.¹²³

Obviously, having a viable judicial enforcement mechanism for African human rights was a matter of critical concern. It was somewhat difficult to understand why the continent was struggling to make up its

¹²² For elucidation on these similarities and differences, see Frans Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 11 *Washington & Lee Journal of Civil Rights and Social Justice* at 26.

¹²³ Michelo Hansungule 'African Courts and the African Commission on Human and Peoples' Rights' in Anton Bösl & Joseph Diescho (eds) *Human Rights in Africa: legal Perspectives on their Protection and Promotion* (2009) Macmillan Education: Namibia at 233.

mind on what such justice system should reflect.¹²⁴ The evolving justice architecture of the AU became fraught with challenges of duplicity. Various discussions by the AU Heads of State and Government in held in 2004 and 2005 in Addis-Ababa and Sirte, Libya respectively discussed the necessity of a merger. The African Human Rights Court¹²⁵ was mostly favoured by international human rights bodies such as Amnesty International, which felt that, a human rights court on the continent was necessary for addressing the systematic violations of human rights that occur on the continent. Despite the criticisms, the AU forged ahead with a merger for the courts by introducing the Protocol and the Statute of the African Court of Justice and Human Rights.¹²⁶ The African Court of Human and Peoples' Rights is the only regional court in existence pending when the Protocol and

¹²⁴ There were varying degrees of discussions and contestations on matters of resources, jurisdiction of both courts because one would deal with issues of states and the other would deal with matters of human rights. So, there was case of numerous overlapping if not repetition.

¹²⁵ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia on 10 June 1998 and entered into force on 25 January 2004. The first judges were sworn in during the July 2006 Summit of the AU in Banjul, Gambia. This Protocol will be replaced by the Protocol on the Statute of the African Court of Justice and Human Rights once the latter has entered into force.

¹²⁶ The Protocol on the Statute of the African Court of Justice and Human Rights was adopted in Sharm el-Sheikh, Egypt on 1 July 2008. It is yet to come into force as at August 2010, only three countries; Libya, Mali and Burkina Faso have ratified the Protocol. For more on the composition, substantive provisions of the Protocol and other matters relating to the merging of courts, see generally Michelo Hansungule 'African Courts and African Commission on Human and Peoples' Rights in Anton Bösl and Joseph Diescho (eds) *Human Rights in Africa: Legal Perspective on their Protection and Promotion* (2009) Macmillan Education: Namibia, 233-248

Statute on the African Court of Justice and Human Rights comes into force.

Despite the unsettling atmosphere surrounding the operation of an African Court, sub-regional enforcement mechanisms located in the ECOWAS Community Court of Justice¹²⁷ and the SADC tribunal¹²⁸ has been significant in enforcing human rights within the sub-continent.

The ECOWAS Community Court of Justice has since 2008 delivered judgments that are relevant to human rights generally and also the rights of women. For example, in the case of *Hadjiatou Mani Koraou v Niger*¹²⁹ where the court found that the rights of Hadjiatou have been violated. According to the case, in 1996 she was bought for 240,000 CFA francs as a slave girl at the age of 12 by a man aged 46 in the context of wahiya. A practice obtaining in the Republic of Niger where a girl /woman referred to as *sadaka* was bought under the conditions that she carries out domestic chores and caters for the needs of the master; which gives the 'master' the mandate to engage the girl slave in sexual relations at any time of day or night. Interestingly, the case

¹²⁷ ECOWAS Community Court of Justice was created pursuant to articles 6 and 15 of the Revised Treaty of the Economic Commission of West African States (ECOWAS), available at www.courtecowas.org/site2012/index.php?lang=en (accessed 12 May 2013).

¹²⁸ The Southern African Development Commission Tribunal is currently undergoing several challenges in terms of its operation which has been suspended by the Southern African Development Commission (SADC).

¹²⁹ *Hadjiatou Mani Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008). See also the case of *Peter David v Ambassador Raph Uwechue* where the applicant alleged violation of fundamental human right to property regarding the non-payment of his outstanding estate allowance. In this case, however the ECOWAS Community Court of Justice held that it had no jurisdiction to adjudicate on disputes between individuals on human rights violations.

was brought before the court even after the 'master' has given Hadjiatou her letter of emancipation indicating that she is no longer a slave. The above case underscores the necessity for proper enforcement mechanisms within the continent for adjudication on violations of human rights.

In addition, the member states of the AU agreed to to subject themselves to voluntary self-assessment mechanism to promote and re-enforce high standards of governance in four thematic areas:
Democracy and political governance;
Economic governance;
Corporate governance and;
Socio-economic governance.¹³⁰

On the African continent, it was necessary to induce compliance by member states of AU to adhere to the principles of human rights, democracy and the rule of law which are critical to the development of the continent. As of January 2013, 35 countries are members of the African Peer Review Mechanism (APRM), who voluntarily submit themselves to be assessed by their peers in the thematic areas listed above. So far, the result of these assessments is evident in countries such as Kenya and Lesotho.

¹³⁰ Adejoke Babington Ashaye 'The Africa Peer Review Mechanism at Ten: From Lofty Goals to Practical Implementation (19 March 2013) at <http://africlaw.com/2013/03/19/the-african-peer-review-mechansim-at-ten-from-lofty-goals-to-practical-implementation/> , www.nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about (accessed November 2013).

Conclusions

This chapter has critically evaluated the global and regional responses to the realisation of gender justice and found that Africa, through the AU framework has made significant strides in engendering justice and human rights on the continent. One can no longer accuse the continent of not having regard to human rights because as shown in this chapter, there are numerous channels available on the continent for the promotion and protection of human rights. It is necessary to acknowledge that though there are mechanisms available to promote and protect human rights, they remain inaccessible and out reach of many in Africa.

Specific efforts have been made by state parties to ensure that the rights of women and children are protected on the continent, through their ratification of these international human rights instruments as well as specific gender-related instruments.¹³¹ The various manifestations of these efforts by the countries that have been analysed in this chapter indicate some measure of progress in promotion and protection of the rights of women. However, it must be stated that implementation of the various projects and programmes that have been developed by these countries is still hugely challenged by lack of resources and or inadequate resources; poor infrastructure and poor human capital development.

¹³¹ For example, through the various instruments and declaration such as the African Charter on Human and Peoples' Rights; Solemn Declaration on Gender Equality in Africa, 2004; Protocol on the Rights of Women in Africa (2003); The African Charter on the Rights and Welfare of the Child (1999).

It is also notable that in Zambia, South Africa and Nigeria, there are some kinds of National Gender Policies that exist in these countries pointing to some measure of compliance with 'adoption of legislative or other measures' provision in many of the instruments as ratified by them.

Notwithstanding the efforts that have been made, it is my view that majority of the time, these countries only apply lip-service to these challenges particularly those that affect women and children. One cannot but wonder why matters of personal status dealing with inheritance, marriage, divorce, adoption and maintenance have remained private matters not usually dealt with by the law enforcement agencies and in some countries are not subject to constitutional scrutiny.¹³² The only reason is that women have become political tools that government can manipulate for various purposes including sustaining patriarchy.

The changes that are currently seen on the continent is moving at a very slow pace because even though countries like South Africa, actively participate in programmes such as the '16 days of Activism' to end violence against women and children in November each year; it is ironic that on a daily basis during this period violation of the rights of women are rife.

In many of the instruments particularly in the African Charter, the Protocol on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child, traditional values of morality, integrity and civilization are always part of the preambular paragraph. It is an indication that these instruments though necessary for modern

¹³² See cases cited in Zambia and Nigeria in chapters three and four above.

living must be applied having regard to values that Africans honour most which is their family values and African morality.

As already seen in this chapter, the African Commission in most of its work has made some progress in the promotion of human rights as well as African values. That said, it must be stated that protecting rights will remain elusive due to lack of clear obligations on certain key provisions in the African Charter to State Parties. Although it now has General Comment on HIV/AIDS, it needs to do more on other critical areas. To effectively weigh in on the clash of African cultural practices and the rights of women, it is, therefore, imperative that the Commission utilizes art 45 to discuss critical issues such as for example the meaning of positive cultural context that is guaranteed in the Protocol on the Rights of Women in Africa. In the opinion of the present writer, art 45 (1) (a) and (b) presents key prospect in optimizing the African Charter and now the Protocol on the Rights of Women in Africa towards the realization of gender justice in Africa.

Chapter Seven

Bridging the gap: approaches to
engendering justice in African
traditional system

7.1 Introduction

Institutions exist in any given society primarily to promote order and social cohesion. It shows therefore, that leaders of society must ensure growth and development by making sure that some form of social control and order exists.

In a number of pre-colonial African countries, it is common knowledge amongst grown men and women that the organs of government were vested in the traditional leaders and their council of elders; authority was based on the notion of communal power. The king rules the community with his council as legislators and advisors whilst in some cases, the Chief Priest acts as the judicial officer who interprets the law and prescribes punishment for offenders or redress to those who have been wronged. There are many variations of this format of governing structure in much of pre-colonial Africa, but the underlying principles of justice, equity and peace remain the core values of society.¹

Against this backdrop, any infringement on an individual or a household becomes a community issue as the peace of the community as a whole is alleged to have been threatened by such acts.² Simply

¹ In modern democracies of today for example, South Africa acknowledges the position of traditional leaders which is why their roles are being enhanced by the Traditional Court Bill which is currently being debated in parliament. See also Phatekile Holomisa 'Balancing law and tradition: The TCB and its relation to African systems of justice administration' *SA Crime Quarterly* NO 35 March 2011 where the author discussed the roles of traditional leaders in South African constitutional democracy.

² PI Abumere 'Athuihkiuki' among the Esan in Yemi Osibanjo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice: Lagos.

put, ensuring justice and peace amongst the people is of utmost importance to the community's general well-being. This is because the deeply-set traditional society of that gone by time expected plentiful harvest, fertility, and freedom from diseases which were all dependent on peace, unity and justice in all the land. They cannot risk calamity of any kind by engaging in acts that would annoy the gods.

These form the basis of many beliefs as well as governing structures of many communities, ensuring that men and women live in harmony for the benefit of the entire community. This also attests to the basis for communalism as it was known in pre-colonial Africa. Traditional institutions operated based on these beliefs and the system has shown some resilience even in some parts of Africa today.

In post-colonial Africa, many things have changed such as forms of government; interactions with many cultures as a result of globalisation have also brought many changes to the way of life of many Africans particularly those in urban and peri-urban parts of Africa. That said, it is interesting to note that a number of African countries still operate some form of pre-colonial society. For example, Swaziland continues to retain basically most of its traditional values and culture. One of the systems that have also endured waves of change remains the legal system whereby customs of the people continued to operate parallel to received or common law from the colonial masters.

The existence of these parallel legal systems has set them both on a collision course particularly in the area of human rights and has continued to create challenges more than half a century after the

independence of many African countries.³ For example, Nigeria battles with human rights violations arising from the activities of Islamist groups; South Africa has yet to balance actual practice and culture of human rights with its constitutional mandate particularly in the area of violence against women and access to justice.

This chapter is aimed at developing a practical model that would remove the contestations from polarising the system but would create new ways of fusing the system to achieve gender justice. Previous chapters have chronicled and analysed the position particularly as it affects women and children. Efforts aimed at dealing with the situation such as enacting pieces of legislation have been ineffective and inadequate.⁴ This chapter discusses means of expanding the frontiers of justice as a prospect in the realisation of gender justice; to properly accommodate the changes that have taken place and create new ways of merging the system to achieve greater rights for women under customary law.

³ See generally the works of the following writers already mentioned in chapter Two- Chuma Himonga; Manfred Hinz; Christa Rautenbach and Willem Du Plessiss.

⁴ This was explicitly stated in the preamble of the Protocol on the Rights of Women in Africa; 'concerned that despite the ratification of the African Charter on Human and Peoples' and other International human rights instruments by the majority of state parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practice'...

7.2 Approaches to gender justice in African traditional system

In many communities in Africa, women do not take part in deliberations at the same time and place with men.⁵ Decisions are usually made on their behalf by the men in the community and they [women] are inclined to follow the leadership position of men with minimal contestation particularly with regards to matters relating to marriage negotiations and inheritance.⁶ This does not mean that the woman has no position of authority but she is made to simply defer such authority to her children and not over the members of the family she had married into or belongs to. It further creates an avenue for women to form parallel councils whose decisions are then relayed back to the men folk especially where the matter affects the entire community.⁷ These gendered roles create and develop fairness by its own standard and ensure that men and women have their opinion taken into account albeit in different forums.

⁵ Michelo Hansungule 'The Historical Development of International Human Rights' in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010) Martinus Nijhoff Publishers, Leiden, Boston 1-28 at 14.

⁶ The status of women within certain communities is enhanced when women are in leadership role. For example, the case of Queen Modjaji in the Polokwane Province of South Africa; also the participation of women in modern law is promoted in the countries under study if regard is had for art 12 of the Protocol on the Rights of Women in Africa. It provides that State Parties shall take all appropriate measures to: (1) (a) 'eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training; ...

⁷ Columbus Okoroike 'Gendered roles in Ibo culture' in *Ibos of Nigeria and their cultural ways: Aspects of Behaviour, Attitudes, Customs, Language and Social Life* (2009) iUniverse Inc: New York, Bloomington, at 108 where the author elaborated on aspects of behaviour of the Igbo people of South East, Nigeria .

The frontiers of gender are expanded and in some cases almost blurred in situations where women have taken titles as leaders in the community. From this position of advantage, some women have made an impact by being among the decision makers which is why when a woman dies in places like the Igbo land, her corpse is taken back to her village where her kith and kin would confirm that she had been taken care of during her lifetime by her husband and his people. Trouble erupts when contrary view is reached on this matter by relations of the dead woman and reparations may be made to appease her kith and kin. Many women who have taken wives for whatever reasons are also accorded rights as a man would be as a result of her status as one who had married.⁸ Similarly, it is acceptable for a woman to take in lovers in her married home where her husband is impotent or had died without children and she wants to remain in that family for the purposes of procreating on behalf of the man. It has never been seen in a traditional setting that a woman is unfaithful under those circumstances and these conduct are viewed as giving the woman autonomy to determine her future with the family.⁹

⁸ Columbus Okoroike (2009) *supra* 7 at 134.

⁹ Contrast this form of empowerment with the one provided for in art 9 of the Protocol on the Rights of Women in Africa which provides that: (1) 'State Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:

(a)...

(b)...

(c) women are equal partners with men at all levels of development and implementation of state policies and development programmes.

(2) State Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

In many societies, the woman has great strength located within her reproductive rights. In Igbo land, the rights exercised by the woman are highly commendable as she can use this power in whatever way she chooses in the family.¹⁰ It is, therefore, uncharacteristic of the position of women in local villages and communities to have their sexual and reproductive rights to be determined or controlled by forms of FGM or other reproductive matters such as male preference or spacing of children.

In cases of conflict between individuals as well as between state and individual, many societies in Africa and beyond have varied forms of adjudicative mechanisms designed to ensure that men and women are protected. In many African societies, there are also varied forms of settling disputes notable among them is the chief's court.¹¹ The nature of these institutions is designed to make justice easy and affordable for the majority of the people. It remains therefore, an instrument for advancing gender justice, rights and development within the society.

¹⁰ Barrister Ifeoma Offor, in an informal discussion with the present author as one of the respondents concerning the lives of the women in particular and the people of Umuna in the Onuimo Local Government Area of Imo State.

¹¹ Michelo Hansungule 'The Historical Development of International Human Rights' in Azizur Rahman and Hajid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010) Martinus Nijhoff Publishers, Leiden. Boston, at 17-19.

7.3 Traditional justice system revisited

The African customary law is mostly tested in the court of the chief or headman and his council.¹² The chief or headman sits usually under the tree amongst his people, listening to the problems brought before him in the presence of other elderly members of the community and makes decisions based on the truth.¹³ The end result of the decisions made at these kinds of forum is aimed at reconciliation of the parties.

Traditional justice system as described above operates parallel to the western styled courts found in most African countries. In effect, statute law and other national laws and regulations are made operational by the judicial organ vested with the powers to adjudicate on them whilst the traditional courts deal with matters arising from customary law. In South Africa, for example, we do not only have parallel legal system but also what could be referred to as 'fused' justice.¹⁴ This is because the constitution in s 39 (2) enjoins modern courts to consider customary law when deciding cases. The South Africa model of justice raises important matters on the status of customary law in a modern democracy which in this case does not

¹² DS Koyana 'Traditional Courts in South Africa in the Twenty-First Century' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of Africa Customary Law* (2011) Cambridge University Press, 227.

¹³ Michelo Hansungule 'The Historical Development of International Human Rights Law' in Azizur Rahman and Jahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010) at 18 where the author described the African judicial system; Koyana (2011); See also Phatekile Holomisa (2011) *SA Crime Quarterly*.

¹⁴ The term 'fused' used in this chapter is aimed at describing the nature and the forms of justice system operating in South Africa.

need to be judicially noticed by way of evidence but as matter of constitutional mandate.¹⁵

Several issues such as sanctions for criminal offences; position of women and children and powers of the traditional leaders have been raised concerning traditional court or customary courts (used in this study interchangeably) and its future in modern democracies. It is common knowledge that most countries in Africa maintained dual or plural legal systems of law and these systems of law have an impact on how justice is administered in those countries. Legal pluralism therefore, has great influence on administration of justice and how courts in most communities operate.

In the first instance, legal pluralism denotes societies that not only make use of dual legal system as seen in most countries in Africa but also take into account all other norms, values and practices that have influence and relevance on the people.¹⁶ It is a jurisprudential notion that removes the binary in formulating rules but takes norms and practices as an embodiment of the values, strengths and weaknesses of any given society. Legal pluralism seeks therefore to broaden rule-making and how it affects the people in order to ensure that their voices are heard. From this point of view, legal pluralism should not be

¹⁵ This parallel as well as fused model of justice system is one of a kind in Africa as opposed to the position in countries like Nigeria that still use the 'repugnancy test' to check validity of customary law in the first instance.

¹⁶ Manfred Hinz 'Legal Pluralism in Jurisprudential Perspective' in Manfred O. Hinz (ed) *Shades of New Leaves Governance in Traditional Authority: A Southern African perspective* in collaboration with Helgaard Patemman (2006) LIT, a Publication of the Centre for Applied Social Science (CASS), Faculty of Law, University of Namibia, 29-41.

viewed as a culprit in the lack of enjoyment of rights particularly by women but should be seen as an avenue for expanding their choices of law and adjudicative mechanisms.¹⁷

Consequent to the matter of plural legal system is that of courts to adjudicate on the law. The controversy following legal pluralism further raises the question whether customary law was law indeed warranting the operation of traditional court. This study had already dealt with the nature of customary law¹⁸ and would therefore focus here on how traditional courts and other traditional institutions play an important role in engendering justice.

The flexibility noted in the nature of customary law flows into the court system administering that law. Traditional courts usually take place in a simple, open environment, with all the parties in attendance and in full view of witnesses thereby creating an atmosphere of reconciliation. In his work, Oyewo¹⁹ itemised the features of traditional court as follows:

1. these courts are the courts of the people which are usually shaped by them and which should be responsive to their needs;

¹⁷ Abdulmumini A. Oba 'The Future of Customary Law' in Jeanmarie Fenrich, Paolo Galizzi, and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press at 65.

¹⁸ See generally chapter two of this study.

¹⁹ A. Toriola Oyewo *Issues in African Judicial Process with Particular Reference to the Customary Courts of South-Western Nigeria* (1999) Jator Publishing Company: Ibadan, at 38; See also similar features as stated in Digby S. Koyana 'Traditional Courts in South Africa in the Twenty-First Century' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press, at 230.

2. the accessibility of these courts to the litigants enables them to air their grievances more freely and at a low cost;
3. there is a generally lack of technicality of procedure in these courts which allows for substantive rather than procedural rules which is the preoccupation of western-styled courts and the speedy decision-making of traditional courts usually goes a long way to engender confidence in the courts;
4. since the existence of these courts do not usually depend on legally trained people, quick justice is presumed to be prevalent in these courts;
5. the comparative cheapness of the customary courts goes a long way to reduce to a considerable length the burden of litigation; hence those courts are not only favoured by the public but also by the government.

All of these attributes of traditional courts have made them resilient even in the face of encroachment on customary law by legislative measures and judicial actions, shrinking areas of operation of customary law due to its restriction to private law of succession, inheritance and marriage as well as all kinds of academic debates forecasting their demise and irrelevance in modern democracies.²⁰ In my view, customary law as interpreted and given effect to by traditional institutions have much to offer in modern democracies. One cannot underestimate the role of these institutions in the formation of personal identity and the moral fibre of the society whilst dispensing

²⁰ Chuma Himonga 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary law* (2011) Cambridge University Press, at 31 with all the footnotes quoted there.

justice to the majority.²¹ It is argued here by the present author that the importance of traditional institutions in Africa today have much to do with the people at the grassroots whose lives are impacted by the roles their traditional headmen and chiefs play in the development of their socio-economic conditions. In many parts of Nigeria, traditional leaders and chiefs are often referred to as 'royal fathers'. The import of this kind of statement is that traditional leaders see and treat their people as their children that must be looked after not merely as subjects. In other words, for the traditional leaders, the well-being of the entire people is paramount in their ruling of the communities. In many parts of Africa, it has been noted that despite the shortcomings of traditional institutions, a majority of the people prefer to have them as their leaders.

Law as instrument of social control is viewed as a hindrance to the kind of cohesion envisaged for their communities by the people.²² Simply put, present day governments have much to gain by according the necessary recognition to traditional institutions as they are in practical terms the interface between the government and the people

²¹ DS Koyana 'Traditional Courts in South Africa in the Twenty-First Century' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press, at 229 where the author indicated that traditional courts in South Africa have huge workloads. He stated that whereas 'there is only one magistrate court each for the 37 districts of the Eastern Cape, there are no less than 250 traditional courts dispensing justice on a daily basis in that province'.

²² Mpilo Pearl Sithole , Gerhard Haggis & Kidane Mengisteab ' Africa's fragmented Institutions' a study undertaken by Human Sciences Research Council (HSRC) and Pennsylvania State University, USA (2009) presented at a workshop in Kempton Park, South Africa. The present author was in attendance at the 2 day workshop.

at the grassroots.²³ As a result of the closeness and interconnectedness of traditional institutions to the majority of the people, some countries have made them part of the local government authorities as clerks and registrars. Under this circumstance, an enabling Act is usually enacted to ensure that they conform to the laws of the state.²⁴

No doubt, customary institutions must conform to the changing needs of society; it must however be stated that most often when there is a piece of legislation granting powers and authority to these institutions violations tend to occur.²⁵ These violations occur because the chiefs are mandated to interpret Acts beyond their knowledge and the forums where these cases are decided do not entertain legal

²³ Toriola Oyewo *Issues in African Judicial Process with Particular Reference to the Customary Courts of South-Western Nigeria* (1999) Jator Publishing Company: Ibadan, at 43.

²⁴ See for example, The Laws of the Western Region of Nigeria 1959 vol 1 Section 4, Cap 19 (dealing with 'The Chief's Law' or Customary Courts Law); Local Courts Act (Zambia), Regional Authority Courts Act (RACA) Act NO 13 of 1982 of the Transkei National Assembly; Traditional Courts Bill (2008) presently before Parliament in South Africa.

²⁵ *Yekini Onigbeden and Another v Ishola Balogun and Another* (1979) All NLR 233 in which the provisions of s 49 (1) of the Customary Court Law was at issue in the Ikeja Divisional 'Grade A' Customary Court for damages for trespass on land. In this case, it was held that the defendant did not obtain the proper leave to appeal the case in terms of s 117 (4) of the then constitution even though the defendant relied on s 49 (1) which does not require such leave to appeal. See also South African Law Commission, 'The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders 2, Discussion Paper 82 (May 1999).

representation.²⁶ Certainly, as the present writer would argue, that there must be a difference between the procedures and practices that obtain in common law courts and that of traditional courts as they arise from different areas of law that though may be complementary are nevertheless irreconcilable.²⁷ It must also be noted that some of these Acts have bias that originated from the time of the colonial masters.

7.4 Modern institution: possible alternative?

What do the modern institutions envisage for people under customary law whose lives are mostly governed in terms of this law?²⁸ In the first instance, modern institutions in this study would refer to national / constitutional and international human rights law. Together, these laws prescribe values and principles that are generally acceptable as standard in modern day democracies. Equality, freedom and justice

²⁶ See *Bangidawo and Others v Head of Nyanda Regional Authority and Another; Hlantlala v Head of the Western Tembuland Regional Authority and Others*, 1998 (3) SA 252 (TK). In this case, lack of legal representation was not the only issue raised, others are that traditional courts place onus of proof on the accused/defendant in civil and criminal cases and that they do not give a right to call for further particulars.

²⁷ See generally TW Bennett *A Source Book of African Customary Law for Southern Africa* (1991) Juta & Co Ltd, at 71. See also the recent Traditional Court Bill (TCB) and Communal Land Act, 2004 is a reflection on how the society was structured at the time of the colonialists which accounts for the numerous criticisms leveled against the above-mentioned Acts by the South African Human Rights Commission at www.sahrc.org.za [accessed June 2012], and Sindiso Mnisi Weeks 'Traditional Courts Bill: Process, Substance and Implications', a HSRC Panel Discussion, 8 May 2012.

²⁸ A possible response would be framed in terms of art 8 of the Protocol on the Rights of Women in Africa; 'equal before the law and shall have the right to equal protection and benefit of the law'...

are some of the values that underline modern democracies as already alluded to in the previous chapter discussing gender justice in relation to African regional human rights architecture.²⁹

It has already been stated also that some aspects of customary law may not pass constitutional scrutiny. To this end, some of the approaches employed in many countries today involve campaigns prohibiting customary practices that violate human rights³⁰ and the use of gender mainstreaming as a tool for empowerment of women.³¹ Aspects of these approaches have failed to achieve the desired results as noted in the enactment pieces of legislation prohibiting aspects of customary law, practices which still occur in those areas where they have been prohibited. In other words, legislating aspects of the conduct of people is hardly an appropriate mechanism for ensuring greater rights particularly for women.³²

Gender mainstreaming is both a global and national strategy aimed at ensuring that women and men have equal access and participate equally in the programmes or development plans that affect their

²⁹ See generally Chapter Six above.

³⁰ Corrine A. Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa* (2002) Intersentia.

³¹ Christine Ainetter Brautigam 'The Relevance of Gender in International Human Rights Law' in Wolfgang Benedek, Esther Kissakye and Gerd Oberleitner (eds) *Human Rights of Women: Instruments and African Experiences* (2002) Zed Books.

³² Sandile Ngcobo J (as he was then) in the *Bhe* case alluded to the fact that merely prohibiting or striking out certain aspects of the law that guides customary law does not develop the law to bring it in line with the Constitution rather it results in nocturnal practice that does not benefit anyone.

lives.³³ On its own as an analytical tool, it has been unable to afford women the opportunity to fully and practically enjoy their rights because advancing women's position through development programmes focuses on empowering women who unfortunately, are lacking fundamental core rights. For example, in most African countries, access to credit is not guaranteed and where they do exist, women are required to produce collateral which may include property. Evidently, property rights are contentious in Africa. More so, gender mainstreaming as a policy and technical programme in most cases do not meet the politics of challenging inequality which in itself is political.³⁴ In other words, the policy and the political strategy required to deal with advancement of women are not at par. As a result, women suffer more injustices under these circumstances leading to the failure some of the programmes where the technical project and national programmes operate on different pedestals.

Furthermore, women participate in activities that hardly generate any income or some form of remuneration leading to inability on the part of many to take part in the competitive, largely male-dominated public space. Although changes are taking place in many countries with women being members of parliament and other political positions, there are still huge disparities in ensuring gender equality.³⁵

³³ Maitrayee Mukhopadhyay 'Gender Justice, Citizenship and Development: An Introduction' in Maitrayee Mukhopadhyay and Navsharan Singh (eds) *Gender Justice, Citizenship and Development* (2007) Zubaan, An Imprint of Kali for Women, New Delhi, India and International Development Research Centre, Ottawa, Canada.

³⁴ Maitrayee Mukhopadhyay (2007) *supra* 33.

³⁵ In the three countries under study, women are part of the members of the executive council with South Africa taking the lead. Out of 34 Ministers in South Africa, 13 are women and you have also 14 women as deputy ministers; in Nigeria,

It has been argued that most programmes to empower women do not take into account the role of men in achieving gender justice.³⁶ Pro-women agenda alone cannot completely and effectively bring the desired results because of the fundamental nature of the African society. Several factors which include structural imbalances of power between men and women, the systemic discrimination against women, and lack of women representation in law creation and implementation contribute in the disproportionate experiences between men and women.³⁷ These factors severely negate the enjoyment of rights by women.

International human rights on its part faces legitimacy crisis on many fronts including inattention to specific human rights concerns that affect women such as inheritance rights, abuses emanating from cultural and traditional practices connected to the family and marriage, access to reproductive and health rights. The Protocol on the Rights of Women in Africa is a prospect and significant additional instrument that would advance gender justice. However, the reach of the

out of 15 members of the Executive Council, 6 are women in key areas such as defence and education; in Zambia, out of 21 ministers only 4 are women. Interestingly in the Zambian case, a woman is the Minister for Chiefs and Traditional Affairs.

³⁶ Christine Ainetter Brautigam 'International human rights law: The Relevance of Gender' in Wolfgang Benedek, Esther Kissakye and Gerd Oberleitner (eds) *The Human Rights of women: International Instruments and African Experiences* (2002) Zed Books at 22-23.

³⁷ Celestine Nyamu-Musembi 'Addressing Formal and Substantive Citizenship: Gender Justice in Sub-Saharan Africa' in Maitrayee Mukhopadhyay and Navsharan Singh (eds) *Gender Justice, Citizenship and Development* (2007) Zubaan, An imprint of Kali for Women, New Delhi, India and IDRC, Ottawa, Canada.

provisions in priority areas such as socio-economic rights and inheritance rights face fundamental challenges at the national level.³⁸ For example, many countries in Africa do not have enforceable socio-economic rights, hence the difficulties that would occur to secure these rights on the international plane whereas the national laws do not guarantee such rights.

Notwithstanding the gaps in national law on certain aspects of the rights to equality, the existing international human rights standards are clear on number of issues relating to equality. For example, the Human Rights Council General Comment No 28 at paragraph 5 and the CEDAW General Recommendations No 19 both stress the point that 'it is specific attitudes and values that negate the right to equality, thereby sustaining discrimination and not culture or religion as a whole'. This is affirmed in the Protocol on the Rights of Women in Africa which opted to use the term 'harmful cultural practices' rather than homogenise the notion of culture. All of these are aimed at promoting equality of the sexes and prohibiting discrimination in all its ramifications; particularly gender and also ensuring that no claims of cultural defence are admissible.³⁹ Most times, dual or plural legal

³⁸ Art 20 and 21 of the Protocol on the Rights of Women in Africa guarantees rights for widows in the property of their deceased spouse and for women generally in terms of inheritance respectively.

³⁹ In Africa, it is only Uganda that has explicitly confronted the right to culture and gender equality conflict, by stating in its Art 33 (6) of the 1995 Constitution that 'Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution'. In the view of the present writer, it is a direct confrontation with customs and practices that may be detrimental to women on one hand, and it is also an obligation on the state to advance practices and customs as well as laws that are positive towards women.

systems are seen as the culprit in the discrimination against women and their lack of enjoyment of their human rights. On the contrary, these diverse legal systems may act as a buffer against discrimination on women if critical steps are taken to facilitate promotion of human rights. There is no doubt that human rights ultimately have the purpose of enriching and protecting the equal dignity of all human beings which resonates in all cultural traditions of the world. Viewed in this sense, there is sufficient basis to state that in every culture and tradition, the value for human rights could be promoted. Based on this premise, it is relevant to devise an appropriate approach to deal with instances of the perennial conflict between human rights and culture particularly as it affects the human rights of women.

Proof and ascertainment customary law as a valid source of law has been problematic particularly in its application to the rights of women. Also amongst legal scholars and teachers on the continent, the importance of having uniform laws that are ascertainable and consistent with modern democracies have seen calls for integration of customary law, codification, restatement and harmonisation.⁴⁰ The debate is strongly opposed to codification which would entail putting

⁴⁰ MC Okany, *The Role of Customary Courts in Nigeria* (1984) Fourth Dimension Publishers: Enugu, 238-239; Yemi Osinbajo & Taiwo Osipitan 'Proof of Customary Law in Non-Customary Courts' in Yemi Osinbajo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 255-269 at 264; Moses Bamidele Oyebanji 'Codification of Customary Law: Prospects and Problems' in Yemi Osinbajo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 270-274; Epiphany Azinge 'Codification of Customary Law-A Mission Impossible?' in Yemi Osinbajo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice, Lagos, 275 – 294; AJ Kerr 'The Reception and Codification of Systems of Law in Southern Africa' (1958) *Journal of African Law (J.A.L)* vol 2 NO 2 82 at 96;

customary laws of different communities into codes that will give them the force of law as a form of statutory law. It has been argued that such a move on laws that are as diverse as there are many ethnic tribes within a community would stultify the law and impede its growth as a dynamic and fluid system of law. Simply put, codification would make the laws rigid and inflexible which is contrary to the nature of customary law. In my opinion, such a move would not advance gender justice but rather, render customary law inflexible and ossified. For example, the customary law requirement for a valid customary law marriage consists of the following:

- (a) family negotiation and payment of bride price
- (b) parental consent
- (c) formal handing over of the bride by her family to the family of the bridegroom

Nowadays however, it is possible for parties to 'contract' a marriage without the above three requirements based purely on consideration between the parties due to urbanisation and there are women whose parents are long dead before she gets married; would such a marriage be nullified? Not likely. The current position of law of marriage could be thus 'that parties with genuine intention to be husband and wife and have put themselves in such a position to be regarded by society as husband and wife; the law would treat them as husband and wife'. Under this circumstance, the law is altered to give effect to the current position whilst the earlier position would have been made obsolete. In other words, the law is taking cognisance of the changing social and economic changes and needs of the society. South Africa clearly demonstrated this striking feature of customary law in the *Shilubana*

case where the Valoyi tribe considered a woman as successor to the King almost 50 years after the death of her father.⁴¹

In Africa, Nigeria is one of the countries with as many as 250 ethnic languages being spoken in that country. It also follows that there are many versions of customary law in operation even within one community as well as other various forms of the law in many other communities. Under this circumstances, codification is impractical and in fact a mission impossible.⁴² People living in rural areas or those whose affairs are governed by customary law must have a practical means of addressing claims and seeking justice for wrongs. The variation of applicable customary law as noted with Nigeria is very much the same in almost all countries in Africa. It follows therefore, that a new way of seeking justice and addressing the huge inequalities faced by most women in Africa must be advanced for development, justice and growth.

7.5 Traditional Court Bill: South Africa at Crossroads of Justice?

South Africa is the only country in the African continent with both parallel and fused justice system. Customary law exists side by side with the received Roman Dutch law as sources of law in the country. The constitution in recognition of the importance of customary law requires courts to take into account customary law when deciding cases.⁴³ The South African model is unique and has gone a step

⁴¹ See generally the *Shilubana case* 2009 (2) SA 66.

⁴² Epiphany Azinge, 'Codification of Customary Law-A Mission Impossible?' in Yemi Osinbajo and Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* (1991) Ministry of Justice: Lagos, 275 -294.

⁴³ Section 39 (2).

further in ensuring adequate access to justice by seeking to enact the Traditional Court Bill.⁴⁴

The Traditional Court Bill (TCB) was initially introduced in Parliament in 2008. It was later withdrawn due to lack of appropriate consultation procedures. The Bill was introduced again in Parliament during 2012 but has generated so many criticisms that at the moment it has been withdrawn with a view to redrafting it at a later stage. The importance of this Bill to this study is that it goes to the heart of the matter of access to justice for many including women.

The relevant sections of the Bill for this study includes the following; in terms of section 2 outlining the objectives of the Bill which are to;

- (a) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
- (b) affirm the role of the institution of traditional leadership in-
 - (i) promoting social cohesion, co-existence and peace and harmony in traditional communities;
 - (ii) enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes; and
 - (iii) promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values;
- (c) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and

⁴⁴ The Traditional Court Bill (TCB) has caused a lot furore among human rights scholars and women's rights movements. One of the articles discussing the implications of the TCB include: Michelo Hansungule and Rita N. Ozoemena 'South African Traditional Courts Bill: Advancing access to justice or a step backwards on the constitutional gains of gender equality? (2013) [submitted].

(d) enhance the effectiveness, efficiency and integrity of the traditional justice system.

Some of the distinctly positive aspects in the guiding principles for the application of the Bill in terms of s 3 include:

(1) (a) the need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution including (i) the right to human dignity (ii) the achievement of equality and the advancement of human rights and freedoms; and (iii) non-racialism and non-sexism;

(b) the need to promote access to justice for all persons;

(c) the promotion of restorative justice measures;

(d) the enhancement of the quality of life of traditional communities through mediation;

(e) ...

(f) ...

To ensure that the traditional court systems operates optimally and utilises the appropriate traditional framework, the TCB seek to authorise the minister to designate appropriate persons to act as presiding officer in a traditional court (s 4 (2) and s 4 (4)). It is also envisaged by the Bill to train traditional leaders in judicial adjudication.

The TCB determines the settlement of disputes of a customary law nature by traditional courts by prescribing the following in s 5 (1):

A traditional court may, subject to subsection (2), hear and determine civil disputes arising out of customary law and custom brought before the court where the act or omission which gave rise to the civil dispute occurred within the area of jurisdiction of the traditional court in question.

(2) A traditional court may not under this section or any other law hear and determine-

(a) any constitutional matter

- (b) any question of nullity, divorce or separation arising out of a marriage, whether a marriage under the Marriage Act, 1961 (Act n0 25 of 1961), a customary marriage under the Recognition of Customary Marriages Act, 1998 (Act 120 of 998), or a civil union under the Civil Union Act, 2006 (Act NO 17 of 2006);
- (c) any matter relating the custody and guardianship of minor children;
- (d) any matter relating to the validity, effect or interpretation of a will;
- (e) any matter arising out of customary law and custom where the claim or the value of the property in dispute exceeds the amount determined by the Minister from time to time by notice in the Gazette; or
- (f) any matter arising out of customary law and custom relating to any category of property determined by the Minister from time to time by notice in the Gazette.

The TCB deals with procedural aspects of the traditional court in terms of s 9 whilst s 10 deals with the kind of sanctions that the traditional court may order and s 11 deals with the enforcement of the sanctions or order of traditional court.

The TCB is an imperative given the challenges that the majority of people including women face in seeking redress for violation of their rights. By seeking to have a uniform process of traditional justice system, the TCB is aimed at bringing justice to the people; protect dignity and equality of women.⁴⁵ Also, in a constitutional democracy such as found in South Africa, the TCB has taken progressive step to ensure that substantive rights and procedural aspects of the traditional justice system is in accordance with the constitutional values of human dignity, equality and freedom.⁴⁶ Undoubtedly, the TCB has good

⁴⁵ Section 3 (1) (a) (i) and (ii).

⁴⁶ Section 3 (2) (a).

intentions to promote access to justice; however, in its current form it seeks to grant the Minister of Justice and Constitutional Development wide powers. Matters relating to family law which could be dealt with speedily are ousted in the traditional court, so also in matters dealing with inheritance or property. The TCB fails to take into account the nature of the socio-economic conditions of the people particularly women who may not have the resources to read from the Gazette when the Minister makes a determination concerning who presides over their matter or the specified amount for a property in dispute that the court may or not adjudicate on.

The criticism levelled against the TCB indicates the crossroads at which issues of culture and tradition in relation to rights have not been truly settled in the South African context as well as many other countries on the continent.

The TCB purports to enhance access to justice but failed to take into account the financial position of the majority as persons who are poor and illiterate where they have to wait for the Minister of Justice to pronounce in matters affecting them.

One aspect of the TCB that has resonated among proponents and critics alike is that the Bill in its current form excludes women from active participation in formulating norms and values as well as dispensing justice.⁴⁷

⁴⁷ Inkhosi Phatekile Holomisa at the HSRC seminar on 25th July 2012 confirmed the exclusion; Masenjana Sibandze of the Department of Traditional Affairs also expressed his opinion in saying that the TCB in its current form does not properly protect all persons particularly women; Also Sindiso Mnisi Weeks; Zolile Nnata, Chairperson of the Eastern Cape Traditional Leaders was also of the opinion that the TCB is a westernisation of an African Institution which will continue to entrench the Bantustan division that should be done away with already.

Further, the traditional court imposes fines on the people for proof of residence; the people have a duty to fence the chief's kraal or maintain his house which may be at the huge cost of about R600, 000; It was also stated that some traditional leaders fail to intervene in matters of rape and abduction of young girls and they also fail to entertain women in the courts because they must bring a male relative to assist them in stating their case.⁴⁸

The status of customary law in South Africa is commendable however, flowing from the issues raised on the TCB it is clear that the country is still grappling with maintaining a balance between cultural practice and constitutional imperatives.⁴⁹ The use of apartheid legislative model in a modern democracy is seen as grossly inappropriate and a bastardization of African institutions.⁵⁰ What is relevant for South African society today is introspection into the kind of values that the proposed African justice system seeks to espouse. One thing that is clear is that given the position of majority of women, the Traditional Courts Bill's objectives including the enhancement of access to justice

⁴⁸ Sizani Ngubane of the Rural Women Movement, Kwa Zulu Natal at the seminar 'The Traditional Courts Bill: A step backwards for our constitutional gains on gender equality? Held at the HSRC on 25th July 2012 in which the present writer was in attendance.

⁴⁹ This is evident in the dissent of two ministers in the cabinet: Minister of Justice- Jeff Radebe and Minister of Women, Children and People with Disabilities- Lulu Xingwana where they disagree on a wide range of things particularly as it affects women. The Parliament is seeking clarity as both departments seem to contradict each other on the validity of the law. See generally, Mail and Guardian Newspaper September 14-20 2012 at 21.

⁵⁰ Nomthandazo Ntlama and Dial Dayana Ndima 'The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice System' (2009) vol 4 1 International Journal of African Renaissance Studies 6-30.

through the application of customary law is desirable and must be properly formulated to ensure greater access to justice.

7.6 Expanding the frontiers of justice: an alternative model?

To ensure gender justice, expanding access to justice and promotion of human rights remain an imperative for countries in Africa. It is common knowledge in Africa and elsewhere that custom and practices of the people that are law to them would remain so for a long time. What is in contention is the appropriate means of eliminating inequalities between men and women and redressing systemic subordination of women.

The current parallel systems of law operating in much of Africa are inadequate. The binary status leaves no room for other forms of adjudication that would accommodate specific interests of women. What is required is to set the standard of customary law that would take into account the many variations that exist within Africa. For example, women are honoured and respected as mother earth because of their nurturing ability. It is inconceivable in many African countries to act against mother earth in any way hence the land is viewed as a spiritual resource. No custom, rule or practice of customary law would act against mother earth in fact, women have the right and power to administer law and dispense justice.

Dispensing justice is not only the domain of men, but women should also be part the system.⁵¹ In Igbo part of Nigeria, the *umuada*⁵² were

⁵¹ Nelson Mandela *Long Walk to Freedom* was happy to sit with the elders of his tribal council in settling disputes but was very disappointed and unhappy to note that

seen in terms of administering justice within the family as the Supreme Court. Recognising other forms of adjudicative mechanisms that exist within communities is instructive in promoting gender justice. There are therefore, key principles that are necessary in expanding the frontiers of justice:

- (a) recognition
- (b) the rights to be protected
- (c) the impact of not protecting the rights on the wider community
- (d) due process and due diligence
- (e) accountability

Under the current system in most African countries, traditional court systems exist and are managed by local justices who are not legally trained but are respected members of the community.⁵³ What is not appropriate with these local justices is that in the first instance, they are not legally trained and also the tendency to interpret what is known as customary law may be fraught with inconsistencies to suit particular purposes. Also, there are no records keeping of the decisions made by the local justices for any kind of future reference. The

women were not given opportunity to express themselves even in cases that involve them.

⁵² *Umuada* are married women of a particular compound who through the exogamous marriage system are still able to wield influence and power in their paternal homes.

⁵³ In Zambia for example, the Local Courts (Amendment) Act 18 of 2003 is the enabling piece of legislation from where the local courts derive their authority. South Africa is currently dealing with passing the Traditional Court Bill (TCB) which has been met with much opposition from women's movement, academia, and human rights organization.

implication is that decisions may be reached based on the whims of the judges rather than the living law. On the other hand, if the living law is widely acknowledged, then it may be difficult to manipulate the system.

It is therefore necessary in my opinion, that:

- (I) local justices be formally recognised (South Africa has made such formal recognition) as persons administering law and justice;
- (II) decisions must be written and lodged with chief's clerk
- (III) reasons for their decisions must also be lodged to maintain accountability.

One of the problems of ensuring gender justice is that rarely is anyone held accountable for measures that have been put in place to promote and protect rights.

Furthermore, the right to be protected must be viewed as not only the right to non-discrimination but also the right to dignity and right to development. Most often in Africa, right to intestate inheritance and succession is not viewed as a right of birth in other words; human right worthy of any protection hence there is no specific mention of it in any law in any country.⁵⁴ Also, the courts are not progressive enough in some of their decisions in keeping with the principles of non-discrimination and human rights.

Greater access to justice through creating and recognising forms of informal adjudicative mechanisms remains an avenue for more women

⁵⁴ Kuena Thabane 'Evaluating Lesotho towards gender equality: A legal perspective' *Work for Justice* Vol 28 NO 1(April 2011) at 9.

to be heard; and for them to be part of the system as envisaged in art 17 (2) of the Protocol on the Rights of Women in Africa. The spirit and purpose of art 17 is to engage with issues of culture and their impact on persons within the continent particularly women.⁵⁵ Women should be part of the formulators and initiators of cultural and traditional beliefs of society. In essence, they are partners in the development and growth of the cultural life of their communities. Therefore, cultural practices should never have negative impact on women as it run contrary to their equality before the law and the full enjoyment of their human rights.

Due process demands that the manner in which claims of right or claims for redress for violation of right must be fair and ultimately lead to justice. It has been noted in many countries in Africa even those under study in this thesis that women are usually excluded in dispensing justice even in cases concerning them. The Traditional Court Bill currently being debated in South African Parliament seems to exclude women in many respects.⁵⁶ For example, most meetings take place in the cattle kraal to ensure ancestral presence, therefore; married women are not allowed to come near let alone be part of the

⁵⁵ Johanna E. Bond 'Women's Rights, Customary Law and the Promise of the Protocol on the Rights of Women in Africa' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press, 467 where the author elaborated on the promise of the Protocol on the Rights of Women in Africa in the realisation of rights and justice for majority of women in the continent.

⁵⁶ Sindiso Mnisi Weeks 'Traditional Court Bill: Reconciling the Irreconcilable' a paper present by the Law and Gender Unit of the University of Cape Town on the 18th of June 2012 at the Human Sciences Research Council in which the present author was in attendance.

meeting though women who are born in that clan may be part of the meeting. Also one of the negative arguments towards the use of local courts by many is the perceived lack of legal representation for litigants/complainants. It is common practice among the majority of people in many African countries including South Africa, Nigeria and Zambia to approach local courts for redress nevertheless without legal representation. One of the reasons for such persistence is based on cultural identity as being paramount to many and the other is that within the system of traditional institutions; specific procedures are followed which usually do not resemble those applicable in western-styled courts. It was stated by Inkhosi Phatekile Holomisa⁵⁷ that there are negative attitudes towards traditional institutions and that no one is denied legal representation in traditional courts because everyone is allowed to examine, cross-examine and even lead evidence in these courts therefore due process is actually followed. It is argued by the present author that the nature of traditional courts remain its best asset as the most easily accessible forum for greater access to justice for women.

Due diligence is critical to addressing human rights violation. In the area of personal or family law, setting the standard requiring the state to act with due diligence in the context of plural legal systems remains untapped.⁵⁸ A simple view of state's obligation that may be invoked

⁵⁷ Inkhosi Phatekile Holomisa is the Chairperson of the Congress of Traditional Leaders in South Africa (CONTRALESA) who in a seminar on the 'Traditional Court Bill: Turing back the gains made on gender equality' at the Human Sciences Research Council (HSRC) on 25th July 2012 in which the present author was in attendance.

⁵⁸ International Council on Human Rights Policy 'When Legal Worlds Overlaps: Human Rights, State and Non-State Law' 2009 at 140.

requires the state to act to prevent human rights abuses for instances by non-legal authorities or customary law bodies. In other words, negative cultural practices must not be beyond the purview of the state to investigate it, punish offenders and redress violations of human rights and above all prevent its occurrence. The first premise of the African system of human rights must be based on having access to adequate and efficient judicial remedies as the first line of defence against violations of basic rights including the rights of women against discrimination. Traditional courts could be harnessed to contribute to current parlous state of access to justice by using human rights as the threshold of the justice system.⁵⁹

Within the traditional institutions, the leaders are generally accountable to the people for decisions that they make on their behalf. However, in many instances, dubious characters have used the system to pursue personal vendetta against fellow community members thereby ruining the integrity of the institution.⁶⁰ Further accountability may also be required of traditional leaders and its institutions by making their court decisions a public document to be perused by the general public and such decisions may also be taken to the magistrate court on appeal. One cannot however ignore the relevance of the

⁵⁹ Inkhosi Phatekile Holomisa at the HSRC Seminar on Traditional Court Bill and Gender Equality on 25th July 2012 insists that the role of traditional court is to provide justice. In fact he avers that the house of the traditional leader is open to all members of the community and anyone could come there and demand food because the home of the traditional leader is a safe place for all including the vulnerable such as widows and orphans.

⁶⁰ See generally the case with Maria Ezeani in Nigeria who had been beaten in her community because she demanded the inheritance of her family from the elders and went ahead to take them to court against the consensus of the village chiefs.

intergenerational social security of customary practices which has sustained its accountability to date.⁶¹

I would argue that this is one of the mechanisms within customary law and practice that must be protected and developed to advance gender justice. An Expanded Justice System (EJS) imbuing the tenets of human rights to promote equality and justice within the customary law system is a must for advancement of gender justice. Issues of discrimination in inheritance and succession can only be resolved through the processes found with traditional institutions with accountability and human rights as the threshold. For example, in African countries, issues of family, property and land could be addressed by:

- ▶ head of family
- ▶ head of clan
- ▶ sub-head of village inviting the clan head
- ▶ sub headman
- ▶ senior traditional leaders and headmen having knowledge of customary law and practices
- ▶ King's court, failing which magistrate court could be approached for redress.

These processes of dispute resolution promotes social cohesion and it is a system well entrenched in most rural communities. It is therefore necessary to develop this system as a valid dispute resolution

⁶¹ Munalula 'Changing the Customary Law Standard of Gender Justice: The Additional Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa' in Manfred Hinz (ed) *The Shades of New Leaves: Governance in Traditional Authority: A Southern African Perspective* in Collaboration with Helgard K. Patemann (2006) LIT, Centre for Applied Social Science (CASS), Faculty of Law, University of Namibia at 167.

mechanism with the purpose of creating greater access to justice and effective judicial remedies for the majority.

Conclusions

This chapter has critically evaluated both the traditional system of governance and adjudication and the modern system espousing human rights and would confirm that both systems have merit in promoting human rights. The traditional institutions are still very relevant in modern societies of today largely because of the matters of social identity; cultural belief and religious beliefs as well. It is necessary therefore, to ensure that these institutions are transformed to give effect to fundamental principles of equality and justice. This can only be achieved through expanding the justice system to recognise and develop the judicial responsibilities of the traditional leaders and their courts. It cannot be over-emphasised the difficulties faced by many particularly women in accessing adequate and effective judicial remedies for violation of their rights.

An examination of the practice in the three countries under study indicates strong reliance by many particularly women in pursuing claims to the realisation of gender justice by way of the local courts or courts of traditional leaders. Notwithstanding few cases of individual chiefs interpreting customs and customary law to suit their personal purposes, people still have strong connection to local court adjudication processes. Gender discrimination in much of Africa cannot be dealt with unless human rights as a threshold of justice are used to reveal the failure of law to deal with inequalities stemming from gender hierarchy especially in multiple systems of law.

Changes are taking place in ensuring gender justice in Africa. Undoubtedly, the African human rights system is at the forefront leading this transformation. The substantive rights in the Protocol on the Rights of Women stand out as key response to elimination of discrimination against women. The normative standard envisaged by the Protocol on the Rights of Women in Africa as a modern system aims to attack discrimination from the root. Realisation of gender justice in Africa is possible where the traditional system accepts the importance of women as stakeholders in culture; with human rights as the standard.

It has been shown in this chapter that creating norms and norm-making processes is not only the domain of state agencies but that there are also other bodies that are relevant in advancing justice. These alternative models of justice system are most times the primary institution of justice. To this extent, in the opinion of the present writer, Expanded Justice System (EJS) must be applied to give practical relief and address cases of injustice for the majority. The nature of this proposed system as a model for realisation of gender justice would entail proper accountability with human rights as the threshold for justice.

This chapter has also shown that despite the shortcomings within the traditional system, there are several advantages of traditional courts such as promoting efficient, quick, affordable and conciliatory remedies to violations of rights or claims of right as opposed to the costly and adversarial western-styled courts. Evidently, the number of courts available for local adjudication purposes far out number those of the magistrate court in the Eastern Cape for example as already

alluded to in this chapter. That said, it is also necessary not to ditch formal courts in its entirety because the South African Constitutional Court for example has made significant strides in pursuing equality jurisprudence worth emulating. In other words, both systems, traditional and modern, have valuable contributions in the realisation of gender justice.

In my opinion, it is therefore inappropriate to seek to reform the traditional institutions through models that strip them of their nature as the institution for the people. For a very long time, Africans have been stripped of virtually every aspect of their identity through colonialism. Traditional institutions seem to have survived all forms of supplantation to be able to still dispense justice for the majority of its people. The only challenge remains on how appropriate these institutions are in promoting human rights in the twenty-first century. Positive attributes of the both systems must be harnessed to give optimal response to the myriad of challenges faced in Africa. To this end, access to justice through the EJS must be open, affordable and close to the people through institutions that promote rights, social cohesion, harmony and development for all.

Chapter Eight

Conclusions and Recommendations

8.1 Conclusions

Customary law and its various practices found in many African countries remains a valid and relevant system of law as shown from this study. Its value remains evident in the consistent use of its institutions by many Africans in the first instance as an institution for their individual as well as group rights.

The strong affiliation of the majority of the people to their cultural practices remains a core component of how they live and express their values and morals which is why several international human rights instruments protect the right to cultural life. Over the years however, there has been wide and numerous arguments on the content and value of customary law and whether it is law strictly so-called or is it a bundle of morals and values only. Evidently, law as an expression of society is about values and morals hence the debate about the status of customary law on that note is immaterial. Customary law finds its value and acceptance in the manner in which the people continue to find resonance in their collective identity through their common practice.

The debate about customary law today is not merely about its relevance but mostly about how its role in modern democracy and how it can further promote gender equality. It is already well established in Africa, that customary law is a way of life for the majority of people on the continent. As has been shown from this study, there are divergent views as to what extent it promotes equality of rights between the sexes given the patriarchal nature of the African society. Many things within the African communities are seen, expressed and given effect to through the male eyes only. In majority of the cases, women are

merely seen and not heard. This is in contrast to the values of equality and freedom espoused by human rights law. So, there are varied opinions on the legitimacy of human rights in African societies.

Many writers in and around Africa shown from the previous chapters believe that African culture espouses its own form of human rights through its protection of the community as a whole. The communal investment in family relationships and resources aim to benefit the community as a whole which promotes unity, social cohesion and growth. There are other writers who believe that African customary law in purporting to promote some kind of human dignity is not entirely a great formulation of its capacity of ensuring human rights protection. There yet others who believe that cross-cultural dialogue is the panacea for human rights protection on the continent. Evidently, it is certain that each culture has within itself the capacity to engender justice and promote rights.

Engendering justice and protecting the rights of women under customary law have in many cases proven to be very difficult. Some of the cases emanating from the continent particularly from the three countries under review in this study point to the fact that the situations are far from satisfactory. Substantive equality that seeks to take into account previous disadvantages suffered by vulnerable groups including women remains far fetched. For the majority, equal access to opportunities and resources are still impossible in many countries where the constitutions have guaranteed equal rights and equal benefit of the law. The non-discrimination clauses in the constitutions are not necessarily adhered to by many countries on the continent. South Africa have been pro-active in ensuring substantive

equality through the constitutional court but a great number of people still suffer discrimination as a result of the unequal power relations between men and women.

The discrimination that the majority of women face on the African continent is so deeply entrenched that mere gender mainstreaming programmes and projects have barely scratched the surface. Eliminating the root cause of inequality and subordination of women to men has defied these gender analytical tools because key stakeholders such as traditional leaders are usually not part of human rights agenda. Also, the focus of any empowering tool is not usually to encourage the totality of the women's identity bearing in mind that in the first place, there are many sites of discrimination and secondly they interact with issues such as race, class, religion, ethnicity and all of these have impact on gender justice.

Gender justice seeks to eliminate inequalities and subordination of women with the aim of requiring redress and accountability. In some common law countries including Nigeria and Zambia on the continent for example, rights that seek to improve socio-economic conditions are unenforceable in courts. Most socio-economic rights such as health, property rights, education are not justiciable and where they are like in South Africa; it is based on progressive realisation or as resources of the government may allow. It is clear that in societies that women already bear the burden of unequal power relations; key socio-economic growth processes are left to be determined according to the discretion of the government leaders. In other words, issues that are of primary concern to women are politically determined without their input. Women lack these basic necessities and in some instances

issues relating to marriage, inheritance, maintenance and custody of children are not brought under constitutional scrutiny as noted in Zimbabwe and Zambia. Although these countries are making efforts to amend their constitutions, it remains to be seen to what extent more accountability would be given on matters relating to the personal status of women. As it stands, women are still hugely disadvantaged in inheritance. Reviews of court decisions on property rights discussed in chapter four indicate some measure of progress. In addition, the protection of inheritance rights for women and girls provided for in the Protocol on the Rights of Women in Africa is remarkable paradigm shift.

From the discussions on practices harmful to women, it is clear that some aspects of customary law have adverse effect on women. Sexual cleansing practised in some parts of Zambia, South Africa and other countries in the SADC region are a violation on the right to the dignity of women and also a violation of their sexual and health rights. Some of the practices do not allow proper consent because some women are forced into performing these degrading acts or are put in situation that they are forced to abandon their homes risking destitution and poverty or succumb to the whims of over-zealous traditionalists. It must also be acknowledged that some practices have been corrupted that it no longer has any value to the people and so must be done away with to promote gender justice. For example, the wanton abduction of children and teenagers in Lusikisiki in the Eastern Cape to marry men who are old enough to be their father as a customary practice is irreconcilable with children's rights. The new ways found by some Tonga people in Zambia to deal with sexual cleansing and wife inheritance is also commendable as it points to the fact that the community has been

sensitised on the need to protect human life and dignity from the ravages of HIV/AIDS. Presently in some parts of Zambia, women are blessed and are encouraged to live with dignity rather than being forced into sexual acts that are callous and degrading.

Widows and girl children in many parts of Africa still bear the burden of lack of inheritance laws within their national body of laws. Few of the cases such as *Bhe*, and *Shilubana* in South Africa and *Mojekwu* in Nigeria are few of the cases where gender equality was protected. In these countries, more cases are being decided in favour of women's rights by giving effect to the provisions of non-discrimination in their various constitutions as well as having regard for international human rights law instruments such as CEDAW.

Obviously, unequal access to resources and opportunities; unequal power relations in marriage and other social relations remain an impediment to the enjoyment of human rights by women. In fact, women remain passive and unable to contribute positively to their socio-economic growth making them lack active citizenship. The overall impact of lack of opportunities remains the vicious cycle of poverty, inequalities and loss of citizenship. In effect, women are in constant struggle to live as actively as their male counterpart in Africa due to ineffective laws and inadequate support for local structures that would benefit them as *bonafide* members of the community.

To ensure that women are not discriminated against or denied of their rights especially in inheritance and succession laws; human rights must be the threshold of justice. The notion of justice in customary law and practices are not generally seen as capable of engendering human rights which is why traditional institution such as CONTRALESA would

always see some principles as being based on western concept. The effect of these kinds of difference of principles is largely felt by women who are caught in the constant clash of culture and human rights. One way of addressing this impasse is to make human rights the threshold of justice in terms of access and effective judicial remedies. To this extent therefore, the other forms of judicial interventions must be recognised and developed to afford the majority the opportunity to claim rights or seek redress for violation of rights. It is noteworthy that in cases where the traditional leaders are clearly sensitised and made aware about the human rights implications and the adverse impact of some customary practices on them and their communities; they have been very quick in eliciting change of attitude from the people on the ground because they have been made proper participants and stakeholders in their development and growth as a community. The reduction in the use of sexual intercourse as a practice of widow cleansing in some parts of Southern Zambia was because some of the traditional leaders were key participants in human rights education and awareness campaign condemning such practices whilst showing the communities the adverse impact of such practices on their lives due to the number of people who have been infected or affected by HIV/AIDS.

As shown from chapter six, it is very clear from this study that global and regional human rights framework are the cornerstone for rights protection in the continent. The African Commission has made significant progress in protecting rights on the continent. Although very few cases involved women, it is evident that realisation of gender justice is paramount given the objectives of the Additional Protocol on the African Charter on the Rights of Women in Africa. Human rights

laws have contributed immensely in promoting the rights of women. For example, the right of widows and the rights in inheritance firstly recognised in the Protocol on the Rights of Women in Africa are significant in addressing the challenges faced by many women in Africa. To human rights activists it is a remarkable stride but to the majority whose national laws do not have these provisions, it may remain a law on paper for a very long time. It has been seven years now since the entering into force of the Protocol and no one has relied on its provisions for claims of right on inheritance or widows rights. It may be an indication that many women are not aware of these rights and find the procedure to lay claims to it impossible. One major setback for utilising the Protocol on the Rights of Women in Africa is the inability to have a functioning reporting mechanism to a committee which will bring about the use of general comments.

A system of law and practice to which the majority have access to and are aware of their procedures such as the traditional courts also constitutes an avenue to remedy the situation. The notion of living law is no longer purely academic but is seen in the manner which the traditional leaders conduct their activities within their institutions as noted the *shilubana case* when it was confirmed in the Constitutional Court. Traditional courts have important roles to play in creating greater access to justice for the majority particularly women. The current justice system is inadequate, expensive and too adversarial for many people. And so, expanded justice system (EJS) aimed at utilising local courts as courts of first instance in justice processes is an alternative that would develop new jurisprudence in customary law; promote gender justice whilst meeting the demands for justice and rights challenges of the 21st century.

8.2 Recommendations

To the three states under review:

- ▶ To amend their constitutions to guarantee rights in inheritance;
- ▶ To also guarantee and entrench in the constitution that customs, laws and practices that are detrimental to women and enjoyment of their rights are prohibited;
- ▶ To recognise the judicial functions of traditional leaders as well as their role in local government administration;
- ▶ to pay traditional leaders decent salaries commensurate with other public servants;
- ▶ to allocate appropriate funds to training, legal awareness and education of the people on human rights and other administration of justice functions of traditional leaders;
- ▶ to depoliticise family law and other issues affecting women as a private law that does not require interference;
- ▶ To create traditional courts in all parts of the country and ensure that its procedures are translated in languages that the majority understands;
- ▶ To domesticate the Protocol on the Rights of Women in Africa as part of national laws in order to better guarantee the rights contained in the Protocol.

To Human Rights Organisations and Civil Societies/CBOs

- ▶ to devote funds to improving access to justice through human rights education and awareness;
- ▶ to desist from pursuing agenda that is contrary to the institutions of the people;

- ▶ to act as a monitoring and evaluation mechanism in areas that the state is deficient;
- ▶ to work with traditional leaders as key participants in formulating cultural practice as well as women organisations and community based organisations;
- ▶ To contribute in developing capacity for consistent dialogue on human rights, culture and access to justice.

To Traditional Leaders

- ▶ To stop negative culture and avoid wrong interpretation that are detriment to women;
- ▶ To attend workshops on gender, culture, human rights and development;
- ▶ To strengthen their relationship with local government administrators to better serve the people;
- ▶ To engage with local government administrators, human rights and community based organisation on the status and roles of women in the community;
- ▶ To ensure that women are part of the *imbizo's* where the customs are being constantly reviewed and formulated in terms of the relevant quota;
- ▶ To be the guardian of children and vulnerable people within the community by ensuring that practices that are detrimental to the growth and lives of girl children are not condoned;
- ▶ To make justice the core principle in their traditional courts for both men and women.

Publications/Presentations from this work

(a) Publications

1. Rita Ozoemena, Michelo Hansungule "*The South African traditional courts' bill: Advancing access to justice or a step backwards in the constitutional gains of gender equality?*" Submitted for publication as an article, **2013**.
2. Mmatsie Mooki, Rita Ozoemena, Michelo Hansungule "*Women's Right in International Law*", in: **An Introduction to International Human Rights Law** (Edited by A.R. Chowdhury and J.H. Bhuiyan), Martinus Nijhoff Publishers, The Netherlands, **2010**.
3. Rita Ozoemena "*Poverty Alleviation Strategies in South Africa: Creating Dignified Living for Women through Social Justice and Development*" Online publication of the Gender Unit of the Consultancy Africa Intelligence, **2010**, www.consultancyafrica.com and www.ngopulse.org
4. Rita Ozoemena and Michelo Hansungule, "*Re-envisioning gender Justice in African customary Law through traditional institutions*", Policy Brief 63, November **2009**, Centre for Policy Studies, South Africa.

(b) Conference / Seminar Presentations

5. Rita Ozoemena and Michelo Hansungule, "*Gender Justice, Traditional Belief Systems and Customary Law in African countries: The case of South Africa and Nigeria*". An invited lecture by the Centre for Policy Studies (CPS), Johannesburg, South Africa.
6. Rita Ozoemena "*Advancing Gender Justice in Africa: Prospects & Challenges*". A presentation made at the XVII Conference of South Africa Sociological Association 10 -13th July 2011 at the University of Pretoria.
7. Rita Ozoemena "*The Legal Quagmire in Swaziland: Any Hope for Gender Justice*" presented at the Democracy Series Lecture of the Africa Institute of South Africa and Human Rights Watch on 28th July 2011, Pretoria.

List of Persons with whom the author had informal discussion (2009-2011):

1. Cameron Jacobs- South African Human Rights Commission, in Johannesburg.
2. Dr Sibandze- Deputy director, Department of Traditional Affairs in Pretoria.
3. Ms Keketso- Executive Director, Commission on Gender Equality in Johannesburg.
4. Ms Brenda Kalenga- International Finance Corporation, a division of World Bank, Johannesburg.
5. Ms Julia Agwu- Gender Activist and Senior Lecturer, University of Nigeria, Nsukka.
6. Barrister Ifeoma Offor-Practising lawyer, Abuja, Nigeria.
7. Barrister Chinelo Emeruwa- Barrister at Law, Old Airport Road, Jos, Nigeria.
8. Mama Chomo, at the Offices of Barrister Emeruwa, Old Airport Road, Jos, Nigeria.
9. Uchenna Okonkwo Eneh- An indigene of Enugu State, Nigeria.
10. Chief Akuluo-uno II- Abuja, Nigeria.
11. Chief Ume Okwoaka, former Commissioner of Information and Culture, Anambra State, Nigeria.

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