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## African Customary Law, Customs, and Women's Rights

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# African Customary Law, Customs, and Women's Rights

MUNA NDULO\*

## ABSTRACT

*The sources of law in most African countries are customary law, the common law and legislation both colonial and post-independence. In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law. Customary law has great impact in the area of personal law in regard to matters such as marriage, inheritance and traditional authority, and because it developed in an era dominated by patriarchy some of its norms conflict with human rights norms guaranteeing equality between men and women. While recognizing the role of legislation in reform, it is argued that the courts have an important role to play in ensuring that customary law is reformed and developed to ensure that it conforms to human rights norms and contributes to the promotion of equality between men and women. The guiding principle should be that customary law is living law and cannot therefore be static. It must be interpreted to take account of the lived experiences of the people it serves.*

## INTRODUCTION

The national legal system of a typical African state is pluralistic and composed of the following sources African customary law: religious laws (especially where there is a significant Muslim population); received law (common law or civil law depending on the colonial history)<sup>1</sup>; and

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1. The common law was introduced by the English Law (Extent of Application) Act. English Law (Extent of Application) Act, Cap. 11, 2 LAWS OF REP. OF ZAMBIA (2002) § 2. The problem is with the manner in which it was introduced in that it raises many questions: what law, relevance. See W.L. Church, *The Common Law and Zambia*, 6

legislation, both colonial (adopted from the colonial state) and post-independence legislation enacted by Parliament. Customary law is the indigenous law of the various ethnic groups of Africa. The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people. In a typical African country, the great majority of people conduct their personal activities in accordance with and subject to customary law. It should be appreciated that the use of the term "African customary law" does not indicate that there is a single uniform set of customs prevailing in any given country. Rather, it is used as a blanket description covering many different legal systems. These systems are largely ethnic in origin, and they usually operate only within the area occupied by the ethnic group and cover disputes in which at least one of the parties to the dispute is a member of the ethnic group. There are local variations within such areas, but, by and large, the broad principles in all the various systems are the same. There is broad agreement that in its present form customary law is distorted. The sources of customary law that are historically and presently accepted as authoritative are a product of social conditions and political motivations. It is influenced by the recent interaction between African custom and colonial rule. In *Alexkor Limited v. Richtersveld Community*, the Constitutional Court of South Africa observed that "although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied."<sup>2</sup>

Customary law has a great impact on the lives of the majority of Africans in the area of personal law in regard to matters such as marriage, inheritance, and traditional authority.<sup>3</sup> In its application, customary law is often discriminatory in such areas as bride price,

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ZAMBIA L.J. 1 (1974); ANTONY ALLOTT, *NEW ESSAYS IN AFRICAN LAW* 21-27 (1970) (noting statutory provisions based on common law in numerous countries).

2. *Alexkor Ltd. v. Richtersveld Cmty.*, 2003 (5) SA 460 (CC) n.51 (S. Afr.) (explaining T.W. BENNETT, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA* (1991)); see also T.W. Bennett, *The Compatibility of African Customary Law and Human Rights*, 1991 ACTA JURIDICA 18, 18-35 (discussing the role of customary law in South African legal reform).

3. In the case of Zambia, an AFRONET study concluded that "[o]f the five rungs of the judicial power in Zambia, comprising the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts and the Local Courts, it is the latter which play an important part in the settlement of disputes of the majority of the population." AFRONET, *THE DILEMMA OF LOCAL COURTS IN ZAMBIA* 1 (1998), <http://www.vanuatu.usp.ac.fj/library/Online/USP%20Only/Customary%20Law/Dilemma.htm> [hereinafter *DILEMMA OF LOCAL COURTS*].

guardianship, inheritance, appointment to traditional offices, exercise of traditional authority, and age of majority. It tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals. There is a major debate between human rights activists and traditionalists centered on whether customary norms are compatible with human rights norms contained in international conventions and national bills of rights in national constitutions.<sup>4</sup> While traditionalists argue that, by promoting traditional values, customary law makes a positive contribution to the promotion of human rights, activists argue that certain customary law norms undermine the dignity of women and are used to justify treating women as second class citizens. Many African constitutions contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender. However, the same constitutions recognize the application of customary law and they do this without resolving the conflict between customary law norms and human rights provisions. Using Zambia's Constitution as an example, a typical constitution provision limits the application of provisions outlawing discrimination by providing that such provisions

shall not apply to any law so far as that law makes provision:

- (a) for the appropriation of the general revenues of the Republic;
- (b) with respect to persons who are not citizens of Zambia;
- (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
- (d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons . . . .<sup>5</sup>

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4. See, e.g., Lea Mwambene, *Marriage Under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi*, 10 AFR. HUM. RTS. L.J. 78, 82 (2010).

5. CONST. OF ZAMBIA OF 1991, art. 23.

This article examines the place of African customary law in an African legal system, and tensions that exist between African customary law and both domestic and international human rights norms. It is important to evaluate customary norms in the context of human rights because legal norms capture and reinforce deep cultural norms and community practices. Customary norms entrench ideas and help give them the sense of being natural and part of the way things are or should be. While African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities, human rights norms typically enjoin state parties to treaties to respect human rights and take all appropriate measures to eliminate discrimination against women.<sup>6</sup> Human rights norms proceed on the basis that women's rights under international conventions are universal norms to which all countries must adhere,<sup>7</sup> women are entitled to the exercise of their human rights, and fundamental rights and fundamental freedoms within the family and society. Human rights norms also proceed on the basis that the protection of the family as a social unit should not be used to justify restrictions on the individual rights of family members. The difference in approach has resulted in clashes between customary law norms on one side, and internationally protected human rights norms and national bills of rights inspired by international norms on the other. As B. A. Rwezaura has observed, the opposition to change is based on an ideology that characterizes attempts at reforming customary law as contrary to African traditions and culture and an attempt to westernize African society.<sup>8</sup> Such opposition is often a political reaction to the colonial imposition of the common law

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6. See generally United Nations Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force* Sept. 3, 1981, G.A. Res. 34/180 [hereinafter CEDAW] (stating in Article 2, "State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; . . . (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; . . .").

7. MARSHA A. FREEMAN, INT'L WOMEN'S RTS. ACTION WATCH, HUMAN RIGHTS IN THE FAMILY: ISSUES AND RECOMMENDATIONS FOR IMPLEMENTATION, ARTICLES 9, 15 AND 16 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 1 (1993).

8. B. A. Rwezaura, Traditionalism and Law Reform in Africa 539 (Jan. 28, 1983) (paper presented at a seminar jointly arranged by the Fundamental Rights and Personal Law Research Project, Centre for Applied Social Sciences, and the Department of Law, University of Zimbabwe) (on file with author).

on African states and an effort to assert African dignity. In such a context, efforts to reform customary law can easily be interpreted as an effort to impose Western values on African societies. In defense of customary law, Cobbah exemplifies this reaction. He states that

It is my contention that to correct injustices within different cultural systems of the world it is not necessary to turn all people into Westerners. Western liberalism with its prescription of human rights has had a worthwhile effect not only on Westerners but on many peoples of this world. It is, however, by no means the only rational way of living human life. . . . Instead of imposing the Western philosophy of human rights on all cultures one's effort should be directed to searching out homeomorphic equivalents in different cultures. In other words, we should understand that homeomorphism is not the same as equivalence and strive to discover peculiar functional equivalence in different cultures.<sup>9</sup>

This reaction to efforts at reforming African customary law is often accompanied by an almost religious exhalation of the virtues of the traditional system of law. While it is imperative that we draw attention to the fact that most Western understandings of African customary law are influenced by their negative attitudes towards all things African, it is important to realize that African theory and practice have been influenced and have become part of the global movement for the globalization of human rights. By enthusiastically joining international human rights instruments and adopting their own African instruments such as the African Human and People Rights Charter<sup>10</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>11</sup> African states are embracing the international human rights movement and its universality.

The context and the implications for vulnerable groups are always going to be important in the interpretation of rights. As Eze has observed, "[t]he categories of rights protected as well as their scope, and ultimately who enjoys any of these rights, are in the end determined by

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9. Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309, 328-29 (1987).

10. African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter].

11. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 11, 2003, AHG/Res.240 (XXXI).

the nature and character of society that is being examined.”<sup>12</sup> Much has changed in African societies since the advent of colonialism. The process of industrialization is widely associated with movements from rural areas to urban centers.<sup>13</sup> The fact that African customary law is changing in response to urbanization, interethnic marriages, and education is not a phenomenon peculiar to Africa. For example, it is well known that the impact of industrialization in Europe changed the nature of the family as a social institution beyond all recognition.<sup>14</sup> The earlier forms of the family exhibited quite complicated kinship patterns similar to those of African families.<sup>15</sup> A fundamental question arises as to whether the continued application of customary norms that discriminate against women can be justified with reference to any set of prevailing social norms or traditions or cultural standards.

The place of African customary law in African legal systems can be divided into three approaches. The first approach can be termed the historical approach. This was the approach adopted during colonial rule. The second approach is that adopted by new constitutions in the postindependence era, and the third is the approach in the postdemocratization era. This article will describe these three approaches in relation to the status of customary law and their impact on women’s rights. In any effort to advance human rights, the courts play a crucial role. Therefore, this article will examine the role of the courts in the implementation of African customary law and the reaction of courts to African customary law norms that discriminate against women. While recognizing the important role legislation can play in law reform, this article argues that the fight for gender equality needs to move to the courts and mass movements. The challenge is how to ensure that courts interpret the law in such a way that gender equality is advanced. This will require social movements to put pressure on the courts and society to act in the interests of gender equality. This suggests that we need to improve access to courts so that women can bring claims based on discrimination, thereby giving opportunities to the courts to reform the law. One way of encouraging the courts to interpret customary law in accordance with human rights norms is to show that the traditional social and economic relations on which the customary norms that discriminate against women are founded, and on which traditionalists rely to oppose reform, have in reality been

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12. OSITA C. EZE, HUMAN RIGHTS AND SOCIAL JUSTICE: AN AFRICAN PERSPECTIVE 30 (Empowerment & Action Research Centre, Annual Lecture, Series No. 4, 1998).

13. Muna Ndulo, *The Changing Nature of Customary Marriage in Zambia*, in LAW IN ZAMBIA 143, 153 (Muna Ndulo ed., 1984).

14. *See id.*

15. *Id.*

radically transformed. This will enable us to show that the values used by traditionalists to support customary legal norms that discriminate against women are no longer practiced in their existing form by communities. For example, Rwezaura has made a strong criticism of the institution of bride wealth<sup>16</sup> based on the changed social and economic relations prevailing today.<sup>17</sup> He has observed that "payment of bride wealth was not an individualized affair. It was a matter for the concern of a wider family."<sup>18</sup> He adds that

[t]he system of mutual assistance in bridewealth transfers was part of a wider economic interdependence and kinship solidarity which obtained in many African societies during the pre-capitalist era. But this economic interdependence and kinship solidarity was based upon a number of other relationships. Agriculture was undertaken by mutual aid teams, and so was livestock husbandry. Children, being so dependent on the elders for their marriage cattle, worked very hard for their fathers and were obedient to them. In return the fathers assisted their sons to establish their own families. They also paid fines and damages in respect of their sons' wrongs.<sup>19</sup>

The practice is now characterized by high demands of money as bride wealth. The rapid rise of the quantity of bride wealth can only be explained by the distortion of the custom.<sup>20</sup> It has become what Westerners alleged was a bride price<sup>21</sup> and has ceased to be a source of African pride, as it has become an institution that is characterized by the domination and exploitation of women.

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16. Rwezaura's use of the term "bride wealth" is synonymous with the term "bride price."

17. Rwezaura, *supra* note 8, at 553-54.

18. *Id.* at 548.

19. *Id.* at 548-49.

20. *Id.* at 552. Aeneas Chigwedere has shown how bride wealth, which served certain traditional functions in a particular community in Zimbabwe, has been turned "upside-down." *Id.* "He cites the example of a small payment known as *mapfukuzda dumba* (literary [sic] meaning to distort the womb) which was given to the mother-in-law as compensation for the distortion of her womb. The argument for the payment was that 'the mother-in-law was shapely before her first pregnancy which gave birth to the daughter now being married.' . . . In contemporary Zimbabwe the *mapfukuzda dumbu* has taken a new form. In addition to rising in quantity, it is now being claimed by both the mother-in-law and the father-in-law and it is also claimed in respect of all daughters including the last born." *Id.*

21. Ndulo, *supra* note 13, at 149-50.



## I. THE COLONIAL PERIOD: THE APPLICATION OF CUSTOMARY LAW

The precolonial law in most African states was essentially customary law in character, having its source in the practices, traditions, and customs of the people. The normative force and legitimacy of customary law is derived from the idea that it is ancient, unchanging and passed on from generation to generation, and that it is part and parcel of people's identity and culture. The colonial administrations recognized customary law and its institutions, although its application was generally restricted to Africans. From its inception the system of administration of justice introduced by the British differentiated between the Europeans and Africans. For example, in Zambia, section 14 of the Royal Charter of Incorporation on October 29, 1889, authorized this differentiation as it entrusted the administration of Rhodesia to the British South African Company.<sup>22</sup> It stated, "In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation . . ."<sup>23</sup> Native Courts administered customary law. Typically the governor of a territory had exclusive right to establish native courts. He also had exclusive right to determine who sat in the native courts and to suspend or terminate the appointment of justices. The courts had jurisdiction over trials and determinations of any civil cause or matter in which both the parties were Africans. The practice and procedure was regulated in accordance with customary law. The native courts were subject to review by District Officers. This led to what is termed the "bastardization" of African customary law. Human rights protections did not arise in the colonial period, as colonialism itself was premised on the violation of human rights. The common law and legislation was and still is administered by an English style judicial system. Practice and procedure in these courts has always been in substantial conformity with the law and practice observed in English courts.<sup>24</sup> This meant distinct judicial systems with no connecting link at any level of the judicial hierarchy.

At independence many African countries instituted judicial reforms which attempted to deal with two things: (1) integration of the court system and (2) the removal of racial bias in the administration of

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22. *Charter of the British South Africa Company (Oct. 29, 1889)*, in SELECT CONSTITUTIONAL DOCUMENTS ILLUSTRATING SOUTH AFRICAN HISTORY, 1795-1910, at 559 (George von Welfing Eybers ed., 1918).

23. *Id.* at 562.

24. High Court Act of 1960, Cap. 27, 3 LAWS OF REP. OF ZAMBIA (1997) § 9.

justice.<sup>25</sup> In most African countries, English or French systems of courts served as models for a full range of African courts: e.g., supreme courts, high courts, and subordinate courts. These courts have the same jurisdiction as similar common law courts elsewhere. At the bottom of these courts, African countries created a fourth tier. The names vary from country to country, but they include primary courts, community courts, and local courts. The local courts serve as the courts of first instance in matters involving customary law.<sup>26</sup> Appeals from these courts go to the subordinate courts, then to a high court, and finally to a supreme court.

From the inception of colonial rule, customary law was applicable on two conditions: (1) that it was not repugnant to justice, equity, or good morality and (2) that it was neither in its terms nor by necessary implication in conflict with any written law.<sup>27</sup> The application of the repugnancy clause has always been a source of controversy. It was observed that subjecting African customary law to a repugnancy clause and the clause being applied to African customary law by English colonial judges meant two things: (1) that customary law was inferior to the common law and (2) that the standard by which the validity of African customary law was to be determined was inevitably to be that set up by English ideas of legal norms, justice, and morality. And yet the values of Western society are embedded in the common law, even as values of traditional African society are embedded in African customary law. These are two different systems of law developed in two different situations under different cultures and in response to different conditions. In addition to the conflict of cultural values, apparent inconsistency in the application of the repugnancy clauses created problems. As can be seen from the examples of the cases Agbede gives in his book *Legal Pluralism*, the inconsistency created by an ad hoc approach to repugnancy clauses does not promote justice and reveals the need for sound principles as rules of guidance for the judges in the various departments of the substantive law to achieve certainty and predictability and promote the course of justice.<sup>28</sup>

There are a number of cases that declared aspects of customary law repugnant to justice and morality that illustrate the inconsistency. Examples of customs that were declared repugnant include woman-to-

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25. See Earl L. Hoover et al., *The Evolution of the Zambian Courts System*, in *LAW IN ZAMBIA*, *supra* note 13, at 47, 55-56.

26. Roger Purdy, *The Zambian Judicial System: A Review of the Jurisdictional Law*, in *LAW IN ZAMBIA*, *supra* note 13, at 67, 67; Hoover et al., *supra* note 25, at 47-66 (discussing the history of the Local Court system in Zambia).

27. ALLOTT, *supra* note 1, at 158-81.

28. I. OLUWOLE AGBEDE, *LEGAL PLURALISM* 71 (1991).

woman marriage,<sup>29</sup> liability of the family for wrongs committed by one of its members, and paternity rules.<sup>30</sup> Ironically it would seem that courts struck down provisions that empowered women and were contrary to the Victorian views as to the role of women in society. Many of today's contentious issues such as polygamy and discriminatory inheritance practices were left untouched. As in other, dual systems of law, there are many problems associated with duality. The coexistence of common law and customary law in the same country raises the problem of when the laws apply and to whom. As Opoku has observed, "As can be imagined, such a division of areas of competence, in the colonial context, was more than a simple mechanical or technical division of labour. It involved all kinds of assumptions and value judgments."<sup>31</sup> "In discussing law under the colonial regime, it is usual to contrast the French policy of 'direct rule' with the British policy of 'indirect rule.'"<sup>32</sup> In fact, the two approaches were not different in effect as both relegated customary law to an "inferior position."<sup>33</sup> Because the different laws were administered by different courts, the resulting problem is not limited to conflict of jurisdiction rules, but also includes the divergence in the quality of justice attainable in the various systems of courts.<sup>34</sup> This is because of the different rules of procedure and the marked differences in the quality of judicial personnel.<sup>35</sup> In addition, in most cases men often staff the local courts, and the men are chosen for their familiarities with customary norms.<sup>36</sup> Such men are more inclined to defend what they see as traditional norms than the living law of communities.

In postindependence constitutions elaborated before the era of democratizations in the 1980s, the independent African states continued to recognize customary law together with the common law and

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29. AGBEDE, *supra* note 28, at 57-96; C.O. Akpamgbo, A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, 14 AFR. L. STUD. 87, 87-92 (1977).

30. ALLOTT, *supra* note 1, at 166-72.

31. KWAME OPOKU, THE LAW OF MARRIAGE IN GHANA A STUDY OF LEGAL PLURALISM 2 (1976).

32. *Id.* at 3.

33. *Id.*

34. See DILEMMA OF LOCAL COURTS, *supra* note 3. The Report concludes, "This survey demonstrates the dilemma of the Local Courts in Zambia. Customary law itself remains in a state of flux. The degree of neglect by the government of the infrastructure of the Local Courts is disappointing. The much talked about autonomy of the judicature remains a myth. Concentration of resources and decision making is still a preserve of the central administration in Lusaka. There is a total absence of moral and material incentives for the judicial and support staff at the Local Court level."

35. *Id.*

36. *Id.*

legislation as a source law. The court system was integrated. This was done by putting the local courts (the courts that dealt with customary law) at the bottom of the judicial structure. Unfortunately, the postcolonial constitutions in this period left much to be desired on the issue of women's rights. The independence and new constitutions of the 1960s contained bills of rights that guaranteed human rights to all on the basis of equality between men and women and, at the same time, immunized customary law against human rights scrutiny. For example, the Zimbabwe Constitution provides that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority"<sup>37</sup> and that "no law shall make any provision that is discriminatory either of itself or in its effect."<sup>38</sup> It then states that

[n]othing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters—  
 (a) matters of personal law; (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law . . . .<sup>39</sup>

There are many aspects of customary law that are good and need to be preserved. For example, it has no institutionalized or complicated procedures, and the objective of dispute settlement is reconciliation. This underpins many of its procedures.<sup>40</sup> In terms of the future, there is need to create one legal system which takes into account both the received law and the customary law. In a unified system the good values of customary law, such as the simplicity of procedures and the preference for reconciliation rather than litigation, should be reflected in the integrated legal system. Unless customary law is integrated it is bound to die or be relegated to the law of the poor. We must always remember that the function of law is to meet the needs of the society it serves.

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37. CONST., art. 23 (1)(a) (2009) (Zim.).

38. *Id.* art. 23 (1)(b).

39. *Id.*

40. See VERNON V. PALMER & SEBASTIAN M. POULTER, *THE LEGAL SYSTEM OF LESOTHO* 99-167 (1972).

## II. EMERGING JURISPRUDENCE IN THE ERA OF HUMAN RIGHTS

In postdemocratization constitutions, the status of customary law in most African jurisdictions is constitutionally protected. It is part of the general law of the country. For example, Section 211 of the Constitution of South Africa provides that the institution, status, and role of traditional leadership are recognized subject to the constitution.<sup>41</sup> It further states that a “traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, including amendments to, or repeal of, that legislation or those customs,” and that “courts must apply customary law when that law is applicable, subject to the Constitution and [relevant] legislation . . . .”<sup>42</sup> As Justice Langa noted in *Bhe v. Magistrate, Khayelitsha*, this means that customary law “is protected by and subject to the Constitution in its own right.”<sup>43</sup> It is no longer dependent on rules of repugnancy for continued validity. Judge Van Der Westhuizen explained in *Shilubana v. Nwamitwa* that “customary law has a status that requires respect.”<sup>44</sup> As the South African Constitutional Court held in *Alexkor v. Richtersveld Community*, customary law must be recognized as an “integral part” of the law and “an independent source of norms within the legal system.”<sup>45</sup> The new approach as reflected in the postdemocratization constitutions does not immunize customary law from human rights norms. The new Kenyan Constitution provides that

[t]raditional dispute resolution mechanisms shall not be used in a way that:

- (a) contravenes the Bill of Rights;
- (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
- (c) is inconsistent with [the] Constitution or any written law.<sup>46</sup>

It makes clear that the Bill of Rights clauses trump customary law norms that conflict with constitutional provisions by stating that “[a]ny

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41. S. AFR. CONST., § 211(1), 1996.

42. *Id.* § 211(2).

43. 2004 (1) SA 580 (CC) at ¶ 41 (S. Afr.).

44. 2008 (2) SA 66 (CC) ¶ 43 (S. Afr.).

45. 2003 (5) SA 460 (CC) ¶ 51 (S. Afr.).

46. CONSTITUTION, art. 159 (3) (2010) (Kenya).

law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."<sup>47</sup> The Kenyan Constitution goes further than any of the other African constitutions by providing for automatic application of international treaties to which Kenya has acceded.<sup>48</sup> Article 2 (6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution.<sup>49</sup> It further provides for the application of customary international law norms to Kenya.<sup>50</sup> Clearly, international human rights norms prohibiting discrimination are applicable to Kenya.<sup>51</sup> Similarly, the Constitution of the Republic of Malawi provides that "[a]ny law that discriminates against women on the basis of gender or marital status shall be invalid . . ."<sup>52</sup> It also obligates the government to take legislative measures that eliminate customs and practices that discriminate against women.<sup>53</sup> In section 10(2), it further provides that "in the application and development of . . . customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution."<sup>54</sup> Similarly, the Constitution of South Africa provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."<sup>55</sup>

A similar approach can be found in the 1985 Uganda Constitution, which in article 33 provides that

(1) Women shall be accorded full and equal dignity of the person to men[;]

(2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement[;]

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47. *Id.* art. 2(4).

48. *Id.* art. 2(5).

49. *Id.* art. 2(6).

50. Article 2(5) clearly implies this by stating that general international law and conventions entered into by Kenya apply to Kenya.

51. *See id.* art. 2(5). ("The general rules of international law shall form part of the law of Kenya.")

52. CONSTITUTION OF THE REPUBLIC OF MALAWI 1995, ch. IV, art. 24(2). *See also id.* ch. I, art. 5 ("Any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.").

53. *Id.* ch. IV, art. 24(2).

54. *Id.* ch. II, art. 10(2).

55. S. AFR. CONST., § 211(3), 1996.

(3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society[;]

(4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities[;]

(5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom[; and]

(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.<sup>56</sup>

The fundamental human rights provision of the Constitution of the Republic of Ghana guarantees the cultural rights and practices of the people, while still prohibiting “[a]ll customary practices that dehumanize or are injurious to the physical or mental well-being of a person.”<sup>57</sup> The modern approach is informed by the development of international human rights norms that outlaw discrimination. The Universal Declaration of Human Rights unequivocally prohibits discrimination.<sup>58</sup> Similarly, several major international conventions prohibit discrimination on grounds of gender. These include: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>59</sup> the International Covenant on Civil and Political Rights,<sup>60</sup> the International Covenant on Economic, Social, and Cultural Rights,<sup>61</sup> and the Convention on the Elimination of All Forms of Discrimination.<sup>62</sup> Similar norms are expressed in regional treaties such

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56. CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, ch. 4, art. 33.

57. CONSTITUTION OF GHANA 1992, ch. 5, art. 26.

58. Universal Declaration of Human Rights art. 7, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948).

59. CEDAW, *supra* note 6.

60. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

61. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

62. G. A. Res. 2106 (XX) A, U.N. Doc. A/RES/2106(XX) (entered into force Jan. 4, 1969).

as the Inter-American Convention on Human Rights,<sup>63</sup> the European Convention on Human Rights,<sup>64</sup> and the African Charter on Human and Peoples' Rights. In the context of Africa, these have been followed by a regional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>65</sup> In addition some of the subregional organizations have adopted regional instruments. For example, in 2008, the Southern African Development Community (SADC) adopted the Protocol on Gender and Development.<sup>66</sup> The conventions, especially CEDAW, impose positive obligations on states to pursue policies of eliminating discrimination against women by adopting legislative and other measures which prohibit discrimination against women.<sup>67</sup> The fact that the postdemocratization constitutions do not immunize customary law against scrutiny based on human rights norms is very significant for women's rights because customary law embodies and underpins customs and traditions that discriminate against women. The discrimination of women is rooted in inequality, male domination, poverty, aggression, misogyny, and entrenched customs and myths. The real solution to the problem is eradication of customs that undermine the dignity of women. The Beijing Declaration called on state parties to ensure that "[a]ny harmful aspect of certain traditional, customary or modern practices that violates the rights of women . . . [is] prohibited and eliminated."<sup>68</sup> That is why it is so important that both the postdemocratization national constitutions and the international conventions impose positive obligations on states to eradicate customs and traditions that undermine the dignity and rights of women. This can, however, only be achieved if judges take up the challenge and interpret both the constitutional provisions and the conventions in a manner that shows sensitivity to the objectives of the norms contained in those documents.

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63. Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

64. Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 (entered into force Sept. 3, 1953).

65. Protocol on Rights of Women, *supra* note 11.

66. Press Release, Southern African Development Community (SADC), SADC Heads of State and Government Sign the SADC Protocol on Gender and Development (August 2008), available at <http://www.safaid.net/content/sadc-heads-state-and-government-sign-sadc-protocol-gender-and-development> (click "Mediate Release on the SADC Gender Protocol.doc"); SADC, Protocol on Gender and Development, Aug. 17, 2008, available at [www.sadc.int/attachment/download/file/247](http://www.sadc.int/attachment/download/file/247).

67. *E.g.*, CEDAW, *supra* note 6, art. 2(b)-(c).

68. Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform on Action* ¶ 224, in *Report on the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>.



## III. JUDICIAL SCRUTINY, HUMAN RIGHTS, AND AFRICAN CUSTOMARY LAW

For decades, decisions by African courts took a static view of customary law and did little to mitigate its discriminatory operation against women.<sup>69</sup> This was especially true in countries where constitutions recognized the application of customary law without resolving the conflict between it and human rights provisions. Judges interpreted this situation as permitting the application of provisions of customary law that discriminated against women. Courts failed to take into account the fact that customary law is dynamic and ignored the living law that was being practiced by the communities. Customary law is continually evolving in the light of social, economic, scientific, and technological developments and possibilities. The failure to take into account that customary law is dynamic has changed in the majority of jurisdictions. Judges are increasingly asserting the supremacy of human rights norms and declaring customary discriminatory norms unconstitutional or invalid and inapplicable in modern society. In several jurisdictions, courts are responding to the need for change and are showing an understanding of the existing social and economic conditions.

In the Nigerian case of *Muojekwu v. Ejikeme*, the Nigerian Court of Appeal examined a custom at issue in the context of several provisions of the constitution.<sup>70</sup> The court considered the *Nrachi* custom of Nnewi that “enable[d] a man to keep one of his daughters unmarried perpetually under his roof to raise issues, more especially males, to succeed him. With the custom performed on a daughter, she takes the position of a man in the father’s house.”<sup>71</sup> The court of appeal held that the custom was discriminatory and therefore inapplicable.<sup>72</sup> It was held to be against the dictates of equity and good conscience, and it was also held to be a violation of CEDAW.<sup>73</sup> It was further held to be inconsistent

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69. See John W. Van Doren, *Death African Style: The Case of S.M. Otieno*, 36 AM. J. COMP. L. 329 (1988); Muna Ndulo, *Widows under Zambian Customary Law and the Response of the Courts*, 18 COMP. & INT’L L.J. S. AFR. 90 (1985).

70. [2000] 5 NWLR 402 (Nigeria).

71. *Id.* at 406.

72. *Id.* at 406-07.

73. *Id.* at 407. Article 5 of CEDAW requires state parties to take appropriate measures “[t]o 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 . . . [and] [t]o 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 . . .” CEDAW, *supra* note 6.

with public policy and as being repugnant to natural justice.<sup>74</sup> Noting the failure of the legislature to outlaw the practice through legislation, the court expressed the view that in such situations it was up to courts to do something about it.<sup>75</sup> Justice Olagunju stated:

since the abrogation of such obnoxious practice rests absolutely with the legislature of the state that still clings to such absurdity and the burden of containing the incidence of its manifestations in judicial matters lies upon the apex court the best that can be done at this level of judicial hierarchy is to shun the practice as repugnant to natural justice, equity and good conscience and, therefore, unenforceable, hoping that sooner than later the authorities that are in a position to do so will hasten the interment of a custom that has outlived its usefulness and has become counter-productive.<sup>76</sup>

Quoting an earlier related case,<sup>77</sup> Justice Fabiyi added, "All human beings—male and female—are born into a free world and are expected to participate freely without any discrimination on grounds of sex, and that is constitutional."<sup>78</sup>

In *Edet v. Essien*, a Nigerian court considered a customary rule in which, if a woman's dowry was not refunded to her former husband, children born by a subsequent marriage belonged to the husband of the first marriage.<sup>79</sup> The court held that the custom was contrary to natural justice, equity, and good conscience.<sup>80</sup> The court ruled that a custom that denies the natural or biological father of his child is certainly repugnant to natural justice.<sup>81</sup>

In *Bhe v. Magistrate, Khayelitsha*, *Shibi v. Sithole*, and *South African Human Rights Commission v. President of the Republic of South Africa*, the South African Constitutional Court consolidated three cases, and took up the "constitutional validity of the principle of primogeniture in the context of the customary law of succession."<sup>82</sup> Central to the customary law of succession is the principle of male primogeniture.

74. *Id.*

75. *Id.* at 408.

76. *Id.*

77. *Mojekwu v. Mojekwu*, [1997] 7 NWLR 283; discussed *infra* pages 105-06.

78. *Id.* at 409.

79. [1932] 11 NLR 47.

80. *Id.* at 48.

81. *Id.*

82. 2004 (1) SA 580 (CC) ¶ 3 (S. Afr.).

These were three cases brought to the Constitutional Court at the same time. In *Bhe*, two minor daughters were ineligible to inherit from their father's intestate estate.<sup>83</sup> Under section 33 of the Black Administration Act 38 of 1927 and regulation 2(e) of the Administration and Distribution of the Estates of Deceased Blacks, minor children are not entitled to inherit intestate from their father's estate.<sup>84</sup> The estate thus devolved to the deceased's father, who was named sole heir and successor.<sup>85</sup> Among other sections, section 23(2) and regulation 2(e) were challenged in the high court, where both sections were ruled unconstitutional.<sup>86</sup>

In *Shibi*, Ms. Shibi, the applicant and deceased's sister, was ineligible to become heir of the deceased's intestate estate, notwithstanding the fact that the deceased had neither a civil nor customary law wife, was childless, and did not have surviving parents or grandparents.<sup>87</sup> This was the result of the application of section 23 of the Black Administration Act, and regulation 2(e) in particular, requiring devolution of an African's estate to be made according to custom.<sup>88</sup> One of the deceased's male cousins was named the rightful representative of the estate, with a second male cousin designated as the sole heir of the deceased's intestate estate.<sup>89</sup> In the high court, Ms. Shibi was granted a declaratory order pronouncing her as sole heir in her deceased brother's estate.<sup>90</sup>

The third case was an application by the South African Human Rights Commission and the Women's Legal Center Trust. These organizations had applied to the high court for the constitutional invalidation of section 23 of the Act, which allowed the application of the offending customary norm. Before the case was heard, the *Bhe* case was referred to the Constitutional Court. Rather than proceed in the high court, the South African Human Rights Commission and the Women's Legal Centre Trust sought direct access to the Constitutional Court to have section 23 of the Act—or in the alternative subsections (1), (2), and (6) of section 23—declared inconsistent with the Constitution of South Africa, in particular the equality provisions (section 9), the right to human dignity (section 10), and the rights of children (section 28).<sup>91</sup> The application was granted.

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83. *Id.* ¶¶ 9-20.

84. *Id.* ¶ 16.

85. *Id.* ¶ 15.

86. *Id.* ¶ 19.

87. *Id.* ¶¶ 21-25.

88. *Id.* ¶ 22.

89. *Id.* ¶¶ 23-24.

90. *Id.* ¶¶ 27.

91. *Id.* ¶¶ 7, 31.

The Constitutional Court declared section 23 and its associated regulations to be discriminatory on the grounds of race, sex, and gender, and thus contrary to section 9(3) of the South African Constitution.<sup>92</sup> The court further held that the section was also contrary to the right to dignity.<sup>93</sup> In so far as it precluded minors and extramarital children from inheriting, the regime violated the rights of children (section 28) in the constitution in that it subjected children to unfair discrimination on the basis of sex and birth.<sup>94</sup> The court found that the serious violations of these rights were not justifiable in terms of the section 36 and therefore the court struck down section 23 pursuant to section 172(1)(a) of the constitution.<sup>95</sup>

In the absence of section 23, the Constitutional Court held that the customary law of succession applied to all three cases, and in contention was the rule of primogeniture.<sup>96</sup> In so far as the rule excluded women from inheritance on the grounds of gender, it violated section 9(3) of the South African Constitution.<sup>97</sup> It also violated the right of women to human dignity secured by section 10 of the constitution.<sup>98</sup> Furthermore, the rule of primogeniture was held to be discriminatory insofar as it hindered all female children, and male extramarital children, from inheriting.<sup>99</sup> Based on this analysis, the court ruled in the *Bhe* case that the minor daughters, Nonkululeko Bhe and Anelisa Bhe, were to be the sole heirs of the estate.<sup>100</sup> In the *Shibi* case, the Court ruled that Charlotte Shibi, the only sister of the deceased, was to be the sole heir of the deceased's estate.<sup>101</sup>

In the Nigerian case *Mojekwu v. Mojekwu*, under the Nnewi custom, if a man dies leaving male issue, the male child inherits the deceased's property.<sup>102</sup> However, if the man leaves no male issue, the man's brother will inherit his property. If the male issue who survives the father dies, leaving no male issue, the father's brother inherits the property, and on it goes along the male line only. In this case, the son of the deceased's late brother inherited the property of his relation to the exclusion of the daughter of the deceased.<sup>103</sup> The Nigerian Court of Appeal found the

92. *Id.* ¶¶ 68, 91-93.

93. *Id.* ¶ 95.

94. *Id.* ¶¶ 52-54.

95. *Id.* ¶¶ 69-74.

96. *Id.* ¶ 74.

97. *Id.* ¶ 91.

98. *Id.* ¶ 92.

99. *Id.* ¶ 93.

100. *Id.* ¶ 136(11)(a)(i).

101. *Id.* ¶ 136(11)(b)(i).

102. [1997] 7 NWLR 283.

103. *Id.*

Nigerian custom that effectively prevented female family members from inheriting property repugnant to the principles of natural justice, equity, and good conscience.<sup>104</sup> The court held that all human beings “are born into a free world and are expected to participate freely, without any discrimination on grounds of sex.”<sup>105</sup> In the opinion, Justice Tobi noted,

Any form of societal inhibition on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. . . . Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the ‘Oli-Ekpe’ custom of Nnewi is repugnant to natural justice, equity and good conscience.<sup>106</sup>

In the Kenyan case of *In re the Estate of Andrew Manunzyu Musyoka*,<sup>107</sup> the deceased died intestate. The application was brought by the deceased’s daughter, born of his first customary law marriage. The application was in response to the filing of letters of administration by the deceased’s sons and wife, to the effect that they were the beneficiaries of the deceased’s estate. The applicant daughter alleged that she was also entitled to inherit from the deceased’s father’s estate. This assertion was met with counterargument from the respondents that application of African customary law stood to exclude her from inheriting. The customary law rule of the Kamba people is that a female married under African customary law is ineligible to inherit from the estate of her deceased father. The daughter may regain eligibility to inherit, however, if on divorce the *mbui sya ulee* (goats) are returned by the woman to the husband. On finding that no customary marriage had in fact been concluded, the court held that the applicant was entitled to inherit, and that her name was to be added to the filings. The court held that Kamba customary law was discriminatory in so far as it sought to deny the applicant her inheritance rights on grounds of sex. The law was repugnant to justice and good morals and therefore inapplicable to the case. In making its determination, the court used the Succession

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104. *Id.*

105. *Id.* at 304-05.

106. *Id.*

107. (2005) eKLR.

Act, which governs intestate succession generally.<sup>108</sup> Section 3(2) of the Succession Act provides that if a party to a matter is subject to or affected by African customary law, then the courts are to apply that law so long as it is “not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice.”<sup>109</sup> Finding that Kamba customary law was applicable to the case at hand, the court noted that the customary law rule under consideration precludes a married daughter from inheriting from her deceased father’s estate. The court held that Kamba customary law discriminated on the basis of sex, and compared this custom to section 40(1) of the Succession Act, which contains a gender-neutral provision for intestate succession in the case of polygamous marriages.<sup>110</sup> In terms of section 40(1), the court pronounced on the applicant’s eligibility to inherit, stating that unless she opted out of a share of her father’s estate, she was entitled to inherit.<sup>111</sup>

Turning to the constitution, the court noted that section 82(4) of the constitution provides an exception to the general protection afforded by the section 82(1) nondiscrimination provision. The relevant exception, contained in section 82(4)(c), provides that the constitutional nondiscrimination provision does not apply to the application of customary law.<sup>112</sup> Notwithstanding this constitutional exception, the court went on to say that Kenya, as signatory to a number of international conventions and regional agreements—the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, CEDAW, and the African Charter of Human Rights and Peoples’ Rights—was under an obligation to observe the doctrines of antidiscrimination contained therein. The court buttressed this point by noting that “[i]nternational law is applicable in Kenya as part of our law so long as it is not in conflict with the existing law even without specific legislation adopting [it].”<sup>113</sup> The court accepted as precedent the case of *Mary Rono v. Jane Rono and William Rono* in which international law instruments were used to nullify a discriminatory succession norm.<sup>114</sup> The court thus endorsed the use of international law in instances of domestic customary law discrimination.<sup>115</sup> The court acknowledged the

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

case of *Estate of Mutio Ikonyo v. Peter Mutua Ngui* as an instance in which customary law rule was applied.<sup>116</sup> In that case, the court held that because the applicant was a married woman, she was not entitled to inherit from the deceased's estate.<sup>117</sup> The judge held that the *Estate of Mutio Ikonyo* decision was not binding on the court, and the court disagreed with its holding, especially in light of the court of appeal decision in the *Mary Rono* case.<sup>118</sup>

In *Ephraim v. Pastory*,<sup>119</sup> the High Court of Tanzania considered a law where, although daughters were entitled to inherit family land, unlike men, they could not dispose of the land.<sup>120</sup> The court held this rule to be discriminatory and inconsistent with the Tanzanian Bill of Rights, which prohibits discrimination against any person.<sup>121</sup> The court further noted that the constitution's incorporation of the Universal Declaration of Human Rights, as well as Tanzania's ratification of CEDAW, the African Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights all required Tanzania to prohibit discrimination based on sex.<sup>122</sup>

In Ghana, faced with similar problems, the courts have shown flexibility and readiness to nullify customary norms that discriminate against women. Ghanaian courts have, for instance, ruled that the successor's title is subject to the widow's right to the home, her right to all the household goods enjoyed in common with the deceased in the matrimonial home, and the right of the widow and children to maintenance out of the estate.<sup>123</sup> In *Akrofi v. Akrofi*, the plaintiff was the only child of the deceased and sought an order from the court declaring her as the sole successor to her deceased father's estate.<sup>124</sup> This action arose from the fact that the deceased's brother had been appointed heir to the deceased's estate. Succession to property in Buem is patrilineal, and male children take preference over female children. However, in the absence of any male children, female children are not precluded from inheriting and are, in the language of the court, "within the range of persons entitled to succeed."<sup>125</sup> The court found that a custom that excludes women did not exist. Moreover, the court noted

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116. *Id.*

117. *Id.*

118. *Id.*

119. (2001) AHRLR 236 ¶ 2 (reprinting (1990) LRC (Const.) 757).

120. *Id.* ¶ 2.

121. *Id.* ¶ 10.

122. *Id.*

123. *Id.*

124. [1965] G.L.R. 13, 14 (Ghana).

125. *Id.* at 16.

that even if such a custom did exist, that custom had outlived its usefulness and was no longer not in conformity with public policy.<sup>126</sup>

Respect for the law can only be achieved if the law furthers the needs and conforms to the circumstances of society subject to the law. Failure to use the law to achieve just social solutions to issues confronting society and to reform society effectively thwarts development and advancement in customary law and consequently also reduces respect for it. As the Ghana High Court in *In re Appiah (Decd.)*, faced with a customary norm that excluded children and vested inheritance in a successor to the deceased, observed,

I must mention that the impact of social and economic changes on this aspect of customary law is to recognise the widows [sic] and the children [sic] of the intestate husband right to personal chattels enjoyed in common with the deceased in the matrimonial home. Such items include beds, beddings, private cars, etc. For it is unreasonable and therefore uncustomary to deprive them of the use and enjoyment of things they have been brought up with and gotten used to.<sup>127</sup>

The scope of the rights of women to own and dispose of real property is an ongoing human rights issue in a number of countries.

For decades decisions by African courts took a static view of customary law and did not try to mitigate the operation of the discriminatory customary law norms that discriminated against women. This is changing; empowered by postdemocratization constitutions, many courts have taken up the challenge. *Hotel Intercontinental v. Longwe*<sup>128</sup> in Zambia and *Attorney General v. Unity Dow*<sup>129</sup> in Botswana were trailblazers in the SADC region. More recent examples that have carried the struggle of establishing a society where men and women are equal to a higher level are the *Bhe* case, in which the South African Constitutional Court took up the constitutional validity of the principle of primogeniture in the context of the customary law of succession.<sup>130</sup> Later, in *Shilubana v. Nwamitwa*, the South African Constitutional

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126. *Id.*

127. *In re Appiah (Decd.)*, [1975] G.L.R. 465, 473; see also *Amissah-Abadoo v. Abadoo* [1974] G.L.R. 110; *In re Kofi Antubam (Decd.)* [1965] G.L.R. 138.

128. *Longwe v. Intercontinental Hotels*, (1993) 4 L.R.C. 221 [SC] (Zam.) (holding discriminatory a hotel practice of refusing entry to unaccompanied women to the hotel premises).

129. (1992) AHRLR 99, ¶ 49 (Bots.).

130. See discussion of the *Bhe* case, *supra* pages 103-05.



Court addressed whether a community has the authority to restore the position of traditional leadership—which has been removed because of gender discrimination—to a house.<sup>131</sup> As the South African Constitutional Court observed in *Carmichele v. Minister of Safety and Security*, the constitution imposes an obligation on the courts to shape the common law and customary law such that it adheres to the principles of the South African Constitution.<sup>132</sup> We can only hope that African courts will provide more of these kinds of decisions.

Unfortunately, there are still a number of jurisdictions where courts continue to reject the reformist approach and insist that legislation is required to change the offending customary law norms. The Zimbabwe Supreme Court case of *Magaya v. Magaya* illustrates this view.<sup>133</sup> Magaya, the deceased, died intestate. A community court initially named the deceased's eldest child (the only and female child of the deceased's first customary law wife) the heir of his estate. On appeal, however, this order was set aside, and the secondborn son of the deceased's second customary law wife was declared the heir (the firstborn son of this second marriage having declined to be declared heir). On further appeal to the Zimbabwe Supreme Court, the decision declaring the male child the heir was upheld. The court reasoned that under the customary law of succession males are preferred to females as heirs. The court stated that the Constitution of Zimbabwe, while containing antidiscrimination provisions in sections 23(1) and (2), does not explicitly prohibit discrimination on grounds of sex or gender. It expressed the view that section 23(3) of the constitution exempts certain discriminatory behavior. Notably, any law that relates to matters concerning marriage, adoption, divorce, burial, devolution of property on death, or other matters of personal law, and the application of African customary law will be exempt from the section 23(1) prohibitions.

The court further argued that African customary law is constitutionally sanctioned under section 89 of the constitution, and some would elevate this right to a right having been conferred by the constitution. While acknowledging the importance of gender advancement, the court argued that the fact that customary law is a long-standing, fundamental, and central aspect of African society means that it cannot easily be discarded. Furthermore, the application of customary law is voluntary in the sense that it applies only to those "who choose to marry under customary law or choose to be bound by it."<sup>134</sup> It reasoned that the matter at hand concerned not only an issue of

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131. 2009 (2) SA 66 ¶ 1 (CC).

132. 2001 (4) SA 938 (CC) ¶¶ 33-36.

133. [1999] 1 ZLR 100 (Zim.).

134. *Id.*

devolution of property on death, but also concerned an application of African customary law in the context of inheritance and succession of the estate of an African, who was party to customary law marriages and therefore the case fell within the sanctuary afforded by section 23(3) of the Zimbabwe Constitution. The court concluded that given the complexity of issues arising from the clash between African customary laws on inheritance and succession and non-discrimination provisions, any reform in this area should be left to the legislative machinery. To argue that if a particular society has always had discriminatory practices it should stay that way, as the court seems to say, is to accept an extreme form of moral and legal positivism.

In deciding as it did, the court completely ignored the policy arguments applicable to the situation and the fact that Zimbabwe is a party to several human rights conventions, including the CEDAW, which speaks directly to the issue the court was addressing and which expressly prohibits sex discrimination. As the Botswana High Court observed in the case of *Attorney-General v. Dow*, custom and tradition

have always yielded to express legislation . . . . A constitutional guarantee cannot be overridden by custom. Of course, the custom, will as far as possible be read so as to conform to the constitution. But where this is impossible, it is custom not the constitution which must go.<sup>135</sup>

In the end, the court upheld a customary law that gave preference to males over females as heirs. A daughter was excluded from inheriting her father's estate under the laws of her community regardless of birth order. This was so because she had certain obligations to her marital family that would conflict with any obligations she might have to her original family as the heir of that estate. Holding this principle as higher in complete disregard of positive laws prohibiting discrimination based on sex is inexcusable.

This approach also departs from the true common law method, which has always been pragmatic. As William Church has observed,

[u]nity, simplicity and preservation of the past are not the only attributes of a sound legal system. Thus concentration on these goals to the exclusion of all others pulls the law away from its more immediate, and more

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135. (1992) AHRLR 99, ¶ 49 (Bots.).

important function as a fluid, pragmatic crucible in which society's problems are tested, debated and resolved.<sup>136</sup>

In the true common law tradition, the inherent flexibility of the common law means that the common law as a procedural system contains its own internal repugnancy clause. The internal repugnancy clause resides in the judicial discretion to overrule precedents and refuse to follow established common law rules in certain circumstances. As Justice Sutherland stated in *Funk v. United States*, "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."<sup>137</sup> In outlining a reason for a common law rule, Chief Justice Black in the Pennsylvania case of *McDowell v. Oyer* stated,

[a] palpable mistake, violating justice, reason, and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutatur*. We change with the change of the times, as necessarily as we move with the motion of the earth.<sup>138</sup>

A notable use of the common law's ability to declare a rule repugnant is the House of Lord's 1991 decision in *Regina v. R.*, overturning the common law rule that a husband cannot be found guilty of raping his wife.<sup>139</sup> The basis of this "marital exception" was that the marriage contract contained an irrevocable consent to sexual intercourse. Lord Keith of Kinkel stated that the common law could evolve "in the light of changing social, economic and cultural developments."<sup>140</sup> The House of Lords rested its decision to destroy the rule on notions of equality between sexes, and the standards of modern society derived from social, economic, and social developments.

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136. William Church, *The Common Law and Zambia*, in *LAW IN ZAMBIA*, *supra* note 13, at 1, 26.

137. 290 U.S. 371, 383 (1933).

138. 21 Pa. 417, 423 (1853).

139. [1991] 1 A.C. 599 (H.L.) (appeal taken from Eng.) (U.K.).

140. *Id.* at 616.

Similarly, the South African Constitutional Court observed that the constitution “imposes an obligation on the courts to consider whether there is a need to develop the common law to bring it into line with the Constitution, and to develop it if so. The same is true of customary law.”<sup>141</sup> The South African Constitutional Court considered the obligation of South African courts to develop the common law and held that “where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.”<sup>142</sup> As Judge Ngcobo observed, this principle applies to the development of indigenous law as well.<sup>143</sup> “Where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation.”<sup>144</sup> This would mean modifying the parts of the custom that are inconsistent with the Bill of Rights.

In *Shilubana v. Nwamitwa*, Judge Van Der Westhuizen explained that customary law “[l]ike the common law . . . is adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law.”<sup>145</sup>

Another factor supportive of a dynamic interpretation of the concept of African tradition is the requirement by the African Charter on Human and Peoples’ Rights in article 60 that the African Commission on Human and Peoples’ Rights

shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations . . . as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.<sup>146</sup>

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141. 2009 (2) SA 66 (CC) ¶ 48 (citing *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) ¶¶ 34-36.)

142. *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) ¶ 33.

143. *Bhe* 2004 (1) SA 580 (CC) ¶ 215 (Ngcobo, J., concurring).

144. *Id.*

145. 2009 (2) SA 66 (CC) ¶ 54.

146. African Charter, *supra* note 10.

The recently established African Court on Human and Peoples' Rights has wide substantive jurisdiction—wider in fact than any of the existing regional courts in that its jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol, and any relevant human rights instrument ratified by the states concerned. Article 7 of the Protocol provides that “[t]he Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.”<sup>147</sup> In effect, the fact that the African Charter embraces all spheres of human rights—political and civil, as well as social and economic rights—represents the most authoritative rendering of the African tradition in the field of human rights.

#### IV. REFORMING CUSTOMARY LAW: COMPLEMENTING THE WORK OF THE COURTS

A fundamental question that remains is how do we complement the work of the courts and advance the project of reforming African customary law so that norms that discriminate against women can be eradicated. The task of reform is too large to be left to the courts alone, and courts are handicapped in that they can only deal with issues that arise in cases brought before them. A strategy is needed because opposition to reform by those who benefit most from maintaining the customary system, as well as from political players, should not be underestimated.

Reform of customary law can be divided into four approaches. The first approach is to encourage all African countries to join international and regional human rights instruments and the enforcement mechanisms that the systems have put in place, such as the African Court of Human and Peoples' Rights. Further, African countries should be encouraged to develop subregional enforcement mechanisms. This will result in a comprehensive system of norm setting and enforcement mechanism instruments and will lay a foundational framework within which women's rights can be articulated and protected together with other human rights. The second approach is to ensure that human rights instruments are reflected in national constitutions and national legislation. All African national constitutions should outlaw all forms of discrimination and none of them should immunize customary law against human rights provisions. If the goal of complete equality

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147. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted* June 9, 1998, O.A.U. Doc. CAB/LEG/665 (entered into force January 1, 2004).

between men and women in all legal, political, and social arrangements and the goal of the Beijing Conference—to remove all obstacles to women's active participation in all spheres of public life and private life through a full and equal share in economic, social, cultural, and political decision making<sup>148</sup>—are to be achieved, African constitutions must be rid of the provisions that derogate from the application of the equality and antidiscriminatory provisions on the grounds of customary law. There is need for constitutional provisions that declare the rights of women and reaffirm their equality with men in all respects. The guiding principle should be the equality of all human beings regardless of sex and gender differences.

The third major approach should be focused on legal reform of both customary law and ordinary legislation in all African countries to rid them of gender discriminatory laws. Reform efforts should start with a comprehensive diagnostic study of each African country's legal system aimed at identifying laws that require reform. Any reform project must begin with the underlying task of figuring out which laws are in conflict with human rights norms of equality and nondiscrimination. With respect to customary law, any reform effort must be mindful of the weapons of the traditionalists who argue that human rights norms are the product of Euro-Christian societies. Reformers must assure the public that the human rights project is not about westernizing African societies, but on the contrary, is an attempt to integrate the traditional and modern values of the African people with the concepts of human rights and dignity for all persons. In order to counter the criticism that human rights is a Western project, the values of the customary law should be studied so that important and nondiscriminatory parts are preserved and included in the legal reform, but without discrimination against women. As Fatima Babikar Mahmoud has observed "There are positive and negative elements in every culture and in every religion. It is important to remain open and critical of ourselves . . ." <sup>149</sup>

In the judgment of the South African Constitutional Court in *Shilubana v. Nwamitwa*, Judge Van Der Westhuizen listed four useful guidelines for how to approach the reform of customary law.<sup>150</sup> The case before the court was an appeal against a court of appeal judgment confirming a decision of the high court, in which "[a] woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender."<sup>151</sup>

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148. Fourth World Conference on Women, *supra* note 68, ¶¶ 22-30.

149. Fatima Babikar Mahmoud, *Are Human Rights Universal? Issues of Gender and Culture*, AFRICA NOTES, May-June 2004.

150. 2008 (2) SA 66 (CC) ¶ 44-49.

151. *Id.* ¶¶ 1-2.

Th[e] Court [was] called on to decide whether the community [had] the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution.<sup>152</sup>

Judge Van Der Westhuizen stated four factors that ought to be considered in determining the content of a customary norm: (1) the traditions of the community concerned; (2) the possible distortion of records due to the colonial experience; (3) the need to allow communities to develop customary norms; and (4) the fact that customary law, like any other law, regulates the lives of people.<sup>153</sup> Customary norms have developed over a period of time, and an inquiry into a norm should involve “consideration of the past practice of the community.”<sup>154</sup> The court emphasizes that this should be done in customary law’s “own setting rather than in terms of the common law paradigm.”<sup>155</sup> The lives and conditions of the people are forever changing as they are embedded in new social and economic conditions. This means that the “need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.”<sup>156</sup>

It should be noted that the descriptions of customary law recorded in books were invariably made by men thought to be knowledgeable about custom. In this case, the court held that the customary rule that chieftainship is passed down to the eldest son is out of step with society’s new norms that men and women are equal.<sup>157</sup> The court concluded that the contemporary practice of the Valoyi community reflected a valid change of custom.<sup>158</sup> As Judge Van Der Westhuizen observed, customary law must be permitted to develop.

The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practices. A rule that requires

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152. *Id.* ¶ 2.

153. *Id.* ¶¶ 44-49.

154. *Id.* ¶ 44.

155. *Id.*

156. *Id.* ¶ 47.

157. *Id.* ¶ 43.

158. *Id.* ¶ 86.

absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society.<sup>159</sup>

However, it is important, as Judge Ngcobo has observed, “[w]hen dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law.”<sup>160</sup> There are obvious dangers in using common law concepts to analyze African customary law. Legal norms develop in different situations under different cultures and in response to different conditions.

It is understandable that there is much nostalgia about African customary law among African people. Customary law is, after all, part of African identity. However, we should not ignore the structural limitations to adapt customary norms to changing circumstances imposed by the nature of the social-economic and political system that existed under colonial rule and contributed to the distortion of customary norms. Africans played a very limited and negligible role in governance and the formulation of laws that governed them. We must also not forget that equality is related to the right to dignity. Following the historical experiences of slavery and colonialism that African people have endured, we should be aware of the fact that discrimination conveys to the person discriminated against that the person is not of equal worth. The discrimination against women conveys the message that women are not equal to men and undermines their dignity.

The fourth approach of the project should be to take the fight for gender equality to mass movements. There has to be a social movement to change the view and ingrained concept that women's rights is a Western idea that does not fit in African culture. We have to show that human rights are not foreign to Africa. As E. E. O. Alemika observes in the introduction to Eze's work *Human Rights and Social Justice: An African Perspective*, Africa “had ideas of human rights, and created institutions, processes and folklore to protect and promote human

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159. *Id.* ¶ 55.

160. *Bhe* 2004 (1) SA 580 (CC) ¶ 156 (Ngcobo, J., concurring).



dignity within the limits of resources and knowledge available.”<sup>161</sup> There has to be a strategic movement aimed at showing that women’s rights is a relevant issue now in Africa and showing that African society has always recognized human rights norms of many types, some of which coincide squarely with internationalized modern ones. This could go a long way in changing the view held by some that the rights project is a western project aimed at spreading western values. We have to ensure that the courts interpret the law in such a way that gender equality is advanced, and social movements should put pressure on the courts and society to act in the interests of gender equality. Courts should be encouraged to examine the prevailing social and cultural conditions as well as the goals of the justice system as they decide cases. They should be encouraged to interrogate customary law and deconstruct it to see what values underpin particular norms. For example, the custom of widow inheritance, where the widow is inherited by a male relative of the late husband’s family, should be interrogated to establish the core value of the custom. Is it about marrying a widow and having a sexual relationship with her or about providing for the welfare of the family of the deceased? If it is the latter, surely this can be achieved without forcing widows into marriages with a deceased’s relative. Getting to the heart of the values of customary law is a daunting task, but including those values in a new legal system free from discrimination is the best way to ensure stability, fairness, predictability, and equality. Customary law, like any other law, is not static and is always changing to reflect how people are living today. This suggests that we need to improve access to courts so that women can bring claims litigating discriminatory practices. This involves not only making courts and legal services accessible and affordable to women, but also should include educating society—men and women—about the Bill of Rights and what rights and obligations flow from the rights articulated in the Bill of Rights. We need to encourage gender-sensitive civic education in our schools and communities. Legal education should target a range of different actors, such as individuals, religious leaders, judges, traditional rulers, and lawyers. It must also involve providing African judges with best practices. We should encourage the exchange of human rights jurisprudence in emerging Africa with the intention of spreading best practices. This would involve making courts aware of other African courts that are making decisions that advance human rights.

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161. E.E.O. Alemika, *Introduction to OSITA C. EZE, HUMAN RIGHTS AND SOCIAL JUSTICE: AN AFRICAN PERSPECTIVE* (Empowerment & Action Research Centre, Annual Lecture, Series No. 4, 1998).

## CONCLUSION

Although progress is being made, there are still many jurisdictions where much work remains to be done. There are still countries where constitutional provisions immunize African customary norms against human rights scrutiny. Judges in these jurisdictions interpret these constitutional derogation provisions as permitting the application of provisions of customary law that discriminate against women. This is clearly a retrogressive way of constitutional interpretation and one that fails to take into account the country's obligations under international conventions and regional human rights instruments. International jurisprudence that has developed in international human rights courts, such as the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights courts, interprets international conventions as imposing obligations on state parties to ensure that discrimination does not happen and that it is prohibited.

In *Velasquez Rodriguez*, the Inter-American Court of Human Rights held that parties to the American Convention on Human Rights shall

undertake to respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.<sup>162</sup>

The court held that three obligations arise from these undertakings: (1) respect the rights and freedoms recognized by the Convention,<sup>163</sup> (2) ensure the free and full exercise of the rights recognized in the Convention to every person subject to its jurisdiction,<sup>164</sup> and (3) investigate acts that violate an individual's rights.<sup>165</sup> "An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself,"<sup>166</sup> but because it failed to prevent the violations when it could have done so. The court stated that "what

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162. *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 161 (July 29, 1988).

163. *Id.* ¶ 165.

164. *Id.* ¶ 166.

165. *Id.*

166. *Id.* ¶ 172.

[was] decisive was whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State allowed the act to take place without taking measures to prevent it or to punish those responsible.”<sup>167</sup>

In *A. v. United Kingdom*, the European Court of Human Rights explained that state parties must protect the human rights of their inhabitants from violation by others, including by private parties subject to the state’s jurisdiction or authority.<sup>168</sup> Similarly the African Commission on Human and Peoples’ Rights has stated that

internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate [a number] of duties for a State that undertakes to adhere to a rights regime . . . . [T]he State is obliged to protect right-holders against other subjects by legislation . . . . [The State must] move its machinery [to protect beneficiaries of the protected rights] towards actual realisation of the rights.<sup>169</sup>

African governments know the discriminatory nature of certain African customary law norms and are therefore complicit in the violation of women’s rights.

But as the South African Constitutional Court observed in the *Bhe* case with respect to the customary law of succession, we cannot leave the customary law of succession, or others areas of the law, to develop in a piecemeal and sometimes slow fashion, since this would provide inadequate protection to women and children. In this respect constitutional provisions should declare that women have equal rights with men in the enjoyment of all rights and freedoms and the derogations on account of customary law should be eliminated. In addition, in order to achieve equality between men and women, we will need to transform institutions that define poverty, vulnerability, and dependence.

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167. *Id.* ¶ 173.

168. (No. 25599), 1998-IV Eur. Ct. H.R. ¶ 22.

169. *Soc. & Econ. Action Rights Ctr. v. Nigeria*, Judgments Afr. Comm’n on Human & Peoples’ Rights, ¶¶ 44, 46-47, ACHPR/COMM/A044/1 (2002) (emphasis omitted).