

## CHAPTER TWO

# INTERNATIONAL HUMAN RIGHTS PROTECTION OF WOMEN IN NIGERIA AND SOUTH AFRICA

*To be a woman means to submit.*

*- Early Han Dynasty (China)*

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### 2.1 INTRODUCTION

Although the study generally focuses on the domestic protection of women's rights, the international systems of human rights protection also impact on the domestic legal system. The international human rights system operates at two levels: the global, under the United Nations auspices and the regional, under the auspices of regional organisations.

This chapter examines the provision for women's rights at these two levels. At the global level, the elaboration, provisions and obligations under CEDAW are examined. At the regional level, the African Charter on Human and Peoples' Rights (African Charter) is examined. The development towards an Additional Protocol to the African Charter is also discussed.

The chapter also examines the reporting obligations of Nigeria and South Africa under CEDAW. The comments of the Committee for the Elimination of All Forms of

Discrimination Against Women (CEDAW Committee) on the reports already submitted by the two countries are compared.

When fifty-seven states stepped forward to sign CEDAW during the opening ceremonies of the 1980 United Nations World Conference on Women in Copenhagen, a new era for women began. Encouraged by a 1975 Mexico City Conference Resolution, women within the UN and in the international non-governmental women's organisation (NGOs) that supported and encouraged them had pressed hard to finish work on this convention in time for the 1980 Conference. Just over a year later, by 3 September 1981, twenty nations had ratified CEDAW and it entered into force.<sup>1</sup> Never before had discrimination on the ground of sex been defined internationally and equality between women and men sanctioned in all areas of life and work.

The Convention and its predecessor<sup>2</sup> resulted from initiatives and long negotiations within the political organs of the UN, but with a unique difference. Women drafted these instruments.<sup>3</sup>

By November 2000, 167 states had ratified the Convention, putting women's human rights firmly on the international agenda.<sup>4</sup> Full implementation of the treaty will take generations, for this is a revolutionary document covering both public and private acts. It requires that nations change laws and policies, that tradition and culture be modified, and that citizens and public officials alike change behaviour. The Committee on the Elimination of Discrimination Against Women Committee officially monitors implementation of the Convention by annually reviewing reports from ratifying countries. After a decade of reviewing these reports, it has made general recommendations and comments that establish new international standards.

How and why women drafted the declaration and the convention, gained necessary approval of their numerous articles and then advanced the principles of the convention within the political milieu of the UN is an essential chapter in the history of women and politics in the UN.

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<sup>1</sup> Fraser (1995) 77-92.

<sup>2</sup> The Declaration on the Elimination of Discrimination Against Women.

<sup>3</sup> Fraser *op.cit.* 80.

<sup>4</sup> Available on the internet ([www.untreaty.un.org](http://www.untreaty.un.org)) accessed on 8 July 1999.

## 2.2 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATIONS AGAINST WOMEN (CEDAW)

### 2.2.1 Historical background to CEDAW

The roots of the Declaration and the Convention lay not only in the common understanding of women's situation gained in the UN Committee for the Status of Women (CSW), but also in the equal rights provisions of the 1945 UN Charter and the 1948 UDHR.

Gender equality has been asserted in all the most important international human rights instruments. The UN Charter, together with the UDHR, forms the cornerstone of modern international human rights law. The Preamble to the UN Charter reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women". In addition, in terms of the Charter, member states of the UN pledge themselves to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The UDHR, which elaborates on the rights propounded in the Charter, states that everyone is entitled to all the rights and freedoms set forth in the UDHR, without distinction of any kind such as, *inter alia*, sex.<sup>5</sup> Both the International Covenant on Civil and Political Rights<sup>6</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>7</sup> affirm the principle of non-discrimination on the grounds of, *inter alia*, sex. Conventions on specific women's rights prepared earlier by CSW, the International Labour Organisation (ILO) and the UN Educational, Scientific and Cultural Organisation (UNESCO) are the foundation on which CSW members built on. The International Convention on eliminating race discrimination offered ideas, as did the UN concern with economic and social development. Political and intellectual support for CSW came from women's national and international organisations to which many members belonged.

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<sup>5</sup> Article 2 UDHR.

<sup>6</sup> Article 26 ICCPR.

In November 1963, 22 developing and Eastern European countries introduced a resolution at the 18<sup>th</sup> GA Session calling for drafting a declaration on eliminating discrimination against women.<sup>8</sup> None of the sponsoring countries are major Western powers, refuting the notion that feminism or women's participation in the development of nations was essential and that discrimination impeded development.<sup>9</sup> In 1963 ECOSOC also had before it a new "Report on the World Social Situation", analysing trends during the preceding decade. Population, health, nutrition, housing, education and social services – all issues with which women are traditionally associated – are prominent in that report.

The UN Declaration on the Rights of Women invited governments, UN specialised agencies, and NGOs to send comments and proposals to the Secretary General (SG). By the 1965 CSW meeting in Teheran, the UN SG had a memorandum ready with replies from 33 governments, 15 NGOs and four UN specialised agencies.<sup>10</sup> The report identified issues that surfaced throughout drafting and adoption of the declaration, the Convention and beyond. There is an almost unanimous agreement that women's education was a priority, and there was a strong sense that tradition and culture, especially as exemplified in marriage and family law, are major constraints on women's equality. Some respondents exalted women's roles as mother and family members, the political argument was over whether women had primary or multiple roles.

Among the eight industrialised countries responding to the SG's report for comments, the Western Europeans all suggested that the new declaration either should be limited to putting together the existing women's conventions or should emphasise the importance of training, and social services so that women could engage in activities outside the

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<sup>7</sup> Article 2 ICESCR.

<sup>8</sup> UN Report of the Economic and Social Council, A/5606 (15 November, 1963), 26. The Sponsors of the resolution are, Afghanistan, Algeria, Argentina, Austria, Cameroon, Chile, Colombia, Czechoslovakia, Gabon, Guinea, Indonesia, Iran, Mali, Mexico, Mongolia, Morocco, Pakistan, Panama, the Philippines, Poland, Togo and Venezuela.

<sup>9</sup> Fraser *op.cit.* 85.

<sup>10</sup> UN Draft Declaration on the Elements of Discrimination Against Women: Memorandum by the Secretary General E/CN 6/426, 30 October 1964.

home.<sup>11</sup> The United States was more enthusiastic, even hinting at the possibility of a stronger document later.<sup>12</sup>

In December 1979 the GA considered the draft convention. The final vote on adopting CEDAW was 130 to 0, with 11 abstentions.<sup>13</sup> Among those states abstaining are three countries that had supported the original declaration resolution – Mali, Mexico and Morocco – all countries with strong religious and family law traditions.<sup>14</sup> With this vote, a new human rights document was adopted. Women now had an international legal instrument aimed at destroying thousands of years of tradition and customs under which they are considered subordinate to men. CEDAW gives women full citizenship under law, made marriage an equal partnership, called for affirmative action to eliminate discrimination, and required all appropriate measures to be taken to modify or abolish discriminatory laws, customs and practices. Legal and *de facto* discrimination was both attacked. Article 18 called for the submission of reports by ratifying countries on legislative, judicial, administrative, or other measures adopted to implement the Convention. Subsequent articles allowed the monitoring Committee to make recommendations and suggestions to the GA based on their reviews of country reports.<sup>15</sup> Country reports are to be submitted within one year of ratification and every four years thereafter. The CSW was to receive the Committee's reports through the SG.

At the conclusion of the UN Third World Conference for Women held in Kenya in 1975, the "Nairobi Forward Looking Strategies for the Advancement of Women" was adopted.

After the adoption of CEDAW, attention then turned to the national level – to ratifications by enough governments to give the document the force of law and to international monitoring. The required number of ratifications took less than two

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<sup>11</sup> Industrialised countries that responded are Denmark, Finland, France, the Netherlands, Norway, Sweden, the United Kingdom and the United States of America.

<sup>12</sup> Fraser *op. cit.* 87.

<sup>13</sup> UN GA Official Records A/34/PV 107. Those states abstaining are Bangladesh, Brazil, Comoros, Djibouti, Haiti, Mali, Mauritania, Mexico, Morocco, Saudi Arabia and Senegal.

<sup>14</sup> Fraser *op. cit.* 88.

<sup>15</sup> *Ibid.*

years.<sup>16</sup> By 3 September 1981, twenty nations had ratified the new women's convention and it entered into force.

At the UN Fourth World Conference on Women held in Beijing, China in September 1995, progress made in terms of the Nairobi document was assessed.<sup>17</sup> It was found that there had been some improvement in the status of women during the previous decade, but that progress had been uneven and that inequalities between men and women persisted. The Beijing Declaration and Platform for Action, which flowed from the Beijing Conference, may be seen as a re-affirmation of the principles propounded in CEDAW and an insistence on the urgency of their realisation. All governments participating in the Conference adopted the Platform, which identified key obstacles to the advancement of women worldwide and set the priorities for action to be taken in this respect by the international community, including the UN system, between 1996 and 2001.<sup>18</sup> In the Platform for Action it was emphasised that governments have the primary responsibility for implementing the Platform for Action.

Human rights treaties may be adopted, but changing laws, policies and above all cultures, is another matter. The UN Division for the Advancement of Women has sponsored regular training seminars on the Convention and women's groups have succeeded in having some provisions of the Convention included into the new Constitutions of Brazil, Colombia and Zambia.<sup>19</sup>

Legal literacy and services projects have been mounted in many countries to teach women their rights and to take cases into local and national Courts, and more scholars – including developing country scholars – are writing about law, custom and stereotyping, and specific women's legal issues. New women and the law research groups are being organised and human rights groups in developing and industrialised countries are

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<sup>16</sup> The first twenty nations to ratify are Barbados, Byelorussia, Cape Verde, China, Cuba, Dominica, German Democratic Republic, Guyana, Haiti, Hungary, Mexico, Mongolia, Norway, Poland, Portugal, Rwanda, Saint Vincent and the Grenadines, Sweden, Ukraine, and the USSR (from Status Chart of Ratifying Countries, Division for the Advancement of Women, UN Vienna International Centre.

<sup>17</sup> Fraser *op. cit.* 89.

<sup>18</sup> *Ibid.*

<sup>19</sup> Fraser *op. cit.* 90.

developing women's programmes. Test cases on women's rights are being taken to Court. A 1992 Botswana case involving a mother's right to convey her nationality to her children was won at least partially by invoking the Convention as an international standard even though Botswana had not ratified it.<sup>20</sup> In 1992, a public accommodations case was won on the basis of Zambia's new Constitution.<sup>21</sup>

Yet, the extent to which the Convention mandate change in the most basic legal and cultural assumptions about women – and the resistance to the change – is indicated by the nature and extent of reservations that are encountered with ratification. CEDAW carries the largest number of reservations of any international human rights instrument. Twenty ratifying countries entered over eighty reservations.<sup>22</sup> Many reservations are to the nationality, employment, legal capacity, and family law articles, the contentious issues during the drafting and adoption of the Convention. Nevertheless, the ever-increasing number of ratifications indicates that political regimes understand that women are a constituency whose concerns must be recognised.

CEDAW is both a revolutionary and evolutionary document: revolutionary in the sense that its objective is equality between men and women; evolutionary in the sense that its language implies orderly change in laws, politics and behaviour.<sup>23</sup> Full implementation of the Convention's principles will take generations because its scope is unprecedented, ranging from family life to the appointment of women to international decision-making posts. CEDAW united women across the traditional developing versus industrialised countries dichotomy.

CEDAW sets standards for development, defines women's right as human rights and demonstrates that abrogation of human rights are not limited to what governments do to their citizens but also include what citizens do to each other. By defining discrimination as "any distinction, exclusion or restriction ... which has the effect or purpose of impairing or nullifying the recognition, enforcement or exercise ... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other

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<sup>20</sup> *Dow v Attorney General (Botswana)* (1992) LRC (Const) 623 (Bot CA).

<sup>21</sup> *Longwe v Interncontinental Hotel* (1993) 4 LRC 221-223.

<sup>22</sup> Fraser *op cit.* 87.

<sup>23</sup> Cook (1990) *Virginia Journal of International Law* 643 – 709.

field”;<sup>24</sup> CEDAW along with the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) has put eliminating discrimination on the world agenda.<sup>25</sup>

### 2.2.2 Substantive provisions of CEDAW

CEDAW is by far the most significant of all international instruments from the woman’s point of view, and it has been said that it “essentially constitutes the International bill of rights for women”.<sup>26</sup> The essence of the obligations of parties to the Convention is to be found in article 2, which provides: “State parties condemn discrimination against women in all its forms, (and) agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”.

Unlike other instruments, which, address women’s issues, the Convention imposes on state parties not only a negative obligation to refrain from discrimination against women, but a positive one to ensure its elimination.<sup>27</sup> State parties must *inter alia* ensure that their Constitutions embody the principle of equality, introduce legislation and other measures prohibiting discrimination<sup>28</sup> and: “adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the ... convention”.<sup>29</sup>

In terms of the Convention, state parties undertake to address discrimination on the political, social, economic and cultural fields, and in customary and other practices. State parties are also enjoined to educate parents to share child-raising responsibilities and to take measures to suppress traffic in women and the exploitation of prostitution of

<sup>24</sup> Article 1 CEDAW.

<sup>25</sup> Fraser *op cit.* 90.

<sup>26</sup> Van Zyl (1998) 3

<sup>27</sup> See Freeman (1995) 164.

<sup>28</sup> See Article 2 CEDAW.

<sup>29</sup> See Article 24 CEDAW.



women.<sup>30</sup> The Convention further enjoins state parties to ensure the full participation of women in political and public life.<sup>31</sup>

Article 3 of CEDAW enjoins state parties to take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

In article 4 state parties are enjoined to adopt special measures aimed at accelerating *de facto* equality between men and women. Such measure shall not be considered discrimination as defined in the present conventions, but shall be in no way entail as a consequence the maintenance of unequal or separate standards. These measures must be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 4(2) states further that adoption by state parties of special measures, including those measures contained in the present convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5 enjoins state parties to 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 of the sexes or on stereotyped roles for men and women.

States are further enjoined to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, and that the interest of the children is the primordial consideration in all cases.<sup>32</sup>

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<sup>30</sup> Article 2 CEDAW.

<sup>31</sup> Article 2 CEDAW.

<sup>32</sup> Article 5(b) CEDAW.

### 2.2.3 Implementation of CEDAW

In accordance with the terms of the Convention the Committee on the Elimination of All Forms of Discrimination against Women (the Committee),<sup>33</sup> quite separate from the CSW, was created to monitor progress made towards implementation of the Convention. Twenty-three members, who are experts on women's issues, are elected by government but serve in their personal capacities.<sup>34</sup>

In April 1982 representatives of the ratifying countries met to elect members of the Committee as provided under article 17 of the Convention. In October 1982, the new Committee met for the first time. In opening the meeting, the director of the Branch for Advancement of Women which serves as CEDAW Secretariat said a "new chapter in the long struggle for equality and the interpretation of women into the process of development has begun".<sup>35</sup>

Members of the Committee understood that the Convention, despite the increasing number of ratifications, needed more publicity to make women to be aware of its existence; power and scope otherwise national implementation would not succeed.

The Convention makes provision for a reporting procedure to ensure compliance with its provisions. State parties are required to submit an initial report within one year of their ratifying the Convention. The reporting procedure is the least effective of the three usual types of enforcement mechanisms embodied in international instruments. Another enforcement mechanism which is presently available under CEDAW is that states parties which disagree about the interpretation or application of the Convention, and cannot settle their dispute by means of negotiation, must go to arbitration if one party requests this. If arbitration cannot be arranged, any of the parties can refer the matter to the International Court of Justice.<sup>36</sup>

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<sup>33</sup> See Article 17 of CEDAW. For a full discussion on this Committee See generally, Jacobson (1992).

<sup>34</sup> Article 17 CEDAW.

<sup>35</sup> UN, The work of CEDAW vol 1, 1982 – 1985, ST/CSDHS/5 (1989), 3.

<sup>36</sup> Article 29 CEDAW.

It is not only the CEDAW Committee that implements the provisions of CEDAW. In the first place, there is an obligation on states to apply CEDAW domestically. In this respect, domestic courts also play a role.<sup>37</sup>

#### 2.2.4 Optional Protocol to CEDAW

CEDAW, like other international instruments, imposes an obligation on state parties *vis-à-vis* other states, not *vis-à-vis* individuals. According to Burrows<sup>38</sup> CEDAW unlike CERD, on which it was modelled, does not embody a mechanism for receiving individual complaints. Under article 14 of CERD, state parties may at any time declare that it recognises the competence of the Committee to receive and consider communications from individuals within its jurisdiction claiming to be victims of violations.

The Commission prepared a draft document, which envisages both a communications and inquiry procedure.<sup>39</sup> In terms of the proposal, communications should be in writing and be submitted to CEDAW Committee by an individual or group claiming to have suffered from a violation of any right in the Convention or to be directly affected by the future of a state party to comply with its obligations under the Convention. Communications should only be submitted after the exhaustion of all domestic remedies. The Committee would then bring a communication to the attention of the state party, but preserve the anonymity of the complainant unless the latter agreed to disclosure. The Committee would have to make itself available as a facilitator between parties.

According to the proposal, if the Committee receives a complaint that a state party to the protocol had committed a serious and systematic violations of right set forth in the Convention, the Committee would have to invite the state party to co-operate in the examination of the relevant information – if necessary, one or more members of the Committee would conduct an inquiry and report back to the Committee. There might also be a visit to the state party if this is considered necessary and if the state party consented. The Committee's findings would be transmitted to the state party, which

<sup>37</sup> See *Dow v Attorney General (Botswana)* (1992) LRC (Const) 623 (Bot CA).

<sup>38</sup> See Burrows (1986) 89 at 94.

within three months of receiving these, would have to submit its own observations to the Committee. An inquiry would be conducted confidentially and the co-operation of the state party would have to be sought at all stages. No reservations would be permitted.

The Optional Protocol, to CEDAW,<sup>40</sup> which embodied the main features of the draft discussed above, was adopted on 6 October 1999 at the 54<sup>th</sup> Session of the GA of the UN.<sup>41</sup> By 31 December 2000 there are 67 signatories and 19 state parties to the Optional Protocol.<sup>42</sup> Regrettably South Africa is not a party to the Optional Protocol to CEDAW. However, Nigeria has signed the optional protocol on 8 September 2000. In fact both countries have not ratified the Optional Protocol to CEDAW (Nigeria has only signed). It is recommended that both countries should ratify as soon as possible.

## 2.3 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND THE RIGHTS OF WOMEN

### 2.3.1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) is a regional human rights instrument adopted by the Organisation of African Unity at the 18<sup>th</sup> conference of Heads of State and Government on 27 June 1981 in Nairobi, Kenya. It entered into force on 21 October 1986.

Any discussion of human rights in the third world<sup>43</sup> in general and in Africa in particular is more often than not attended by a sinking feeling that the attempt is a pointless

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<sup>39</sup> Van Zyl *op. cit.* 3I-11.

<sup>40</sup> For the full text of the Optional Protocol to CEDAW See A/RES/54/4.

<sup>41</sup> For a discussion of the Draft Optional Protocol to CEDAW See Flinterman (1995) 13 *Netherlands Quarterly of Human Rights* 85.

<sup>42</sup> Available on the internet ([www.un.org/unhchr](http://www.un.org/unhchr)) accessed on 31 December 2000.

<sup>43</sup> The term is used in a wide sense to describe those countries, mainly in South America, Asia and Africa, which emerged into statehood after World War II and whose economies, largely dependent on the industrialised world, are in a state of under-development. It is no secret that apart from

exercise, a lawyer's game that is fated to achieve nothing of significance for the ordinary person. Firstly, there is the indifference of African governments and leaders to the human rights ideal, seeing efforts to achieve it as irritants tending to confuse the determined march towards "law and order", "peace and stability", "economic development" or whatever else is seen as the primary state goal.

A second, more substantial, reason for the slow momentum of the human rights ideal is provided by Africa's special conditions of poverty, ignorance, disease and lack of political sophistication affecting the vast majority of the continent's people.

But by far the greatest obstacle in the path of human rights observance has been the success with which governing elites have been able to deploy the argument that the international human rights movement reflects the liberal, individualistic tradition of Western Europe, and America and therefore has no relevance for African society.<sup>44</sup> The conditions mentioned above are then used as a basis for distinguishing the African situation from that which prevails in the developed world, and asserting that Africa's solution cannot be shaped by a foreign standard. The danger in this argument lies in its *prima facie* plausibility.

The UDHR, the ICCPR, the ICESCR and other regional treaties such as European and American Conventions owes much to Western legal and political philosophy and ideology. International instruments seeking to set standards in specific areas of life bear the imprint of their Western origins all too clearly and in no where more obviously than in the field of family law. The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage is a good example, in addition to the language of UDHR and the International Covenants on Consent and Equality in Marriage.

It is relatively easy to dismiss international human rights as a doctrine that is blind both to Africa's special problems and its culture, and which is therefore an inappropriate standard to apply in finding human rights performance on the continent. There are no

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poverty, the other feature that they have in common is political instability and a generally sad human rights record.

<sup>44</sup> Nhlapo (1989) 3 *International Journal of Law and the Family* 1.

doubts a number of African leaders whose denunciations of international concern over human rights is merely a device to cover up their own abuses.<sup>45</sup>

The UDHR, adopted in 1948, embodied a philosophy of human rights that was directly descended from the religions, social and political struggles in England and France between the 17<sup>th</sup> and 19<sup>th</sup> centuries, and in the United States of America for part of that time.<sup>46</sup> It marked the culmination of the fight against absolutism whose early beginnings can be traced back to the ideas of Hobbes and Locke, and to such significant events in European and American history as the trial of Charles I in 1649, the Virginia Declaration of Rights in 1776 and the French Declaration of 1781.<sup>47</sup> These moves developed against the background of strong natural law and contract theory ideas, and the present day international human rights ideal still bears the imprint of those origins.

It is founded on a new society as an association of individuals, united by a contract between them, in which the individual's happiness and freedom are to be the goal of all human association.<sup>48</sup> Kamenka and Tony point out that this is not necessarily the only view, or one without critics, but they observe that although all societies have had a concept of suffering, human worth, justice, fair dealing and meeting one's obligations, the society of the great 17<sup>th</sup> and 18<sup>th</sup> century social contract theory is strictly a European phenomenon.<sup>49</sup>

The cultural differences between Africa and Western Societies are no less important. They have serious implications for human rights even though these implications may be less obvious than the dangers posed by ideology. Though there may be danger in generalisations, it is beyond dispute that one of the most outstanding features common to all African traditional systems is what may be termed the community principle.<sup>50</sup>

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<sup>45</sup> E.g. General Sanni Abacha the late Dictator who ruled Nigeria between November 1993 and June 1998.

<sup>46</sup> See generally Pollis & Schwab (1979).

<sup>47</sup> Kamenka (1978) 1.

<sup>48</sup> Kamenka *op. cit.* 6.

<sup>49</sup> *Ibid.*

<sup>50</sup> Allott (1960) 69-71.

Apart from the community principle, African culture differs in other superficial ways from Western Culture. African leaders are not slow to point out that confrontations, questions of authority, disobedience to the elders, equality for women, competitiveness and so on, are all “foreign” to African culture. The threat to human rights under such argument is obvious.

On closer examination, it is clear that these justifications cannot be sustained. It is true that the UN sponsored human rights movement is the product of a particular history and philosophy. It is even true that Africa differs from the West in its history, its political and economic needs and its culture. But all that cannot justify the allegation that human rights have no place in Africa.

### 2.3.2 Women’s rights under the African Charter

The Universal Declaration and the UN Charter are referred to in the Charter of the Organisation of African Unity (OAU) as the documents, which embody principles to which the OAU ought to adhere to. Of course, several African countries cited the international documents in their own Constitutions. Despite these good intentions, the actual record of human rights observance remained bleak.

The African Charter seeks to depart from regional models such as the European and American Conventions by taking into account problems unique to Africa while retaining those “traditional Western” human rights embodied in the Universal Declaration. The preamble to the African Charter is very revealing in this respect. The ACHHR draw inspiration from the Charter of OAU which, *inter alia*, pledges “to eradicate all forms of colonialism from Africa”.<sup>51</sup> In addition, the preamble reaffirms the duty of African states to achieve “the total liberation of Africa ... and ... to eliminate colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases”. Civil and political rights cannot be dissociated from economic, social and cultural rights, stressing that the satisfaction of these rights is a guarantee for the enjoyment of civil and political rights. Taken together these three paragraphs set the ideological tone of the African Charter and reflect the continent’s historical reality, thus

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<sup>51</sup> Preamble to the African Charter.

attempting to confront the criticism earlier alluded to, that Western human rights thinking is the product of a history significantly different from that of Africa.

The African Charter in addition to being inspired by the spirit of the OAU Charter and other human rights documents adopted by the United Nations, the Charter's grant of rights must also be viewed in the context of African traditions. The attempts to make the African Charter "relevant" on the twin issues of ideology and culture is thus complete.

Articles 1 to 18 of the ACHPR list individual rights of the type found in most human rights documents (i.e civil and political, as well as economic, social and cultural rights). Articles 19 to 21 detail the rights of "peoples", while the whole of Chapter II (articles 27 to 29) deals with the duties of the individual towards his family, community and state, and the international community.

The twin objectives of the Chapter are incomparable – one to preserve African culture and tradition and at the same time protects human rights.<sup>52</sup> The achievement of one must necessarily be at the expense of the other. Can a state guarantee equality before the law for its citizens whilst taking into consideration "the virtues of ... (its) historical tradition ..."? Does the spirit of the preamble on the matter of African values tend to neutralise the effect of the more radical rights guaranteed under peremptory sections of the Charter? Family law is very important in traditional African societies. Matters such as marriageable age, consent and equality within marriage are closely tied up with the very structure of traditional society.<sup>53</sup> The family unit is so crucial in traditional thinking that customary family law is invariably the best developed branch of customary law for most African communities.

Even in the most unsophisticated systems of tribal law there will exist an elaborate network of principles, rules and regulations concerning such matters as Courtship, the

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<sup>52</sup> See generally Kois (1996) 3 *East African Journal of Peace and Human Rights* 92 at 99. See also Dawit (1994) 42 that stated that article 18(3) of the African Charter is a paradox since African customs and traditions have been used to justify practices harmful to women.

<sup>53</sup> No account of African society can afford to ignore the traditional dimension. The vast majority of African peoples (up to 90% in some countries) are rural areas and regard themselves as subject to customary law.



marriage ceremony, childbirth, the relationship of husband and wife, the relationship between parent and child, domestic dispute settlement, and succession.

“Family” in the African context is usually the extended family rather than the nuclear unit found in the developed world. This generates yet more rules about matters like the duty of support, adoption, relationship with in-laws and so on. A quick study of African traditional economic and political arrangement will reveal the fact that the notion of family impinges upon almost every area of community life, including property ownership and even civil status.

Family life is central to African social, political and economic life and attempts to bring the provisions of the Charter into force cannot afford to ignore this. It is an incomparable repository of customary rules and because of its importance it has always been the subject of very strongly held views.

Family matters cannot be dissociated from issues of women’s rights. In Africa, the topic of women’s rights is not a popular one. The idea of sex equality is of comparatively recent origin even in advanced societies and nowhere has it been fully accomplished yet.<sup>54</sup> Most of the sex inequalities in traditional society stemmed from the African conception of marriage.<sup>55</sup> From marriage law flowed not only controversial practices such as child betrothal and bride price, but also important status changes with a direct bearing on a woman’s personal autonomy, rights to property, rights to her own children, freedom of decision making on various areas and sometimes even her personal dignity. One must always be aware of the danger of taking the traditional African marriage out of its social context: on the wider network of marital obligations the wife’s own position (for instance, with respect to property or inheritance) was secured by the very rules which appeared to be designed for her subjection. It is clear that a discussion of African values in relation to the family will eventually have to confront the issue of the position of women with family.

In most African countries, reaction to any type of “women’s movement” tends to be hysterical, thus effectively obscuring the issues and preventing the laying down of the

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<sup>54</sup> Adebite (1978) 186.

<sup>55</sup> Adebite *op.cit.* 187.

proper formalities for enlightened reform. Western feminist theory seems to be that economic and psychological discrimination are the two factors responsible for the disadvantageous position of women. It is interesting to note that both factors are seen as existing primarily within the family. Economically, women are seen as being disadvantaged by a double role as reproducers – of children in the biological sense and of the labour force in the wider sense of supporting and servicing male breadwinners ...<sup>56</sup> This item identifies the capitalist system as an oppressor of women. Secondly, the institutions of marriage and the family are today seen as the prisons in which women's psychological inferiority is embodied and ensured.<sup>57</sup> Hostility to both marriage and the family seems to be a recurring theme in feminist theory.

Most of the hostility seems to be directed at childcare, housework, romantic love, and inequality of the partners. Most African cultures see the family unit as the basic building block of society and far from seeking its abolition, African philosophy aims at preserving and strengthening it. The African Charter provides in Article 18 that:

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 and moral health the state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community 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 the aged and the disabled shall also have the right to special measure of protection in keeping with their physical or moral needs

Article 18 affirms that “the family shall be the national unit and basis of society” and guarantees its protection by the state. Article 18(3) is extremely difficult to interpret. How is the confirmation to “ensure the elimination of every discrimination against women” reconcilable with the duty to be conscious of “the values of African civilization”? What about the protection of the rights of the women and the child “as stipulated in international declarations and conventions”? Should reference to those documents be made only if the issues involve motherhood, or whenever it concerns

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<sup>56</sup> Oakley (1981) 32.

<sup>57</sup> *Ibid.* 33.

discrimination against women?<sup>58</sup> The answers to these questions will depend on how the African Commission elects to interpret the article.

Any clause purporting to deal with the elimination of discrimination against women in the African situation is the object of great interest. Non-discrimination also raises some purely legal issues. Most African countries with a colonial past have dual legal systems, with the “received” law existing side by side with the indigenous law. The traditional rules governing matters of family and women’s rights are not merely historical curiosities. They are part and parcel of the living domestic law in most African states. The received law is usually the system that is the “general law of the land”, with the customary law cast in a subsidiary role. Neff argues that whatever the consequences, discriminatory customary law would have to be abandoned once the Charter come into force.<sup>59</sup> The Charter has since come into force and discriminatory culture and traditions against women are still subsisting.

A Charter characterised by “uniquely African” thinking can render meaningless the very rights it purports to grant. The “virtues of ... historical tradition and the values of African civilisation” mentioned in the preamble as the themes which should guide any reflection on human rights, may leave much to be desired in the way of a direct protection of the guaranteed freedoms especially the elimination of ... every discrimination against women.<sup>60</sup>

### 2.3.3 Implementation of the African Charter on Human and Peoples’ Rights

The monitoring body for the Charter is the eleven-member African Commission on Human and Peoples’ Rights (the African Commission),<sup>61</sup> whose parent body is the OAU. The Commission meets once a year. Like the CEDAW Committee, it relies on a reporting procedure to ensure compliance with its provisions. The African Commission

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<sup>58</sup> *I e* is there some significance in the use of the term “women” in the first part of the article and the phrase “the woman and the child” in the second.

<sup>59</sup> Neff (1984) 33 *CLO* 331.

<sup>60</sup> Article 18(3) ACHPR.

<sup>61</sup> There are four women on the Commission – from The Gambia, Congo Brazzaville, Uganda and Malawi as of 31 December 2000.

is experiencing similar problems to the CEDAW Committee, such as failure by states parties to submit reports timeously, incompleteness of reports, which have been received, and insufficient time for the Commission to consider reports. Up until now, little attention has been paid to women's issues in the reports, which have been received. In addition to reports, the African Charter, unlike CEDAW, makes provision for the receipt of communications, but the procedure is not clear-cut.<sup>62</sup> Nevertheless, the provision that NGOs are permitted to submit complaints may prove to be a very valuable one.<sup>63</sup>

Unfortunately, the Commission has even less administrative and secretarial support than CEDAW Committee, and its parent body has even more severe financial problems than those of the UN.<sup>64</sup> An additional problem is that many members of the Commission are government officials.<sup>65</sup> The African Charter can at present contribute less to the empowerment of African women than CEDAW can, although Butegwa<sup>66</sup> stated that article 25 imposes on states the obligation to "protect and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the ... Charter". She sees state responsibility arising only of this provision if individuals follow discriminatory customs because of ignorance of laws or international instruments.<sup>67</sup> A promising development is that the Commission has granted observer status to a large number of NGOs.<sup>68</sup>

#### 2.3.4 Obligation to report under the African Charter

Article 62 of the African Charter requires each state party to submit every two years, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter. "The African Charter does not spell out what should happen to these reports: To whom must they be

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<sup>62</sup> Article 55 ACHPR.

<sup>63</sup> See Butegwa (1994) 495 – 505.

<sup>64</sup> Welch & Metzger (eds) (1993) 561 – 567; Butegwa *op. cit.* 506.

<sup>65</sup> Welsh & Meltzer (eds) *op. cit.* 570; Butegwa *op. cit.* 504.

<sup>66</sup> Butegwa *op. cit.* 501.

<sup>67</sup> *Ibid.*

<sup>68</sup> Butegwa *op. cit.* 510; Kueyehia *op. cit.* 99.

addressed? Must they be examined? And if so by whom? Once examined, what action should be taken, if at all?<sup>69</sup>

The African Commission at its third session adopted a resolution in which it recommended that the OAU Assembly of Heads of State and Government should:

Mandate the General Secretariat of the OAU to receive the said reports and communicate them to the Commission without delay;

Specifically entrust it with the task of examining the periodic reports submitted by the States Parties pursuant to Article 62 and other relevant provisions of the African Charter;

Authorise it to give the State Parties general guidelines on the form and the contents of the said periodic reports.

The OAU Assembly entrusted the African Commission with this task.<sup>70</sup> In October 1988, the African Commission adopted guidelines for state reporting. These guidelines have been described as not very user-friendly and as “excessively detailed and unnecessarily complex”.<sup>71</sup>

In the second activity report of the African Commission on Human and Peoples’ Rights,<sup>72</sup> state parties to the African Charter are given general guidelines regarding the form and contents of reports to be submitted on the Elimination of All Forms of Discrimination against women.<sup>73</sup> The Commission stated that discrimination against women in Africa is of such widespread occurrence that the Commission would like to receive reports on measures taken by state parties to eliminate discrimination against women.

According to the guidelines, the report of every state party should be in two parts,<sup>74</sup> the first part should state actual, general, social, economic, political and legal framework within which a state party approached the elimination of discrimination against women in all its forms as defined by CEDAW. The second part of the state report should

<sup>69</sup> See Viljoen (2000) 44 *Journal of African Law* 110-118.

<sup>70</sup> See the African Commission’s Second Annual Activity Report para 20.

<sup>71</sup> See Viljoen (1999) 47 at 96.

<sup>72</sup> Adopted on 14 June 1989.

<sup>73</sup> See *African Commission on Human and Peoples’ Rights Documentation* 68.

<sup>74</sup> Article 3 of the Guidelines.

provided specific information in relation to each of the provision of CEDAW.<sup>75</sup> Such report should include any limitations or restrictions imposed by law or practice on the enjoyment of each right. States are also enjoined to include any factors or difficulties affecting the exercise and enjoyment of each right. State report should also reveal obstacles to the participation of women on an equal basis with men in the political, social, economic and cultural life of the country and give information on types and frequencies of cases of non-compliance with the principle of equal rights.<sup>76</sup> It is hoped that in future Nigeria and South Africa would adhere to this guidelines.

When reporting to the African Commission, states' periodic reports must contain actions taken or being embarked upon to improve the protection of the rights of women.<sup>77</sup> State parties must, before submitting their reports, assess the compatibility of each piece of their national legislation with each article of the African Charter including brief comment on each article.

The difference between "initial" and "periodic" reports was also clarified. The only difference between the two is that initial reports have to contain additional information and the "Simplified guidelines" provide that this covers information of the state focussing on (a) a brief history of the state concerned; (b) its form of government; (c) the legal system and the relationship between the three branches of government of the state reporting. In addition, the following documents have to be annexed to initial reports: (a) the Constitution; (b) the labour law, act or code; (c) the penal code and the code of criminal procedure; and (d) landmark decisions on human rights.<sup>78</sup>

The African Commission must adopt concluding observations after examining a state report. "Without a record of previous examinations, there can hardly be a yardstick against which 'improvement' may be gauged, and leaves no room for continuity".<sup>79</sup> Concluding observations at the end of each state report will serve further as a database of information for commissioners who are absent during the examination of a particular report, and to new commissioners who have to examine subsequent reports submitted b

<sup>75</sup> Article 4 of the Guidelines.

<sup>76</sup> Article 7 of the Guidelines.

<sup>77</sup> Viljoen *op.cit.* 97.

<sup>78</sup> See generally Viljoen (2000).

<sup>79</sup> Viljoen (2000) 16 *SAJHR* 580.

a particular state. In other words, the Commission's institutional memory needs to be reinforced, as there is no assurance of continuity in its membership.<sup>80</sup>

Nigeria and South Africa have ratified the African Charter. Nigeria ratified the African Charter on 22 June 1983. The initial report was due in 1985. Nigeria submitted its initial report in 1990, five years after the due date. It was noted by a member of the African Commission Prof. Umozurike that Nigeria should have been making its third report at the time the first report was submitted.<sup>81</sup>

The initial report submitted by Nigeria was considered in 1993 at the 13<sup>th</sup> Session of the African Commission.<sup>82</sup> At the session the representative of the Nigerian government Ms. Dowodu was asked what steps Nigeria had taken to implement the Charter, specifically by eradicating harmful traditional practices, especially those that amount to discrimination against women. The representative was also asked of the measures taken by government to eradicate practices such as scarification. The representative was further asked about the measures the government have taken to eradicate female circumcision in view of the danger to women, in fact, in view of the implied discrimination against women.<sup>83</sup>

The representative said that the government is committed to human rights and that the African Charter has been incorporated into the Nigerian Law<sup>84</sup> and that human rights education is being taught in schools from secondary school to universities and police colleges.

On the right to development of women, the representative stated that government now grants loans to women and that a bank – Peoples' Bank was created to give small loans. The Peoples' bank is a mobile bank and they go around the markets, and every nooks and corners of the country to assist people especially rural women. On the issue of

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<sup>80</sup> *Ibid.*

<sup>81</sup> See generally *The African Commission on Human and Peoples' Rights, Examination of State Reports*. 13<sup>th</sup> Session April 1993: Nigeria – Togo Vol. 4, 1995, 28.

<sup>82</sup> See *The African Commission on Human and Peoples' Rights, Examination of state reports*, 13<sup>th</sup> Session April 1993: Nigeria – Togo Vol. 4, 1995, 29.

<sup>83</sup> *Ibid.* 30.

<sup>84</sup> As Cap 10 LFN 1990.

female genital mutilation and scarification, many programmes such as seminars, symposia and workshops have been organised to educate people especially women as to their rights and people are being educated on the dangers inherent in female genital mutilation and scarification.<sup>85</sup>

The African Commission observed that Nigeria still has to do more to improve human rights generally and the rights of women in particular. The Commission impressed it on Nigeria to find ways of stopping female genital mutilation and scarification. Nigeria was further enjoined to submit future reports timeously.

South Africa ratified the African Charter on 9 July 1996. It therefore had to report by 9 October 1998, two years after the African Charter had taken effect.<sup>86</sup> South Africa submitted its initial report on time. The report covers 146 pages. South Africa had already reported to two UN human rights monitoring bodies - the Committee on the Rights of the Child, and the Committee on the Elimination of all forms of Discrimination Against women. These reports formed the basis of the initial report under the African Charter.

The South African report was considered at the 25<sup>th</sup> session of the African Commission.<sup>87</sup> The report followed the Simplified Guidelines the first two chapters deal with the history of the country and provide an introduction to the South African legal system. Chapter 3 deals with the general measures for the implementation of the Charter, including actions taken in respect of vulnerable groups (including women). Chapter 4 forms the bulk of the report and provides details about steps taken to implement the rights set out in the African Charter. Chapter 5 highlights South Africa's use of the African Charter in relations with other states. Chapter 6 contains a conclusion. The two reports to the UN, the National Programme of Action for /children in South Africa, the Constitution, legislation and judgments of the Constitutional Court are attached as appendices.<sup>88</sup>

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<sup>85</sup> See *The African Commission on Human and Peoples' Rights, Examination of State reports*, 13<sup>th</sup> Session April 1993: Nigeria – Togo Vol. 4, 1995.

<sup>86</sup> See Article 65 of the African Charter, The Charter is deemed to have come into effect three months after deposit of instrument of ratification or accession.

<sup>87</sup> Held in Bujumbura, Burundi from 26 April – 5 May 1999.

<sup>88</sup> Viljoen (2000) 115.



The South African report was presented by the Deputy Minister of Justice, Dr. Tshabalala-Msimang, who was the head of the delegation. The Commission raised many questions among which are: the status of the African Charter in South Africa, the electoral system and process, the process of drafting the report, the criminal justice system, the role of customary law, and its relation to human rights (especially the right of inheritance for widows under indigenous law). Finally the Commission wanted to know the approach of the government to the treatment of AIDS and how education can be said to be compulsory when it is not free.<sup>89</sup>

On follow up, it has been stated that as far as can be ascertained, no steps have been taken to address the concerns raised by the African Commission in an integrated way. In fact this lack of an integrated approach is a problem in respect of all the human rights treaties and their treaty bodies in South Africa.<sup>90</sup> This may be due to the relative inexperience of government in dealing with international human rights obligations.<sup>91</sup>

In general the South African report complied with the guidelines for reporting. The reports, however, does not show what are the specific obstacles and shortfalls in realising the rights in the African Charter in South Africa.<sup>92</sup> The African Commission commended South Africa for submitting its initial report timeously. The Commission wants South Africa to look into ways of combating the HIV/AIDS epidemic. South Africa was also urged to provide free and compulsory basic education.

### 2.3.5 Special Rapporteur on the Rights of Women in Africa

At the 23<sup>rd</sup> Ordinary Session held in April 1998, the African Commission endorsed the appointment of Mrs Julienne Ondziel-Gnelenga as the Special Rapporteur on the Rights of Women. The mandate of the Special Rapporteur covers all 53-member states of the OAU. Her duties over the next four years from 1998 include the following:

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<sup>89</sup> *Ibid.*

<sup>90</sup> Viljoen (2000) 115.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

- To undertake the study of the situation of women's rights in Africa.
- To facilitate the development and examination of states parties' reports on the rights of women in Africa.
- To ensure that states parties uphold their obligations as outlined in the African Charter. This requires the Special Rapporteur to report on situations in which violations against women occur and propose recommendations to the Commission.
- To work toward the adoption of the Additional Protocol on Women's Rights.
- To assist African governments in the development and enactment of policies that promotes and protects the rights of women in Africa.
- To encourage and work with NGOs who are involved in the promotion and protection of the rights of women.
- To serve as a liaison between the Commission and intergovernmental and NGOs at the regional and international level in order to harmonise initiatives on the rights of women.
- The Special Rapporteur will collaborate with United Nations Special Rapporteurs and other regional systems.
- To inform each session of the Commission of the advancement of her work and the difficulties she has encountered.
- To submit an annual report that will be annexed to the report of the State Heads and Government of the OAU.<sup>93</sup>

The Special Rapporteur on the human rights of women in Africa contributed to the drafting of a "Draft Protocol on the Rights of women". Apart from this contribution, the Special Rapporteur has not done much towards improving the status of women in Africa.

### **2.3.6 The Draft Protocol to the African Charter on Women's Rights**

There are many versions of the Draft Protocol to the African Charter on Women's Rights. The Dakar Protocol is the one referred to in this study.<sup>94</sup>

The process of drafting the Additional Protocol to the African Charter began in March 1995 in Lomé, Togo, when the African Commission in conjunction with Women Law and Development in Africa (WILDAF) organised a two-day seminar on "The African Charter on Human and Peoples' Rights and the Human Rights of Women in Africa".

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<sup>93</sup> WILDAF: The Newsletter of Women in Law and Development in Africa (1999).

<sup>94</sup> A final version of the Draft Protocol was adopted on 13 September 2000 (CAB/LEG/66.6).

The seminar was well attended with many participants representing NGOs working in the field of women. The seminar specifically addressed the urgent need for an additional instrument to make the African Charter more responsive to the needs and concerns of women.<sup>95</sup>

### **2.3.6.1 Overview of the Draft Protocol**

The Draft Protocol to the African Charter consists of 22 articles. The Preamble to the Draft Protocol re-affirm the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status as contained in the African Charter.<sup>96</sup> Article 18 of the African Charter calls on all African States to eliminate all discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.

The Draft Protocol defines discrimination in line with CEDAW<sup>97</sup> and urge state parties to respect the dignity of women<sup>98</sup> and to take all necessary measures to integrate a women's perspective in their policy decisions, legislation, development plans and all spheres of life.<sup>99</sup> The Draft Protocol preserve the right of women to physical security including the prohibition of all forms of trafficking in women. The Draft Protocol further enjoins state parties never to sentence pregnant women to death, and to prohibit all traditional and cultural practices which are physically and/or morally harmful to women and girls and which are against recognised international norms such as force feeding and female genital mutilation and the protection of physical health of women and girls. Women and girls are to be protected against rape and all other sexual offences and that in times of conflict/war, rape and sexual violence against girls and women should be considered as war crimes and be punished as such.<sup>100</sup>

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<sup>95</sup> WILDAF (1999).

<sup>96</sup> Article 2 African Charter.

<sup>97</sup> Article 1 Draft Protocol.

<sup>98</sup> Article 2 Draft Protocol.

<sup>99</sup> Article 3 Draft Protocol.

<sup>100</sup> Article 5 Draft Protocol.

Article 6 of the Draft Protocol deals with the issue of marriage, the need for free and full consent of both parties to a marriage is emphasised, a minimum age of 18 is prescribed for both men and women. Polygamy is also prohibited<sup>101</sup> and that women and men shall have the same rights in marriage<sup>102</sup> and that every marriage shall be recorded in writing in order for it to be recognised and such marriages should be registered in accordance with national law.<sup>103</sup> A married woman should be allowed to keep her maiden name, or to use it jointly or separately with her husband's name, she may also be able to give her maiden name to her children.<sup>104</sup> A married woman shall have the right to retain or change her nationality or to confer it on her husband and children.<sup>105</sup> A married woman shall also have the right to acquire her own property and to administer and manage it freely and in case of joint ownership the wife shall have the same rights as the husband.

Divorce or annulment of marriage shall be effected only by judicial order and husband and wife shall have the same right to seek divorce and annulment and after the divorce or annulment, both husband and wife shall have the same rights with respect to the children and property of the marriage.<sup>106</sup>

The Draft Protocol also recognises the rights of widows not to be subjected to inhuman, humiliating and degrading treatment, the right to marry a person of her choice, the right to inherit her husband's property and the right to continue to live in the matrimonial home irrespective of the matrimonial regime.<sup>107</sup> The political rights of women in conformity with the African Charter<sup>108</sup> is preserved.<sup>109</sup> Article 12 of the Draft Protocol prohibit all forms of violence against women in both public and private spheres,<sup>110</sup> state parties are to identify the cause of violence against women, take measures to prevent and eliminate violence, punish perpetrators and provide for rehabilitation and reparation

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<sup>101</sup> Article 6(3) Draft Protocol.

<sup>102</sup> Article 6(4) Draft Protocol.

<sup>103</sup> Article 6(5) Draft Protocol.

<sup>104</sup> Article 6(7) Draft Protocol.

<sup>105</sup> Article 6(8) Draft Protocol.

<sup>106</sup> Article 7 Draft Protocol.

<sup>107</sup> Article 8 Draft Protocol.

<sup>108</sup> Article 13 African Charter.

<sup>109</sup> Article 10 Draft Protocol.

<sup>110</sup> Article 12(1)(a) Draft Protocol.

for victims of violence.<sup>111</sup> The right to education of women is emphasised in article 13 while article 14 preserves the economic and labour rights of women. Health and reproductive rights of women are also given prominence in the Draft Protocol. The right of women to control their fertility, to decide whether to have children or not, to space children, the right to choose any method of contraception and the right to protect themselves against sexually transmitted diseases are all preserved in the Draft Protocol.<sup>112</sup> States parties are also required to take appropriate measures to provide free health services to women especially those in rural areas, establish pre and post natal and nutritional services for women during pregnancy and while breastfeeding and also to protect the reproductive right of women particularly in cases of rape and incest.<sup>113</sup> Socio-economic rights of women are protected in Articles 16 and 17 of the Draft Protocol, access to land, clean drinking water, food and housing are preserved. The Draft Protocol also recognises the right to cultural practices and environment rights.<sup>114</sup>

The Draft Protocol is to come into force one month after the deposit of fifteen instrument of ratification or accession.<sup>115</sup> Article 22 of the Draft Protocol provided for the amendment of the Draft Protocol and the procedure for Amendment.

The Draft Protocol to the African Charter on the rights of women remains a draft. It is yet to be adopted by the African Commission. It is only after adoption by the African Commission that it would be sent to the Assembly of Heads of States and Government for adoption.

### **2.3.6.2 Critical analysis of the Draft Protocol**

The Draft Protocol to the African Charter is a very ambitious instrument and highly revolutionary for an instrument, which is supposed to regulate the rights of women in Africa, given the patriarchal nature of the region and the numerous traditional and cultural practices, which undermine the human rights of women.

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<sup>111</sup> Article 12 (1)(b)(c) and (d) Draft Protocol.

<sup>112</sup> Article 15(1) Draft Protocol.

<sup>113</sup> Article 15(2) Draft Protocol.

<sup>114</sup> Articles 18 and 19 Draft Protocol.

<sup>115</sup> Article 21 Draft Protocol.

Most of the provisions of the Draft Protocol are commendable, for example the definition of discrimination, is very wide, the right to physical security in Article 5 of the Draft Protocol is novel especially the sub-section dealing with female genital mutilation and the elimination of all forms of violence against women.<sup>116</sup>

The requirement for free and full consent of both parties to a marriage is highly commendable when it is considered that in some societies in Africa, the consent of the wife is not usually required. Marriages in most African societies are seen as the binding together of two families rather than the coming together of a man and a woman. Fixing of 18 years as the minimum age of marriage is also important especially in a society where child betrothal is not uncommon.

The Prohibition of polygamy is however too ambitious. People have come to accept the fact that polygamy is synonymous with Africa and most Africans including women see nothing wrong in polygamy and some women see polygamy as an avenue for them to pursue their economic activities without caring too much about husbands and families, polygamy offer them an opportunity to enjoy a more independent existence.<sup>117</sup>

If polygamy is prohibited what will happen to several polygamous marriages already in existence. It should also not be forgotten that there are a lot of Muslims in Africa and the Islamic religion recognise the taking of more than one wife. The provisions on marriage and polygamy may prevent some states in Africa from ratifying the Draft Protocol,<sup>118</sup> and if ratified, a lot of reservations may be entered as seen under CEDAW where 20 ratifying countries entered more than 80 reservations.<sup>119</sup> Nigeria is yet to ratify the African Charter on the Rights and Welfare of the Child, which has similar provision. The provision on marriage and polygamy may also prevent Nigeria from ratifying the Draft Protocol. Polygamy is also practiced in South Africa. The provision

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<sup>116</sup> Even CEDAW did not specifically deal with the issue of violence against women.

<sup>117</sup> See Dennis (1963) 9.

<sup>118</sup> The African Charter on the Rights and Welfare of the Child with similar provisions on consent and minimum age for marriage took a long time before it came into force. It was adopted on 11 July 1990, it only came into force on 29 November 1999.

<sup>119</sup> Cook *op cit.* also most Islamic countries entered several reservations to CEDAW e.g. Libya, Egypt, Iran, Iraq, Pakistan.

on minimum age on first marriage and consent would not be a problem for South Africa, as already South Africa has laws that stipulated the minimum age on first marriage and make consent of parties to a marriage mandatory.<sup>120</sup>

In Africa it is not acceptable for women to have the same rights as men in marriage. In most African culture, most women go into marriage with nothing and in a society where financial clout and authority go hand in hand, men continue to have greater monetary power and hence more authority in marriage. For equal rights to exist in marriage, there is need for women to be more economically empowered.

The Draft Protocol recognises the right of women to retain and change their nationality or to confer it on their husband and children. This provision is a step in the right direction, as most women in many parts of the world especially in Africa, cannot pass their nationality on their husbands and children.<sup>121</sup>

The provision of the Draft Protocol recognising the right of women to physical security is to be commended, however, the provision that stated that pregnant women should never be sentenced to death should be expunged. What happens to other categories of people who may be sentenced to death, the Draft Protocol should either take a definite stand on the abolition of the death penalty generally or expunge Article 5(a) of the Protocol considering the fact that the African Charter is silent on the issue of the death penalty, Article 5(a) should be expunged, as this sub-section is discriminatory.

The provision dealing with the health and reproductive rights of women to control their fertility, to decide whether to have children or not, to space their children, to choose method of contraception and protect themselves against sexually transmitted diseases is highly commendable. All these are provided for in a society where the reproductive benefits of women are regarded as the primary reasons for marriage. It will also be difficult for most women to insist that their men use condoms, most men are of the opinion that they have a right to unprotected sex with their wives even when they know

<sup>120</sup> See the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998.

<sup>121</sup> See *Dow v Attorney General (Botswana)* (1992) LRC (Const) 623 (Bot CA), and S.26(2) Constitution of the Federal Republic of Nigeria, 1999 where only women married to Nigerian men may be registered as Citizens of Nigeria, without a corresponding right on men married to Nigerian women.

that they are infected with sexually transmitted diseases and most men would not allow their wives to use any form of contraception, as they would not be able to control the fidelity of their wives. It is almost unheard of in traditional African setting for a woman to decide not to have any children in marriage without any medical cause. Infertility is greatly frowned at in Africa and many marriages have ended due to the inability of the wives to bear children.<sup>122</sup>

Article 10 of the Draft Protocol dealing with political rights of women should be expanded to include affirmative action aimed at increasing the participation of women in politics.

The requirement of at least fifteen instruments of ratification or accession before the Draft Protocol can come into force may delay the coming into effect of the Draft Protocol as in the case of the African Charter on the Rights and Welfare of the Child.<sup>123</sup> CEDAW a United Nations instrument came into force after ratification by only 20 countries. It is therefore recommend that the Draft Protocol should be allowed to come into force one month after the eight instruments of ratification or accession.

The Draft Protocol also did not provide for individual complaints and inquiry procedure. It is suggested that the Draft Protocol should include the receipt of communication from individuals, NGOs and state parties. The inquiry procedure should also be allowed in case of substantial violation of women's rights by any state party.

The enforcement mechanism of the Draft Protocol is not spelt out. It is being suggested that an independent body separate from the African Commission should be constituted to implement the Protocol. A Committee like the Committee on the Elimination of All Forms of Discrimination against Women that implement CEDAW should be constituted. Such a Committee should consist of nine persons nominated by states parties to the Protocol but who should serve in their individual capacities.

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<sup>122</sup> See Chapter 8 below.

<sup>123</sup> The African Charter on the Rights and Welfare of the Child only came into effect in 1999, some ten years after it has been adopted. It requires at least 15 instruments of ratification or accession.



The OAU is presently cash strapped, but if the Organisation is truly committed to the realisation of women's rights, necessary funds must be provided.

There is also the argument that the Draft Protocol is superfluous as article 18 of the African Charter can be interpreted to cover all the rights enshrined in the Draft Protocol. This argument however is not tenable as almost all UN instruments are applicable to both women and men, and this however did not prevent the UN from adopting CEDAW. CEDAW is one of the most ratified UN instruments, so the Draft Protocol will not amount to a duplication of other existing human rights instruments.

Finally, African countries should be lobbied to ensure the adoption of the Draft Protocol and after adoption, countries should also be lobbied to ensure that the required number of ratifications is obtained within the shortest time possible.

## **2.4 NIGERIAN REPORTING OBLIGATIONS UNDER CEDAW**

### **2.4.1 Introduction**

Nigeria signed CEDAW on 23 April 1984 and ratified CEDAW on 13 June 1985 without reservation. The initial report was made in 1986 (this was made within one year of ratification as requested under CEDAW) while the second and third periodic reports covering the period from 1987 to 1994 are presented together in 1998. The second report was eight years over due and the third report was four years overdue. The reports are considered at the 396<sup>th</sup> and 397<sup>th</sup> meetings of the Committee on 2 July 1998.<sup>124</sup>

Nigeria's combined second and third reports<sup>125</sup> are presented by a high level delegation led by the Minister for Women's Affairs and Social Development. The report demonstrated the progress made since the 1986 initial report and identified the remaining areas of difficulty in the promotion of equality between women and men in

<sup>124</sup> CEDAW/C/ NGA 2-3 available on the internet ([www.un.org/unhchr](http://www.un.org/unhchr)) accessed on 8 July 1999.

<sup>125</sup> This session is based on the second and third reports of Nigeria to the Committee.

Nigeria. The Minister noted that the reports addressed the impact of external factors on national efforts to promote equality between women and men.

The Committee was informed that there had been an awareness-raising campaign concerning the need to have more women legislators and senators and that, women had been elected into local government councils and the state and federal legislators. The reports noted that, although education and training promoted equality between men and women, but certain cultural and traditional practices and beliefs remained obstacles to women's full enjoyment of rights, including in the context of marriage, inheritance, and land ownership.<sup>126</sup>

The Committee was informed that a National Committee of Women and Children reviewed all laws relating to women and children, in order to bring them in conformity with CEDAW and CRC. For example the Taxation law has been reviewed, and women are now able to claim for children expenses without any documentary proof, in the past only men are able to claim automatically, while women require documentary proof, the labour law has also been reviewed and women now receive equal pay for equal work. A National Commission for Women<sup>127</sup> had been established to co-ordinate the implementation of programmes to facilitate and enhance the advancement of Women in Nigeria. The Commission had been upgraded to the Federal Ministry of Women's Affairs and Social Development and also State Ministries of Women's Affairs on Social Development had been established in the 36 states of the Federation. The Ministry of Women Affairs sought to raise awareness among women and men of the need to empower women and forge a new partnership based on mutual respect for the family. The Ministry had emphasised the importance of education and the acquisition of skills for women and girls.<sup>128</sup>

Temporary special measures had been adopted by the government, including education Committees relating to women, the appointment of women to decision-making positions, and poverty alleviation measures to improve the economic status of women. CEDAW had been published in a simplified version. It was noted that traditional practices affected rural women more than urban educated women. Seminars had been

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<sup>126</sup> CEDAW/C/NGA 2-3.

<sup>127</sup> National Commission for Women Act Cap 246 (Laws of Federation of Nigeria) 1990.

organised for women to discourage these traditional practices. Domestic violence was seldom reported because of fear of reprisal and lack of response from law enforcement officials. It was stated further that statistics relating to violence against women would not be available until women are motivated to report domestic and other forms of violence.

On socio- economic conditions of women the representative informed the Committee that commercial banks frequently denied women credit because of lack of creditworthiness and that the government had implemented several credit schemes, including the Family Economic Advancement Programme, which operated credit facilities for women and family units for the promotion of family enterprises. The essential role of rural women in the agricultural sector is now being recognised in development plans.

The report concluded that although significant progress had been achieved in the quest for gender equality, but that much work still needed to be done in order to eliminate some of the customary, traditional and religious practices, which impeded the advancement of women.

## **2.4.2 Concluding observations of CEDAW Committee on the Nigeria reports**

### **2.4.2.1 Introduction<sup>129</sup>**

The Committee commended the Federal Republic of Nigeria for having ratified the Convention in June 1985 without reservation. The Committee also commended the government on the high level of the delegation, led by the Minister for Women's Affairs and Social Development.

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<sup>128</sup> CEDAW/C/NGA 2-3.

<sup>129</sup> This section is based on the comments of the CEDAW Committee on the combined second and third Nigeria report (CEDAW/C/NGA/2-3) available on the internet ([www.un.org/unhchr](http://www.un.org/unhchr)) accessed on 7 July 1999.

#### ***2.4.2.2 Positive aspects of the reports***

The Committee noted with satisfaction that progress had been made in some areas since the previous report. Such progress includes the establishment of a Ministry of Women's Affairs and the Advancement of Women, and an increase in school attendance rates for girls and literacy rates for women. The number of women in decision-making posts had also increased. The government of Nigeria was commended for improving rural women's access to drinking water and electricity.

#### ***2.4.2.3 Factors and difficulties affecting implementation of the Convention***

The Committee noted the predominance of cultural stereotypes that are prejudicial to women. The Committee was also disturbed to learn about the continued existence of such practices as polygamy, inhumane rites undergone by widows, female circumcision, which present serious dangers to the physical and emotional health of women and violate their fundamental human rights.

The Committee noted further that the co-existence of three legal systems, civil, religious and customary, make it difficult to adopt and enforce laws which genuinely protect women's rights.

#### ***2.4.2.4 Areas of concern to the Committee***

The Committee noted with regrets that the government of Nigeria did not reply to all the questions raised in connection with the second and third periodic reports. The Committee recommends that Nigeria include answers to these questions in its next periodic report. The Committee was very concerned about religious and customary laws and practices in the family context that violate women's human rights. The Committee recommends that effective measures be taken to change laws and cultural norms which allow practices such as polygamy, one-sided repudiation of marriage, unequal subsistence rights and shares, as well as practices preventing women from travelling without the permission of a male relative.

The Committee noted that although Nigeria ratified CEDAW without reservation, the Convention is not being implemented within an adequate legal and Constitutional framework. Nigeria government was urged to fully respect the commitments and obligations arising under the Convention and that it should adopt all necessary measures.

The Committee is concerned by the lack of statistical data in the Nigeria's second and third reports. It noted that while there are financial constraints, the use of statistics allows a clearer understanding of progress since the previous report in the areas of domestic violence, prostitution, women's labour, including the informal sector and women's and children's health. The Committee recommends that the government collect statistical information disaggregated by sex in all areas of importance in the lives of women and that such data should be used in future reports.

The Committee is concerned about the inadequate representation of women in the judiciary and recommends that temporary special measures in accordance with article 4(1) of CEDAW be adopted to increase the participation of women in judiciary. The Committee is concerned at the various forms of violence against women that exist in Nigeria and the absence of laws, programmes and policies to address this serious problem. The Committee recommends that the government collect information on this issue and introduce and enforce appropriate laws, programmes and policies to confront all forms of violence against women. It further recommends the establishment of shelters for victims and the introduction of measures to ensure that women are protected from reprisal where they report victimisation. The Committee recommends the introduction at all levels of education of courses on women's and children's rights as well as public awareness campaigns with regard to these issues.

On education, the Committee is concerned at the low literacy rate among women and the low attendance rate of girls at secondary institutions. The Committee recommends that the government increase its efforts through implementation of a specific programme to reduce illiteracy among women particularly in rural areas and promote access by girls to secondary education. The government should also ensure that primary education is free.

On health, the Committee is concerned that there are no statistics and information on AIDS and sexually transmitted diseases in the second and third reports. The Committee noted that polygamy and prostitution contribute to the spread of sexually transmitted diseases. It recommends that statistical data and information be compiled on the incidence of HIV/AIDS and other sexually transmitted diseases. The Committee is alarmed by the rates of maternal and infant mortality and the lack of medical facilities for women and children and recommends that free access to health services should be a priority for government.

The Committee recommends that the government should strengthen its socio-economic programmes so as to reduce discrimination suffered by rural women and ensure that rural women have access to education and credit facilities and that the government should take account of the recommendations of the United Nations Development Programme (UNDP) relating with respect to sustainable human development.

Finally, the Committee as usual in reports of this nature requests the wide dissemination in Nigeria of the Comments of the Committee on the Reports in order to make the people of Nigeria and particularly government administrators and politicians aware of the steps that had been taken to ensure de facto equality for women and further steps that are required in that regard. It also requests the government to continue to disseminate widely, and in particular to women's and human rights organisations, the Convention, the Committee's general recommendations and the Beijing Declaration and Platform for Action.

## **2.5 SOUTH AFRICAN REPORTING OBLIGATIONS UNDER CEDAW**

### **2.5.1 Introduction**

South Africa signed CEDAW on 29 January 1993 and ratified CEDAW on 15 December 1995 without reservation. South Africa's initial report was due on 14 January 1997. The Initial Report was submitted on 5 February 1998 and considered at the 387<sup>th</sup>, 388<sup>th</sup> and 393<sup>rd</sup> meetings of the Committee on 24 and 29 June 1998.<sup>130</sup>

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<sup>130</sup> This section is based on the First South African Report to CEDAW (CEDAW/C/ZAF/1).

### 2.5.2 Structure of the report

Part I of the Report provides a brief description of the country.

Part II consists of a sequential discussion of each of CEDAW articles except that articles 2 and 3 are discussed together to avoid unnecessary repetition. Due to the seriousness of violence against women in South Africa, there was a discussion on violence against women even though the subject is not dealt with directly under any of CEDAW articles. Violence against women was discussed under CEDAW General Recommendations 12 and 19, provisions which are drawn up after CEDAW.

Many of CEDAW articles overlap. Many government actions are relevant to more than one article. To avoid too lengthy a report, repetition was avoided wherever possible. The report follows CEDAW articles in separating out the discussions of rural women. This separation presents several problems. Firstly to avoid repetition, and secondly, the separation of rural women raises the question as to why other marginalised or vulnerable groupings – for example, those living in informal settlements, the disabled, girl child – are not similarly separated. Issues relating to the girl-child are not elaborated in the report. This is due to the fact that South Africa has also ratified the Convention on the Rights of the Child (CRC) and the issue of the girl child will be elaborated in South Africa's report on the CRC.<sup>131</sup>

### 2.5.3 Limitations of the report

The South African Constitution allocates powers of policy-making and delivery in different sectors between the national, provincial and local levels. The report was compiled primarily on the basis of submissions from national departments. In some cases the national department requested input from the provincial level. The report thus reflects the broad national picture, but is missing some important regional differences.<sup>132</sup>

Some important government-related institutions are also not requested to provide input. These include, for example, the Central Statistical Service, South African Revenue

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<sup>131</sup> Available on the internet ([www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)) accessed on 9 June 1999.

<sup>132</sup> *Ibid.*

Services, Land Bank, National Housing Board, Deeds Office, etc. There are also no reports from the range of Commissions and other independent bodies created under the new Constitution. A few Departments reported on such bodies which had powers linked to their own. Many others do not.

The other major limitations are the deficiencies in data and statistics. The previous government's information system reflected its patriarchy and racism. It was particularly weak in respect of the more marginalised areas and issues, which are often those of greatest relevance for women. There have been some steps to address this since 1994. One example was the ability of all government departments to provide breakdowns by race, gender and level of their staff complements.<sup>133</sup>

The government is aware that while law and formal policies can be changed fairly rapidly, practices on the ground take much longer time to change. The government has ratified CEDAW, but social, traditional and customary practices still contradict CEDAW provisions in many respects. Much of CEDAW initial report presents information on legislative and policy changes. In many cases, the discrimination which these government initiatives attempt to address persists.

#### 2.5.4 The report

South Africa's report to the Committee was presented by a high level delegation headed by the Minister of Welfare and Population Development (the Representative").

The representative informed the Committee that the new Constitution of South Africa was written in non-sexist and accessible language and had been widely disseminated in 11 languages and in Braille. The Constitution guaranteed equality between men and women and prohibited discrimination on the basis of *inter alia*, sex, pregnancy and marital status. Gender equality and provisions for affirmative action has also been Constitutionally entrenched.

An Office on the Status of Women (OSW) was established within the Presidency to develop a woman's empowerment policy. The OSW was mandated to translate

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<sup>133</sup> *Ibid.*



government objectives of gender equality into meaningful government programmes. A draft policy on women's empowerment and gender equality had recently been completed. The Commission for gender equality (a Constitutional Institution) established to promote gender equality was charged with facilitating the transformation of gender relations in civil society through education and public advocacy.<sup>134</sup>

The high incidence of violence against women and children particularly rape was highlighted in the report and several policy initiatives aimed at combating the menace was explained. The report also noted the continuing deep entrenchment of patriarchy and customary, cultural and religious practices, which contributed to wide-spread discrimination against women in South Africa.

On socio-economic rights of women the report stated that only six percent of African women 20 years and older had graduated from tertiary education, while 20 per cent of African women had no formal education. Unemployment was higher among women than men and when employed more women are in low income jobs. Measures taken by the government include a transformation of the public service where a target of 30 per cent among new recruits to middle and senior management with the public service should be women.

On the issue of health, the report noted the prevalence of (HIV) and (AIDS), and that it was highest among heterosexual African women aged 20 to 24 particularly those who are poor and otherwise marginalised, and that free health care was available to pregnant women and children under six at state clinics and hospitals.

The report highlight the plights of women married under customary law as under the Customary Marriage Act, a woman is deemed to be a minor under her husband's guardianship but that the South Africa African Parliament was considering repeal of that and other Acts pertaining to married women's rights under customary law.<sup>135</sup>

The report was concluded by reiterating the South African government's firm commitment to bring its legislation in line with CEDAW as well as to fully

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<sup>134</sup> See South African First Report to CEDAW *op. cit.*

implementing CEDAW and the Beijing Platform for Action and providing services that will improve the quality of life for women in South Africa.

### **2.5.5 Concluding observations of the CEDAW Committee on the South African initial report**

The Committee commended the government of South Africa for ratifying the Convention, without reservation in December 1995. It commends the government for the clarity and frankness of the report as well as the oral presentation and for the extensive replies to the questions posed by the Committee. The Committee also expressed its appreciation to the government of South Africa for its high-level delegation, headed by the Minister of Welfare and Population Development, which also included representatives of non-governmental organisations (NGOs).

#### **2.5.5.1 Positive aspects of the South African report**

The Committee noted the efforts undertaken by the government at the level of legislation, policies, programmes and awareness-raising to redress the effects left by apartheid on women and to achieve gender equality. It recognises the crucial role women have played in the country's transition to a democratic, multiracial society, and their continuing participation in and contribution to the creation of an enabling environment for respect for human rights.

The Committee commended the establishment of national machinery as well as other bodies for achieving the goal of gender equality. It also notes the active collaboration of government with NGOs and the existence of a vibrant women's movement. The Committee notes with satisfaction that while health workers are not forced to participate in the provision of legal abortions, they may not obstruct access to services for termination of pregnancy.<sup>136</sup>

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<sup>135</sup> See "What the Parliament is doing to improve the status of women in South Africa". The Recognition of Customary Marriage Act has now been enacted Act 120 of 1998.

<sup>136</sup> See The South African Report to CEDAW *op.cit.*

The Committee noted that the legacy of apartheid for women includes wide-spread discrimination and underdevelopment, and is visible in areas such as women's high level of unemployment, illiteracy, poverty and violence against women.

The Committee noted that while the Constitution of South Africa includes an equality clause, the continuing existence of conflicts between the Constitution and religious and customary laws perpetuates practices in various areas that are discriminatory to women.

#### **2.5.5.2 Areas of concern to the Committee**

The Committee noted the absence of a definition of gender discrimination in the Constitution. The Committee recommends the adoption of the definition contained in Article 1 of CEDAW. The Committee expressed concern that in spite of several legislations and other measures women are still being discriminated against. It was further noted that the national machinery and the Commission for gender equality do not have sufficient financial and human resources.

The Committee expressed concern at the high rate of violence against women, including the high incidence of rape particularly of young girls. The Committee stated that efforts to address violence against women should be given top priority in the National Crime Prevention Strategy, so that it does not get submerged in the larger struggle against violence in the society. The Committee recommends that the seriousness of rape including marital rape, be emphasised and urged the government to undertake research into the causes of the high numbers of rape so that effective preventive measures can be developed.

The Committee encouraged the government to continue to use temporary special measures especially to ensure that women are well represented in parliament and the judiciary.<sup>137</sup>

The Committee expressed serious concern at the chronic high rate of women's unemployment and the insufficient implementation of article 11 of CEDAW.<sup>138</sup> The

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<sup>137</sup> South African CEDAW report *op.cit.*

government was urged to focus, as a matter of priority, on creating income-generating activities for women. Government was also urged to ensure equal access to health services throughout the entire country.

The Committee noted that vulnerable groups of women, especially rural women, require specific measures to empower them to overcome the constraints of poverty, low levels of education and literacy, high unemployment and high fertility rate. Access to family planning for rural women should be provided and the need for rural women to participate in land reform programmes was stressed. The Committee also want the government to implement special programmes for vulnerable groups of women in rural areas, including education and employment. The national machinery for women was enjoined to work actively in matters of land reform policy and problems of rural women to ensure their active participation.

Finally, the Committee requested the wide dissemination of its observations and comments in order to make the people of South Africa and particularly government administrators and politicians, aware of the steps that have been taken to ensure de facto equality for women and further steps that are required in that regard. It also requests the government to continue to disseminate widely, and in particular to women's and human rights organisations, the Convention, the Committee's general recommendations and the Beijing Declaration and Platform for Action.

## **2.6 A COMPARISON OF INTERNATIONAL HUMAN RIGHTS PROTECTION OF WOMEN IN NIGERIA AND SOUTH AFRICA**

Nigeria ratified CEDAW in June 1985, while South Africa ratified CEDAW 10 years later, in December 1995. Both countries ratified CEDAW without reservations. This is commendable considering the fact that CEDAW has the highest number of reservations of any international human rights instrument.<sup>139</sup>

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<sup>138</sup> State parties are to take all appropriate measures to eliminate discrimination against women in the field of employment.

<sup>139</sup> Cook *op cit.* 656.

Nigeria submitted an initial report in 1986, within one year of ratifying the Convention.<sup>140</sup> South Africa, on the other hand, submitted its initial report one year after it was due. Nigeria's second report was due in 1990<sup>141</sup> and the third report in 1994, but a combined second and the third report was submitted only in 1998.<sup>142</sup> The second report was eight years overdue and the third report was four years overdue. Nigerian's fourth report to CEDAW has been due since 13 July 1998. It is yet to be submitted. This demonstrates a lack of commitment of the Nigerian government to its obligations under CEDAW.

South Africa's initial report was well detailed with adequate data and statistics, while the Nigeria's reports (second and third) are condemned by the Committee for lack of data and statistics.

South Africa involved NGOs in the preparation of its report and in the general efforts to achieve gender equality and improving the status of women generally in South Africa. It was not certain whether the NGOs in Nigeria had any input in the preparation of the Nigerian report, but given the government's general opposition to NGOs and human rights organisations, it is doubtful whether they are involved.

South Africa was commended for the clarity and frankness of its report, analysing the progress made in abolishing all forms of discrimination against women and the obstacles encountered. The Committee was concerned that the Nigerian government is not implementing CEDAW within an adequate legal and constitutional framework and that the government of Nigeria should fully respect the commitment and obligations arising under the Convention and should adopt all necessary measures to ensure the full implementation of the Convention.

The Committee commended South Africa's efforts aimed at combating violence against women and the offence of rape in particular. The Committee expressed its concern at the various forms of violence against women in Nigeria and the absence of laws, programmes and policies to address this serious problem. In South Africa there are

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<sup>140</sup> In compliance with article 18(a) CEDAW.

<sup>141</sup> See Article 18(b) where reports are to be submitted every four years after the initial report.

<sup>142</sup> CEDAW / C / NGA / 2-3.

several laws aimed at preventing violence against women.<sup>143</sup> Outside the criminal law there are no specific provisions to deal with the issue of violence against women. In Nigeria violence against women is treated as criminal assault and domestic violence is still regarded as a purely private matter within the family<sup>144</sup> invoking the usual public/private divide in law.

On socio-economic rights, the Committee praised South Africa for the provisions of free health services to pregnant women and children under six. The Committee lamented the high rates of maternal and infant mortality in Nigeria and the lack of facilities for women and children. Nigeria was urged to provide for free access to health services for women and children. Nigeria was urged to provide free and compulsory primary education to reduce the low literacy rate among women and also to ensure the attendance of girls in secondary institution. The right to education in Nigeria is not a justiciable right<sup>145</sup> whereas the right to education is fully justiciable in South Africa.<sup>146</sup>

The South African report contained information about the prevalence of HIV/AIDS in South Africa, whereas Nigeria's report did not contain information about HIV/AIDS. There is a need for Nigeria to focus attention on HIV/AIDS and other sexually transmitted diseases. There is general apathy in Nigeria about the reality of HIV/AIDS. Most Nigerians believe that it is a foreign disease,<sup>147</sup> that it is almost non-existent in Nigeria. People in Nigeria should be educated on the reality of HIV/AIDS. This is important as there are many polygamous marriages in Nigeria. Polygamy increases the possibility of HIV/AIDS.

In both Nigeria and South Africa, the Committee complained about the inadequate representation of women in the judiciary. Both countries are urged in accordance with

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<sup>143</sup> See *e.g.* The Domestic Violence Act 116 of 1998 aimed at providing for the issuing of protection orders with regard to domestic violence, and for matters connected therewith.

<sup>144</sup> In the Northern part of the country the right of husbands to chastise their wives is preserved in s. 55 Penal Code Cap 347 LFN 1990.

<sup>145</sup> Section 18(3) Constitution of the Federal Republic of Nigeria 1999.

<sup>146</sup> Section 29(1) Constitution of the Republic of South Africa Act No 108 of 1996.

<sup>147</sup> *E.g.* a Nigerian Musician, Late Fela Anikulapo Kuti, once described AIDS as an "American Invention to Discourage Sex". The musician died of AIDS in August 1997.

article 4(1) of CEDAW to adopt temporary special measures to increase the participation of women in the judiciary.

In respect of both Nigeria and South Africa, the Committee noted the predominance of cultural stereotypes that are prejudicial to women. The continued existence of the practice of polygamy, inhuman rites undergone by widows and female circumcision in Nigeria are especially highlighted. The Committee noted especially the co-existence of three legal systems (civil, religious and customary) in Nigeria and the difficulty in adopting and enforcing laws that genuinely protect women's rights. Both countries are urged to stop various customary and traditional practices in the family context that violate women's human rights.

Nigeria has the Federal Ministry of Women's Affairs and State Ministries of Women's Affairs to deal with Women's rights. While this look like a very good protection for women, in reality it is caught up in lots of bureaucracies associated with government agencies. South Africa on the other hand has the Office on the Status of WFomen, the Commission for Gender Equality and the various gender agencies at provincial level and there is a general gender policy in place. NGOs are actively involved in the realisation of equality in South Africa. Nigeria needs to emulate South Africa in this respect by having a genuine gender policy and actively involving relevant NGOs in the quest for equality.

On the political rights of women, both countries are urged to adopt measures aimed at increasing the participation of women in politics.

Since its last report to CEDAW in 1998 the South African Parliament has enacted the following legislation aimed at improving the legal position of women:

- Domestic Violence Act<sup>148</sup>
- Employment Equity Act<sup>149</sup>
- Recognition of Customary Marriages Act<sup>150</sup>

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<sup>148</sup> Act 116 of 1998.

<sup>149</sup> Act 55 of 1998.

<sup>150</sup> Act 120 of 1998.

- Child Care Amendment Act<sup>151</sup>
- Maintenance Act<sup>152</sup>
- Promotion of Equality and Prevention of Unfair Discrimination Act<sup>153</sup>

Since Nigeria last reported to CEDAW in 1998, no new law aimed at improving women's rights has been enacted at the federal level.<sup>154</sup> This could be due to the fact that a new democratic government is now in place.

There is need for Nigeria to take its obligations under CEDAW more seriously and renew its commitment to women's rights. At present, only lip service is being paid to gender equality in Nigeria. Since 1994, South Africa has made drastic improvement in the equality of women and significant role is being played by international human rights law especially CEDAW.

Nigeria and South Africa have both reported to the African Commission. Nigeria submitted its initial report five years after it was due, while South Africa reported promptly. Women issues are addressed by the reports of both countries. The African Charter is incorporated into the Nigerian law and it is directly enforceable in Nigeria. The implication of this is that where the charter provides for better protection than those in the Nigerian Constitution, the charter may be relied upon.

The African Commission criticised the HIV/AIDS policy of the South African government, the education policy of the government was also criticised that how can education that is not free be made compulsory. Nigerian government was urged to intensify efforts towards eradicating female genital mutilation.

Nigeria should take its reporting obligations more seriously. It is not the number of instruments ratified that matters but how the instruments are used to improve the status of the citizens. South Africa has demonstrated a commitment to its obligations under CEDAW and the African Charter. A situation where reports are submitted five years

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<sup>151</sup> Act 13 of 1999.

<sup>152</sup> Act 99 of 1998.

<sup>153</sup> Act 4 of 2000.

<sup>154</sup> Some State governments (Edo and Cross Rivers) have enacted laws to ban female genital mutilations in their States. One of the States has also enacted a law to prohibit prostitution.



after the due date is not ideal. Most of the required attachments are also not included. It is hoped that now that Nigeria is under a democratic government, it will take its reporting obligations seriously and bring domestic laws in line with CEDAW and the African Charter.