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**THE APPLICATION OF THE RIGHT TO EQUALITY FOR WOMEN UNDER
INTERNATIONAL LAW IN SOUTHERN AFRICAN COURTS**

A SURVEY OF FIVE COUNTRIES.

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INTRODUCTION

A significant proportion of the world's population are routinely subjected to abuse, torture, humiliation, starvation and mutilation simply because they are female, more so in Africa where women's rights are still often viewed as distinct from human rights.¹ This raises the question of state responsibility for protecting women's human rights. Women, as much as men, are entitled to full protection of their rights and freedoms because they are human beings.

A decade ago, the United Nations summarized the burden of gender inequality by stating that women composed one-half of the world's population and performed two thirds of the world's work, but earned only one tenth of the world's income and owned only one hundredth of the world's property.²

A look at the constitutions of many Southern African states would suggest that women enjoy equality and access to first generation human rights across the region. In most of these constitutions 'discrimination' on the grounds of gender is prohibited, but the governments frequently do not have the mechanisms in place to enforce these constitutional provisions effectively and women are therefore subjected to widespread practices of discrimination, violence and inequality.

¹Katarina Tomsevska 'Women and Human Rights' Introduction *Women and Law Development Series* (1995)

²Nina J. Crimm 'Introductory Remarks' *Womens Rights as International Human Rights* St Johns Law Review (1995) Vol. 69 @3

Although party to international human rights instruments that advocate gender equality, African states still take a particularly selective view of women's human rights and make this contingent upon local custom. Then one might find that the constitution and civil law give women the same rights as men, but make these subject to traditional practices that limit women's rights. This dissertation will address the issue of how customary laws limit women's human rights and will examine the role of the courts therein. We will also briefly look at the application of international human rights documents in domestic courts.

In order to constructively and comprehensively examine the topic within the space constraints dictated, I had to limit this paper to a survey of five Southern African states that were chosen because of their common language, cultural and legal dualism, colonial histories, and the availability of case law. This paper will cover specific issues that affect women in the personal law of marriage, divorce, property rights and inheritance and will be limited to those areas where most inequalities occur. The reason that this paper will concentrate on the above-mentioned issues is that family law is central to African social, political and economic life. The importance of family law in traditional African systems cannot be sufficiently emphasized as it has been noted that in any study of African traditional economic and political arrangements, the notion of family impinges upon almost every area of community life³. These traditional rules are not merely historical curiosities but are part and parcel of the living domestic law in most Southern African states. We will now examine these domestic legal systems.

³ T. W. Bennett 'Sourcebook of African Customary Law'(1991)@311

CHAPTER 1

A) GENERAL LEGAL SYSTEMS

1. DOMESTIC LEGAL SYSTEMS AND CONSTITUTIONS

All the countries that are reflected in this work derived their constitutional heritage from the British legal system. The colonial governments were initially sympathetic to African women, whom they perceived as living in virtual bondage.⁴ This did not accord with the ideals of female emancipation that was gradually gathering impetus in Nineteenth Century Europe.⁵ The courts were prepared, grudgingly, to free African women from some of the constraints of customary law on the basis of conflict of laws, namely that they had abandoned a 'tribal' way of life and had adopted a western one, and were therefore entitled to the protection afforded by the western system. This tentative move to alleviate the position of women was soon abandoned and after the 1930s the courts made no further efforts to interfere with customary law and were content to treat women in the same way as common law minors, an approach that was both misguided and prejudicial to its subjects.⁶

All the countries, save for Swaziland, now provide for multiparty democracy and all the countries have incorporated a Bill of Rights into their constitutions which contain limiting provisions relating to human rights. The equality provisions in the various

⁴ See T. W. Bennet *Sourcebook of African Customary Law* (1991)@ 321

⁵ See T.W Bennet *Sourcebook of African customary law* (1991) @ 321

⁶ See T.W.Bennet *Sourcebook of African Customary law* (1991) @ 322/323

constitutions all regard discrimination on the grounds of a person's sex as unlawful and provide equal protection for all people.⁷

All the countries have a dual legal system, with the customary law of the people coexisting with the general law of the land. A general discussion of the legal systems will now be addressed under the relevant country headings.

Botswana

In Botswana constitutional power is shared between the president and the elected National Assembly.⁸ Section 3 of the Constitution⁹ affords equal protection to all persons, irrespective of their sex, and accordingly discrimination in the sense of unequal treatment is unconstitutional. In addition to the right to equality for all, the constitution contains specific provisions for respect to integrity and for the person.¹⁰ It should be mentioned that the constitution does not include sex as a ground on which laws should not be based,¹¹ although of late this particular provision has attracted a lot of attention because of the case of *Unity Dow*.¹² This case has made a significant impact on the way the judiciary interprets the relevant equality clauses in the constitution. The learned judge Agunda said that :

“ I conceive that the primary duty of the judges is to make the constitution grow and

⁷ At least on paper.

⁸ [http:// www.state.gov.botswana](http://www.state.gov.botswana)

⁹ Constitution of Botswana 1966

¹⁰ Constitution of Botswana 1966-Section 3

¹¹ Constitution of Botswana 1966 – Section 15

¹² *Attorney General vs Unity Dow* BCLR 1994 (6) a full review of the case will be discussed below.

develop in order to meet the just demands and aspirations of an ever developing society which is part of a wider and larger human society governed by some acceptable concepts of human dignity.”¹³

In the case of *S.R.C of Molepole College of Education vs Attorney General of Botswana*¹⁴ the Appeal Court continued with its liberal interpretation of Section 3 of the constitution especially on the question of *Locus Standi* of appellants which will enhance a litigants access to the courts to challenge constitutional infractions.¹⁵

The dual legal system has a significant impact on the legal position of women¹⁶ where the customary law of the people coexists with the civil law of Botswana, which consists mainly of Roman Dutch law and statutes.¹⁷ The customary law consists of traditional laws and practices of specific tribes, which are not codified and are therefore harder to interpret.¹⁸

The court system also reflects this dual nature with the lower and higher customary courts and various grades of magistrates and high courts existing side by side. Both civil and customary courts of appeal exist and all courts are competent to apply

¹³ Note 10 above @41g-h

¹⁴ Unreported Civil Appeal No13 of 1994, Misc No 396 of 1993. Judgement delivered on 31 January 1995- In this case female students at the college had to disclose their pregnancy and thereafter leave the college and if they fell pregnant a second time they could never return, their male counterparts on the other hand could be responsible for any number of pregnancies at the college and suffer no such liability.

¹⁵ E. K. Quansah ‘ Is the Right to Get Pregnant a Fundamental Human Right in Botswana’ 1995 *J.A.L.*97

¹⁶ A. Molokomme ‘Women’s law in Botswana laws and research needs’ in *The Legal Situation of Women in Southern Africa* (eds) Julie Stewart and Alice Armstrong

¹⁷ Supra note 16 above @ 9

¹⁸ Supra note 16 above @12

customary law in the proper cases. Where customary law is not properly applicable, these courts are to apply the common law.¹⁹

South Africa

This is the only constitution amongst all the countries discussed that prohibits discrimination in all its forms and places a duty on the constitution to promote gender equality and national unity. It further proclaims constitutional principles and Chapter 5 of the constitution commences with a general responsibility of all to promote equality generally. Section 27 reiterates the general responsibility by a social commitment to all to promote gender equality. Section 26 places a responsibility on all persons operating in the public domain, including ministers, who must adopt equality plans and abide by prescribed codes of practice and take measures to promote equality.²⁰

Specific forms of gender discrimination prohibited by the Act include the system of preventing women from inheriting family property, female genital mutilation and any practice including traditional, customary or religious practices which unfairly violate the dignity of women and undermine equality between men and women.²¹

In keeping with the above, section 11 (3) of the Black Administration Act No. 38 of 1927 has been repealed because it was inconsistent with the equality provisions. The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 was

¹⁹ Supra note 16 above @ 11

²⁰ Constitution of the Republic of South Africa, 1996 Act108 of 1996 –Sections 26,27

²¹ De Waal et al *The Bill of Rights Handbook* @207

passed in January 2000 and the Customary Marriages Act No. 120 of 1998 came into effect in November 2000.

Black South Africans are currently subject to two sets of personal laws existing side-by-side, namely customary and civil law, which do not always treat men and women as equals. In reality some religious and customary practices result in the unequal treatment of women. The history of dual legal systems during colonial and apartheid rule has had a negative impact on the rights of black women, and the constitutional guarantee of gender equality now requires that constitutionally acceptable principles in both the civil and customary law systems be integrated into a single system available to all South Africans or that it be abolished altogether.

In the *President of the Republic of South Africa vs Hugo*²² the Constitutional Court acknowledged the centrality of human dignity to the prohibition of unfair discrimination and stated that:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a

²² 1997 (4) SA @1 (CC)

society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the constitution should not be overlooked or forgotten.”²³

The courts have been liberal in their entrenchment of gender equality and even when prosecuting an offence, any discrimination on the grounds of gender, race or disability will be an aggravating factor. Further all Magistrates and High courts are Equality courts for their areas of jurisdiction and within the monetary limits of their jurisdiction.

Swaziland

The Kingdom of Swaziland is a monarchy in which legislative and executive powers vest in the King, and the King rules according to unwritten laws and customs in conjunction with a politically elected government.²⁴ Duality of legal and political systems is endemic to Swazi life and the King presides over the traditional and western hierarchies.

The King alleged a constitutional monarchy, but from 1973²⁵ the constitution of Swaziland has been suspended and currently the country has no written constitution although a constitutional review commission has been in existence from 1996.²⁶ Further, a new Decree no.2 of 2001 was issued by the head of state which has restricted the exercise of fundamental rights and legal challenges have been nullified

²³ @ PARA 41

²⁴ R.T. Nhalpo ‘The Legal Situation of Women in Swaziland and some thoughts on Research’ *The Legal Situation of Women in Southern Africa* (eds) Julie Stewart and Alice Armstrong @97

²⁵ Section 2C of the *Proclamation of the Nation* of 12 April 1973

²⁶ <http://www.amnesty.org> (Amnesty International report on Swaziland dated July 2001)

by special “Legal Notices” which prevent legal challenges and declare certain court rulings null and void.²⁷ This is not conducive to a healthy promotion of human rights.

The duality of legal systems exists but is strictly separate and Swazis are subject to two sets of law. The Swazi Courts apply only Swazi law and custom while the civil system is restricted to Roman Dutch common law and statutes. The exception is the High court and Appeal court.²⁸ Sometimes under special circumstances matters can be transferred from the Magistrates court to the Swazi Court but the legal system itself is so complicated that customary law seems to be getting stronger rather than weaker²⁹. There is a tendency for people to comply with extra legal cultural practices and ignore the existing legal principle. Women tend to favor the western system because it is more sympathetic to women’s issues than the customary courts³⁰. The King has the sole discretion to appoint judges and also determines the terms of such appointment³¹, and failure of the law to correct inequities is nowhere more apparent than in the field of women’s rights.

Zambia

The constitution of Zambia reflects the influence of the British Westminster system,³²

²⁷ www.amnesty.org (Amnesty international report on Swaziland dated July 2001)

²⁸ Supra note 24 above @ 103

²⁹ Supra note 24 above @ 107

³⁰ Supra note 24 above @ 105

³¹ This would clearly affect the Independence of the Judiciary.

³² In the United Kingdom there is an unwritten constitution and the parliament is the supreme law making body.

but contains modifications similar to some Southern African nations. The constitution³³ contains the provisions for fundamental rights and freedoms regardless of race, tribe, place of origin, colour, creed, sex or marital status, however these protections are subject to certain limitations³⁴ and constitutional provisions proscribing sex discrimination are confined to enumerated areas and do not address the injustices inflicted through application of aspects of customary law.³⁵

Zambia is a unitary state and power is divided between the president and legislature and the courts have very little, if any, power of judicial review although they are given a role by the constitution for enforcement of fundamental rights³⁶. Constitutional review consists of Ad Hoc Tribunals that may report on the constitutionality of certain laws before enactment.

The dual legal system consists of customary law and general law based on English law, and exists only in relation to personal law, and then only in matters of marriage, rights in respect of land, and succession, and in these areas operate side by side with the general law. In matters of public law the general law governs all Zambians.³⁷

³³ The 1996 Constitution - The constitution of Zambia was amended under Act No. 18 of 1996.

³⁴ Art. 23 makes exceptions to which the prohibition against discrimination does not apply.

³⁵ 'Constitutionalism in Zambia' - *J.A.L.* 1996 Vol 40 No. 2 @275

³⁶ Art. 20 of the Constitution of Zambia 1996

³⁷ C.N Himonga, K.A. Turner, C.S.Beyani 'An outline of the legal status of women in Zambia' in *The Legal Situation of Women in Southern Africa* @ 139

The judiciary consists of a supreme court, a high court, and other courts created by the legislature.³⁸ Article 91 of the constitution requires the judges of the courts to be independent and impartial and subject only to the constitution and the law.

Zimbabwe

Zimbabwe is a unitary state and the constitution was initially based on the British Westminster system, but major revisions since their independence has greatly increased the power of the President as head of state.³⁹ His power is shared with the government, the legislature and the courts, which have limited powers of judicial review. The Declaration of Rights sets forth a number of fundamental rights and freedoms which every person in Zimbabwe is entitled to, regardless of his race, tribe, place of origin, political opinion, colour, creed or sex. These rights are subject to respect for the rights and freedoms of others and for public interest.⁴⁰

The Zimbabwean Constitution expressly states that:

“This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void”.⁴¹

³⁸ Supra note 37 above

³⁹ Geoff Feltoe ‘Basic Information on the Constitutional and Legal System of Zimbabwe’ *Zimbabwe Law Review* @166

⁴⁰ Mary Maboreke ‘Women under Zimbabwean Law’ *Zimbabwe Law Review* Vol. 6 1988 @ 64

⁴¹ Sec. 3 of the Zimbabwe Constitution

There is a dual legal system in Zimbabwe consisting of the general law and the customary law.

The general law is an amalgam of Roman Dutch law, heavily influenced by English law and statute law.⁴² In the civil sphere the customary law is applied to regulate the rights and obligations of black Zimbabweans living a traditional way of life.⁴³

All courts in Zimbabwe have jurisdiction to apply customary law and primary courts and community courts apply only the customary law and such general law that has specifically been placed within their jurisdiction. Although the High Court has jurisdiction to apply customary law, it routinely refers such cases to the District Commissioner's Courts.⁴⁴

In terms of section 79A of the Constitution, the judiciary consists of judges and persons presiding over courts subordinate to the High Court. This includes judges, magistrates and presiding officers in local courts. Section 79B provides that when exercising his judicial authority a member of the judiciary shall not be subject "to the direction and control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary."⁴⁵

⁴²Supra note 39 above @166

⁴³Supra note 39 above

⁴⁴Supra note 39 above @ 167

⁴⁵Supra note 39 above @ 169

Since independence the government has enacted major laws aimed at enhancing women's rights and intends revising certain traditional practices that discriminate against women.

CONCLUSION

In most of the countries under review, the standard source of national human rights norms is the written constitution. Constitutions are by their nature both normative and aspirational, and are regarded as embodying the essential principles upon which citizens wish their society to be organized. Whether they in fact reflect the wishes of the citizens or whether the citizens even know what is in them is another subject that is outside the scope of this document. Some academics have argued that sex discrimination is a human rights issue that can be addressed by national legal systems far more effectively than by any international mechanism.⁴⁶ However, it is submitted that it is impossible to discuss national human rights norms in isolation from the global context, since these are perceived of as universal principles, which in fact generally derive from international instruments.

⁴⁶ Marsha A Freeman in 'Women, Law and the Land at the local level' *Claiming Womens Human Rights in Domestic Legal systems Human Rights Quartely* Vol. 16 1994 @563

INTERNATIONAL AND REGIONAL HUMAN RIGHTS PROTECTION

One strategy for dealing with the problem of discrimination against women in Africa has been through state ratification and enforcement of treaties that establish internationally applicable standards of performance for the states and obligate those states to submit regular reports about steps they have taken or should take.⁴⁷

The United Nations Charter was the first to affirm explicitly the human rights of men and women in its preamble and includes a person's sex among the prohibited grounds of discrimination. Subsequently, there have been many conventions and treaties that protect women's human rights.⁴⁸ The Universal Declaration of Human Rights⁴⁹; the International Covenant on Civil and Political Rights,⁵⁰ and the International Covenant on Economic, Social and Cultural Rights⁵¹ all recognize equal rights of men and women and make their provisions applicable to all without distinction as to sex.⁵²

These instruments attempt to reduce economic, social and political barriers to the advancement of women.⁵³ Unfortunately, such efforts remain well removed from the lives of African women in Southern Africa.

⁴⁷ Claude .E. Welch Jr 'Human rights and African women-A comparison of Protection Under Two Major Treaties' - *Human rights Quarterly* 1993 Vol 15

⁴⁸ A list of these can be found in the Appendix

⁴⁹ Adopted 10 Dec 1948 – U.N. DOC. A/810

⁵⁰ Adopted 16 Dec 1966 entered into force 23 mar. 1976U.N. DOC.A/6316

⁵¹ Adopted 16 Dec 1966 entered into force Jan U.N. DOC.A/6316

⁵² Article 2(1) of the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights- Documents reprinted in *Womens Rights in International Documents* – Winston E. Langley (1991)

⁵³ Supra note 47 above

It is only lately since the Convention on the Elimination of All Forms of Discrimination Against Women⁵⁴ (hereinafter CEDAW) and the African Charter on Human and Peoples Rights, (hereinafter African Charter)⁵⁵ that Southern African courts have taken advantage of the rights afforded to women therein and have referred to some of their provisions.⁵⁶

All the states under discussion, except for Swaziland, are parties to the aforementioned treaties.⁵⁷ The African Charter sets out the basic obligations of state parties to 'recognize' and to 'adopt' legislative and other measures to give 'effect' to the rights and freedoms in the Charter.⁵⁸ The judicial application of the African Charter will depend on the status that international rights enjoy in a local legal system. It is unlikely that judicial institutions will make findings based on the provisions of the African Charter if it is not regarded as part of domestic law.⁵⁹

CEDAW and the Optional Protocol to CEDAW⁶⁰, have been signed by all the States and signatories are obliged to condemn discrimination against women in all its forms and pursue a policy of eliminating such discrimination.⁶¹

⁵⁴ Adopted by General Assembly Resolution 34/180 of 18 December 1979 U.N. Doc. A/RES/34/180 entered into force on 3 Sept. 1981 (Womens Convention)

⁵⁵ African Charter on Human and Peoples Rights adopted 27 June 1981 entered into force Oct. 21 1986

⁵⁶ See generally on SA- John Dugard 'The Role of International Law in Interpreting a Bill of Rights' *SAJHR* 1994 VOL10

⁵⁷ CEDAW and African Charter

⁵⁸ 1981 *ILM* 58 African Charter of Human and Peoples Rights

⁵⁹ Frans Viljoen 'Application of the African Charter on Human and Peoples Rights by Domestic Courts in Africa' *J.A.L.* 1999 Vol. 43 @ 1

⁶⁰ CEDAW was adopted on 18 December 1979 by General Resolution 34/180 and the Optional Protocol was adopted by the Commission on the Status of Women

⁶¹ Article 2 of the Convention is a statement of the obligations undertaken by the contracting parties

It aims to achieve a society where women will be treated equally to men and where oppressive customs and prejudices will be questioned and replaced by egalitarian forms of behavior.⁶² This Convention is not concerned with the formal equality of women but its focus lies in according women substantive equality.⁶³ The provisions take into account the significant differences in the characteristics and circumstances of men and women so as to avoid unfair, gender-related outcomes. The Convention demands from the ratifying states an extensive commitment to women's rights.⁶⁴ The Optional Protocol will allow women to directly communicate with the committee on CEDAW when their rights, as defined in CEDAW have been violated.⁶⁵ Non-governmental organizations will also be able to bring reports of violations.⁶⁶ The Protocol may be exercised after state remedies have all been exhausted at a national level, it may also have the added effect of improving domestic remedies by encouraging states to give better legal protection to women's issues.⁶⁷

In 1981 African states adopted the African Charter on Human and Peoples Rights unofficially known as the Banjul Charter.⁶⁸ This Charter does not specifically address the issue of women's rights, but rather incorporates them by reference. Article 18 of the Charter begins by declaring that the family is the "natural unit and basis of society"

⁶² Article 2 further enjoins State Parties to abolish or modify existing laws, regulations, practices and customs which constitute discrimination against women.

⁶³ Formal equality means sameness of treatment: The law must treat individuals in the same manner regardless of their circumstances. Substantive equality takes these circumstances into account and requires the law to ensure equality of outcome – De Waal et al, *Bill of Rights Handbook* @188

⁶⁴ Fayeeza Kathree 'Convention on the Elimination of All Forms of Discrimination Against Women' *SAJHR* 1995 @ 421

⁶⁵ www.un.org/womenwatch- Article by Natalie Fisher titled 'Two new Instruments'

⁶⁶ *Supra* note 60 above

⁶⁷ *Supra* note 60 above

⁶⁸ 21 *I.L.M.* 59 (1981)

and enjoins states to protect the family. It then proclaims that African states “ shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international declarations and conventions”⁶⁹. There has been a growing awareness of the African Charter during the 1990’s⁷⁰ possibly following the creation of new domestic institutions and the enforcement of constitutional rights as exemplified by the case law referring to the African Charter.⁷¹ Chaloka Beyani⁷² stresses the importance of using the sexual equality provisions of the African Charter because he notes that most of the national constitutions do not include sex as a prohibited ground of discrimination. He observes further that the African Charter obliges the African Commission to draw inspiration from the international law of human rights and international human rights instruments.⁷³

The African Charter gives little direct attention to women as a group, although the drafters were well aware of CEDAW and other major international human rights documents.⁷⁴

⁶⁹ Winston Langley ‘The Rights of Women, The African Charter and The Economic Development of Africa’ 1987 *Boston College Third World Law Journal* @215

⁷⁰ Frans Viljoen ‘Application of the African Charter by Domestic Courts in Africa’ 1999 *J. A. L.* @1 vol. 43

⁷¹ See case law discussed below @ 18-21

⁷² Zambian Research fellow @ Wolfson College Oxford – View expressed in ‘*Human Rights and African Women*’ See note 73 below

⁷³ In its task of interpreting the Charter, the African Commission is supposed to draw inspiration from the United Nations Charter, the Universal Declaration and other instruments adopted by the United Nations. It is doubtful whether drawing inspiration means that these documents are binding on the commission or directly applicable to replace a vague Charter provision - In any case even without this problem Article 18(3) is extremely difficult to interpret. – ‘Human Rights and African Women’ *Human Rights Quarterly* 1993 Vol 15 @249

⁷⁴ Supra note 73 above @249

Another limitation of the African Charter is that it couples non-discrimination against individuals on the one hand with the emphasis on family relations, protection of cultural values and duties of persons to the state on the other.⁷⁵ It is submitted that these two aspects are highly irreconcilable within the sphere of women's rights.

Some common issues of women's rights can be identified in the reports submitted to both CEDAW and the African Commission. Most African states parties note in their reports that discrimination on the basis of sex is unconstitutional, yet widespread in their societies where inequalities can be found in every walk of life. It would therefore appear that their commitment to these documents could be questioned.⁷⁶ Under CEDAW and the African Charter, responsibility for enforcement rests with the ratifying states. However, African leaders emphasize and continue to stress domestic sovereignty and not international accountability.⁷⁷ Therefore the courts would have to undertake to incorporate international law into the local system.

International law can be incorporated into local legal systems in two ways; by explicit reference or by reception⁷⁸. In countries where the judiciary has credibility and legal decisions have precedential value, vindication of rights through litigation can be extremely effective⁷⁹. In the case of *Attorney General vs Unity Dow*⁸⁰, the plaintiff

⁷⁵ *ibid*

⁷⁶ *ibid*

⁷⁷ *Supra* note 73 above.

⁷⁸ Explicit reference entails the enactment by name, as part of domestic legislation and reception entails when international agreements are reproduced in national legislation or if national legislation is amended or repealed to conform to international norms – For definition see article in note 66 above

⁷⁹ Geoff Feltoe 'Basic information on the constitutional and legal system of Zimbabwe' *Zimbabwe Law Review* @166

⁸⁰ 1994 *BCLR* (6) @1

Unity Dow, was a citizen of Botswana and married to a United States national. The plaintiff had three children, two of whom were born after Botswana Law was changed to provide that children born in wedlock are deemed citizens only of their father's country of nationality. Dow sued to have the nationality law set aside as *ultra vires* the Constitution. She claimed that the law, in denying her the capacity to confer citizenship rights on her family in the same way that men can confer citizenship on theirs, discriminated against her because it violated her right to non-discriminatory protection of the law and to liberty.⁸¹ The use of international human rights norms in interpreting the Constitution was problematic in this case because Botswana had not ratified any of the international human rights instruments other than the African Charter. The court negotiated the difficulty by invoking the incorporation provision in the African Charter preamble and Botswana's signature of CEDAW and made reference to both in the judgment and said that:

“It is difficult if not impossible to accept that Botswana would deliberately discriminate against women in its legislation whilst at the same time internationally support non-discrimination against females or a section of them.”

The decision was appealed and upheld. Judge Amissah, writing for the majority noted that in his opinion:

⁸¹ Section 3 (a) of the Constitution of Botswana

“Botswana is a member of the community of civilized states which has undertaken to abide by certain standards of conduct, and unless it is impossible to do otherwise it would be wrong for its courts to interpret its legislation in a manner which conflicts with the International obligations that Botswana has undertaken”.⁸²

As a direct consequence of this case Botswana amended its Citizenship Act.⁸³

The South African Constitutional Court acknowledged South Africa’s obligations in terms of international human rights law in *Thomas vs Minister of Home Affairs*.⁸⁴ In *S vs Williams*⁸⁵ the learned judge Langa J said that Article 5 of the African Charter helped him to substantiate the assertion that section 11(2) of the interim Constitution corresponds with most international human rights instruments. The Constitutional Court in *Brink vs Kitshoff*⁸⁶ had to consider the constitutionality of section 44 of the Insurance Act ⁸⁷which had the effect of declaring a life insurance policy, which had been ceded by a husband to a wife two years before the estate was sequestrated, allowed the wife only R30,000 and the remainder of the insurance policy would fall into the insolvent estate. The Act discriminated against women because it made no reference to insurance policies ceded in favor of the husband by the wife. In reaching its decision the court made reference to section 35 (1) of the Constitution that requires us to have regard to international law to interpret the rights it entrenches, and examined

⁸²Supra note 80 above @ 28

⁸³ Section 4 of the Citizenship Act of 1984 was amended, although the amendment came several years after the Unity Dow judgement. It is clear from the memorandum accompanying the amendment that it was adopted in reaction to the judgement. (Memo on Citizenship Amendment Bill no. 9 of 1995)

⁸⁴ BCLR2000 (8) 837 (CC)

⁸⁵ 1995 (3) SA 632 (CC)

⁸⁶ 1996 4 SA @ 217

⁸⁷ Act 27 of 1943

the definitions of the concepts of 'equality before the law' and 'discrimination' as defined in, amongst others the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and CEDAW.⁸⁸

In Zambia, in the case of *Longwe vs Intercontinental Hotels*⁸⁹ where the petitioner had been refused entry into the bar of the hotel because she was unaccompanied, the respondent hotel having adopted a policy of excluding women unaccompanied by men from entering the bar, the petitioner sued the hotel for damages for unlawful discrimination citing Article 11 of the Constitution of Zambia. The learned judge Musumali J. found that the petitioner had clearly been discriminated against on the grounds of gender.⁹⁰ He stated further that in deciding an issue not covered by domestic legislation, a court should take judicial notice of international treaties and conventions and referred to the international human rights documents including the African Charter and CEDAW.⁹¹ The Zambian High Court made the following remarks about International treaties

"It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony to the willingness of the state to be bound by the provisions of such a document. Since there is this willingness and if an issue comes before this court which would not be covered by local legislation but would be

⁸⁸ Supra note 86 above.

⁸⁹ *Longwe vs International Hotels* 1993 (4) pg. 221 Commonwealth Law Reports

⁹⁰ Idem @ Pg. 232 a-b

⁹¹ Idem @ Pg. 233 c-d

covered by such International documents, I would take judicial notice of the treaty or convention in my resolution of the dispute.”⁹²

In the Zimbabwean case of *Chirwa vs Registrar General*⁹³ the judicial officer referred to the African Charter as one of a number of instruments that contain a right to freedom of movement and travel. In *Rattigan and Others vs The Chief Immigration Officer*,⁹⁴ the court looked at international codes guaranteeing protection against interference with family life and acknowledged that there was no provision in the Constitution of Zimbabwe equivalent to those provisions, but stated that section 11 of the Constitution came close by guaranteeing every person “protection for the privacy of his home”⁹⁵

It can therefore be concluded that the courts of the countries under study have shown respect for international human rights documents and have made reference to them in their decided cases. It is submitted that even a failed attempt to challenge or change the law via litigation can be an important step forward and will incrementally make life easier for women. When Wambui Otieno of Kenya had lost her claim to bury her husband’s body according to his wishes instead of according to Luo custom, it was a major legal defeat for Wambui and for women. But the case attracted so much national

⁹² *Idem* @ 222 a-c

⁹³ 1987 *Zimbabwean Law Reports* @ 228

⁹⁴ 1995 (1) *BCLR (ZS)* @ 1

⁹⁵ *Idem* @ 2 J

and international attention that immediately after the appellate decision women in Kenya began organizing to change the succession law.⁹⁶

It should be remembered that women's rights begin at home. They cannot be guaranteed at Geneva or Banjul or Strasburg or Vienna, where international bodies meet and lobby and craft the premises of international human rights instruments. What transpires in those centers can only happen because people and organizations at the local and national level identify the problems, develop the issues and make it known to the public and policy makers.⁹⁷

Tremendous potential exists for applying international human rights norms to develop and improve women's rights throughout the world. Non discrimination provisions in laws and constitutions can be invoked to establish women's capacity to function as individuals and adults in every aspect of their society to enter and dissolve marriages freely, and make important family decisions, to inherit, own and manage personal property and land and to have the freedom to contract and litigate. We will now examine women's rights in the above areas in the countries under discussion.

⁹⁶ As discussed in Marsha A Freeman 'Women, Law and the Land at the local level' Human Rights Quartely Vol 16 1994 @559

⁹⁷ Ibid

CHAPTER 2

B. SUBSTANTIVE ISSUES

1. MARRIAGE AND DIVORCE

The rights of women in marriage are central to their rights as individuals, more so in Southern Africa where extended families predominate and marriages are a matter of lineage concern. These rights are even more important than in areas where the nuclear family prevails. The customs of bridewealth, child betrothal, arranged marriages, bigamy and polygamy, and 'inheritance' of a relative's widow, all of which contravene the United Nation's provision for Human Rights, are central to the organization of Southern African societies. Many readers might find these practices abhorrent, yet these practices are far from abhorrent to a society which regards marriage as an alliance between lineages, which believes that young people are incapable of making reasoned decisions with regard to their future spouses, and which wishes to protect widows by providing them with a new male guardian on the death of their spouses.⁹⁸

It must be noted that the traditional rules that govern matters of family, marriage and women's rights are not merely historical curiosities, they are part and parcel of the living domestic law in most African states.⁹⁹

⁹⁸Rhoda Howard 'Women's rights in English speaking Sub Saharan Africa' @46 in (eds) C.E. Welch *Human Rights and Development in Africa*.

⁹⁹Ronald Thandabantu Nhlapo 'International protection of Human Rights and the Family :African Variations on A common Theme' *International Journal of Law and the Family* 1989 Vol. 3 @1

All the International documents mentioned herein recognize the special position of the family in society. Article 16 of the Universal Declaration of Human Rights stipulates that 'men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family'.¹⁰⁰ It goes on to recognize that they are entitled to 'equal rights as to marriage, during marriage and at its dissolution' and it makes the full and free consent of the intending spouses, a condition of marriage.¹⁰¹

Article 23 of the International Covenant on Civil and Political Rights, and Article 10 of the International Covenant on Economic, Social and Cultural Rights recognize the right to protection of the family by society and contain essentially similar provisions on marriage as the Universal Declaration of Human Rights.¹⁰²

Article 18 of the African Charter affirms that 'the family shall be the natural unit and basis of society' and guarantees its protection by the state.¹⁰³ A fundamental disappointment of the Charter is its failure to mention marriage specifically. One can surmise that in the interests of obtaining the widest possible acceptance for the Charter, the drafters decided to leave the issue of marriage law to the domestic legislation within each state.¹⁰⁴

¹⁰⁰ Supra note 101 below @ 7

¹⁰¹ Document reprinted in Winston E Langley *Womens Rights in International Documents* (1991)

¹⁰² Idem @ Pg. 8 and 10 respectively.

¹⁰³ Supra note 99 above @ 13

¹⁰⁴ Supra note 99 above @ 14

Article 16 of CEDAW¹⁰⁵ confers on women the same rights as men to enter into marriage with their full and free consent, to freely choose a spouse and to decide freely on the number and spacing of their children. It goes one step further and awards women access to the information, education and means to enable them to exercise these rights.¹⁰⁶ In addition, it accords husbands and wives the same personal rights, including the right to choose a family name, a profession and an occupation.¹⁰⁷ Men and women also have the same rights with respect to ownership, acquisition, management, administration, enjoyment and disposition of property.¹⁰⁸

In the following countries specific case studies we examine how Civil and Customary Marriages affect Women's Rights to Equality:

¹⁰⁵ Supra note 101 above @ 165-166 – CEDAW Relevant provisions reprinted

¹⁰⁶ Article 16 (a-e)- CEDAW -Ibid

¹⁰⁷ Article 16 (g)- CEDAW- Ibid

¹⁰⁸ Article 16 (h) – CEDAW -Ibid

BOTSWANA

Marriage

In Botswana it is traditionally said "*Mosadike ngwana wa monna*"- *a woman is the child of a man*, meaning that women under Tswana Customary law always had guardians and women had limited legal capacity although in practice some women are more independent than others depending on their social class or marital status.¹⁰⁹

Botswana law recognizes two systems of marriage, that under the Customary laws and that under the common and statutory laws. Persons wishing to marry must choose between these two types of marriage. The statutory law provides that one cannot marry a different person during the subsistence of the marriage, on the other hand the customary marriage is potentially polygamous.

Under the customary regime there are two requirements for a valid union. These are the agreement between the respective spouse's families and the transfer of *bogadi* or bridewealth.¹¹⁰ It is a patriarchal system and the husband is regarded as the head of the family, and all final decision making powers vest with him. There is also a belief that a man who has paid the *bogadi* is allowed to chastise his wife and this is used as an excuse for spousal abuse.¹¹¹ A wife under this system lacks *locus standi in judicio* as her husband is regarded as her guardian and as such he issues and defends legal suits

¹⁰⁹A. Molokomme 'Women's law in Botswana: laws and research needs' in *The Legal Situation of Women in Southern Africa* (eds)Julie Stewart and Alice Armstrong

¹¹⁰ Idem @ Pg. 14-15

¹¹¹ Idem @ Pg. 15

on her behalf and must assist her in entering contracts¹¹². When she brings a suit against her husband she has to be assisted by her parents whom rarely assist women in taking their husbands to court.¹¹³

The polygamous nature of customary marriages often inflict economic hardship on women, and the wife has little or no say in her husband's decision to take another wife. Even if he does not marry another wife his infidelity is tolerated but a wife is prohibited from adultery, which constitutes a ground for divorce.¹¹⁴ There are no specialized property regimes in customary marriages and the husband owns and controls all the property of value. A wife has only usufructuary rights.

In the common law of marriage we find that severe restrictions are placed on the legal status of women. The personal consequences of marriage deny women equal say in matters of domicile, guardianship of their minor children and decisions affecting the household in general. These rights seem to belong to the husband.¹¹⁵ The proprietary consequences are variable in that the women may choose between marriages in and out of community of property but both these systems are unsatisfactory. While community of property is advantageous in that it gives the wife a half share in the joint estate, it gives the husband sole power of administering that property. During the marriage the

¹¹² Idem @ Pg. 16

¹¹³ Idem @ Pg.16

¹¹⁴ Idem @Pg. 15

¹¹⁵ Athaliah Molokomme 'Marriage – what every woman wants or 'civil death'? The status of married women in Botswana' in *Women and Law in Southern Africa* (eds) Alice Armstrong and Welshman Ncube 1987 @ 182

wife has a near minority status and may not enter into contracts with regard to the joint estate without her husband's consent.¹¹⁶

Under the *Deeds Registry Act of 1969* immovable property could not be registered in the name of the wife, and husbands married in community of property could dispose of the joint property.¹¹⁷ Houses and land were usually sold without the wife's permission and the courts are generally reluctant to interfere. In the case of *Moisakamo vs Moisakamo*¹¹⁸ a woman applied for an order restraining her ex-husband from disposing of the joint property pending the determination of the allocation of property following their divorce. The high court refused to grant the order on the grounds that litigation should be of a vindicatory or quasi-vindicatory nature and that the applicant had failed to show an actual or well-grounded apprehension of irreparable loss.

The situation has now been amended and the *Deeds Registry Act of 1998*¹¹⁹ provides that in marriages in community of property neither spouse can alienate the immovable property of the joint estate without the other's written consent. From 1996 women married in community of property are permitted to own immovable property in their own name but their husbands still retain considerable control over the joint assets.¹²⁰ It is submitted that these changes are purely cosmetic and do not change the actual

¹¹⁶ *Idem* @ Pg. 182-185

¹¹⁷ *Supra* note 109 above @ Pg. 17

¹¹⁸ 1979-80 *Botswana Law Reports* @ 131

¹¹⁹ <http://www.U.S Dept. of State/human rts reports 1999/ Botswana.htm>

¹²⁰ *Ibid*

prejudice suffered by women under the husband's marital power, and neither does it abolish it.¹²¹

The women who choose to marry out of community of property are not in any better position. Although they have full legal capacity to contract and acquire property, it disadvantages women who do not have an independent income, like housewives, who usually leave the marriage empty handed.

Divorce

Grounds for divorce under customary law are different for men and women; a husband can divorce a wife for infidelity, barrenness, repeated adultery, sorcery, refusal to perform household chores, and other traditionally viewed forms of insubordination on the part of the wife.¹²² The wife cannot divorce the husband on the grounds of infidelity and cruelty unless his behavior is excessive.¹²³ However, it is generally accepted that women are expected to 'persevere in the face of difficulty' and divorce is more difficult to obtain.¹²⁴ Irretrievable breakdown is considered a ground of divorce but only if one or more of the abovementioned grounds are present.¹²⁵

¹²¹ <http://www.freedomintheworld.org/Botswana.htm> It was reported that women's rights are not fully respected in Botswana and made particular reference to the fact that a married woman cannot take a bank loan without her husband's consent.

¹²² Supra note 109 above @ Pg.20

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Ibid

On divorce the husband usually ends up with all of the property and the children. The elders usually request that the bridewealth be returned and in many cases have refused to hand over the children to the wife, once custody has been granted to her, until the payment of the bridewealth.¹²⁶

In the unreported case of *Jane Mofokate and Isaac Mofokate*¹²⁷ where the wife wished to have the customary union dissolved on the legal grounds provided by the *Matrimonial Causes Act* of 1973 the High Court ruled that traditional marriages are best dealt with by the traditional courts. It held that the provisions of the above Act do not apply to customary unions, and averred that divorces under customary marriages must be based on the customary rules of law which apply to that particular tribe to which the parties belong, although under section 95 of the Constitution of Botswana, the High Court is competent to hear and determine any matter, under any law.

The sole ground on which an action for divorce can be brought under Statute law is that the marriage has broken down irretrievably. Section 15 of the *Matrimonial Causes Act of 1973* provides for factors to prove such breakdown. The grounds for divorce, which apply to customary and statutory marriages respectively, are not interchangeable between the two systems and problems arise in cases where parties are married under both systems.

¹²⁶ Supra note 109 above @ 21

¹²⁷ Unreported (4 December 2000)–<http://www.afrolgenderprofiles.co.za>- Transcript on file with Author

It is submitted that the court's reluctance to dissolve a customary union using the statutory law unfairly discriminates against women, as this is the more equitable option for wives.

It is apparent from the above discussion of marriage and divorce that customary norms are predominantly responsible for the unequal relationship between spouses in Botswana. In the *Unity Dow* case the learned judge Bizos JA said that:

“The customs, traditions and culture of a society must be borne in mind and afforded due respect, but they could not prevail when they conflict with the express provisions of the constitution”.¹²⁸

It is submitted that this is the attitude that will facilitate change in Botswana.

The situation of married women in Botswana is precarious. In spite of recent publications of the *Unity Dow* case,¹²⁹ which catapulted the position of married women in Botswana into the international arena, although the courts mentioned respect for the international right to equality, and the obligations under international treaties that advocate for equality between spouses, much work still needs to be done on married women's rights in Botswana.

¹²⁸ 1994 BCLR (6) @1

¹²⁹ 1994 BCLR(6) @1

SOUTH AFRICA

Marriage

Although the Constitution of the Republic of South Africa Act 108 of 1996 contains no express provision protecting the right to family life or to marriage per se, such rights are in fact protected through the provisions concerning human dignity. In *Thomas and Another vs Minister of Home Affairs and others*¹³⁰ it was stated that marriage and the family are social institutions of vital importance. It was further acknowledged that the right to dignity was the most specific right that protected individuals who wished to enter into and sustain a permanent relationship. The court declared that any legislation which prohibited the establishment of such a relationship would “clearly constitute an infringement of the right to dignity”.¹³¹

The right to equality is premised on the idea that every person possesses equal human dignity and unfair discrimination on the grounds of personal attributes, denies recognition of the very attribute that is common and equal to all, namely human dignity.¹³²

¹³⁰ 2000 (8) BCLR 837 CC/2000 (3) SA 936CC- The Applicants in this case were spouses one of whom was a South African and the other an alien who sought an immigration permit to settle in SA. They successfully argued that ss25 (9) (b) of the Aliens Control Act 96 of 1991 denied spouses the right to cohabit and therefore infringed their rights inter alia to dignity.

¹³¹ Saber Ahmed Jazbhay ‘Right to marry and family life’ *De Rebus* October 2000 @ 56

¹³² De Waal et al *The Bill of Rights Handbook* @210(2000)

Prior to 1994, the customary law of marriage was unstable as was reflected in the case of *Ismail vs Ismail*¹³³ where the court found that it could not recognize customary unions because it entailed the recognition of polygamy, which was contrary to public policy.¹³⁴

The public policy debate was once again revisited in the case of *Ryland vs Edros*¹³⁵ which involved the recognition of muslim marriages.¹³⁶ The plaintiff married the defendant, his wife, by muslim rites, and instituted action for her eviction from the marital home. The wife founded her claim on what she alleged were the 'contractual agreements' constituted by the marriage by muslim rites between the parties.¹³⁷

The court held that the continued refusal to recognize muslim marriages would violate the principle of equality between groups and a court should only brand a contract as offensive to public policy if it were offensive to those values which were shared by the community at large and not only by one section of it.¹³⁸ It was further stated that recognition of potentially polygamous marriages and enforcement of the contractual relationships arising from them are no longer per se contrary to public policy.¹³⁹

In November 1996 the South African Law Commission proposed that the customary and civil law of marriage be harmonized and that the discriminatory elements in both

¹³³ 1983 (1) *SALR* 1006 (A)

¹³⁴ The effect of the public policy proviso was to subjugate customary law and ensure that it always remained subordinate to civil law.

¹³⁵ 1997 *Commonwealth Law Reports* pg. 70/1997 BCLR @77 (CC)

¹³⁶ Which in South Africa have suffered a history of even greater prejudice than customary marriages.

¹³⁷ @ pg. 70 e-g

¹³⁸ *Supra* note 135 above @ Pg. 78 h-i

¹³⁹ *Per curiam* @ 71e-g The same principle did not necessarily apply to marriages which were actually polygamous.

be removed.¹⁴⁰ It also acknowledged the distinction between the official and the living versions of customary law. In keeping with this, the court in *Mabena vs Letsoalo*¹⁴¹ applied a 'living' system of law whereby the groom could negotiate bridewealth directly with his prospective wife's mother.¹⁴² This new gender-neutral custom was held to be consonant with the 'spirit, purport, and objects' of the fundamental rights.¹⁴³

With the *Recognition of Customary Marriages Act 120 of 1998* women who choose to marry under customary law are protected. The Act also gives effective recognition to all existing customary marriages.¹⁴⁴ It provides that both the parties must be over 18 and consent to be married and that the marriage must be entered into or negotiated in accordance with customary law.¹⁴⁵ Further, it does not expressly require the payment of lobola or bridewealth and provides for the registration of customary marriages and places a statutory duty on parties to have the marriages registered.¹⁴⁶

The most contentious issue of the Act is that it provides for polygamy and recognizes that a man may marry as many women as he wishes. The Act also recognises that if a person has entered into more than one customary law marriage, all valid marriages

¹⁴⁰ Titled the Harmonisation of the common law and the indigenous law – Discussion Paper 74 August 1997

¹⁴¹ 1998 (2) S.A.L.R.1068 (T)

¹⁴² According to the standard version of customary law bridewealth agreement requires the consent of the brides and grooms guardians and is usually negotiated between the families.

¹⁴³ T.W. Bennett 'Human Rights and African Customary Law' @188 (1999)

¹⁴⁴ Section 2(1) of the Act – This long awaited provision sought not only to remove the anomalies caused by the refusal to countenance potentially polygynous unions as proper marriages but also to comply with the constitutional guarantees of culture and equal treatment.

¹⁴⁵ Section 3(1)b of the Act

¹⁴⁶ Section 4 of the Act - Section 4(3) (a) provides that if an existing customary is not already registered spouses must do so within 12 months after the commencement of the act. Failure to comply will not affect the validity of the union.

entered into before the commencement of the Act are recognized.¹⁴⁷ One of the main reasons for recognizing polygamy was the fact that prohibition would be impossible and wives must consent to the polygamous unions.¹⁴⁸ It seems that some women's rights are being protected at the expense of others, because it was argued that if one bans polygamy altogether, then men will enter into informal unions and those women will be prejudiced thereby.¹⁴⁹ Section 7(6) of the Act provides that if a man wishes to enter into a further customary union he must make an application to the High Court for a contract to regulate the proprietary consequences thereof and that all present and prospective spouses must be joined as respondents.¹⁵⁰

Parties who are married under customary law may marry each other civilly but spouses who are married civilly cannot, during the subsistence of the marriage, enter into any other marriage.¹⁵¹

All civil marriages in South Africa after November 1984 are in community of property, unless the parties sign an ante nuptial contract either with the provision of accrual or without. All customary marriages entered into after the commencement of the Act are automatically in community of property unless the parties enter an ante nuptial contract. The provisions of the *Matrimonial Property Act*,¹⁵² which applies to civil law

¹⁴⁷ Section 2(3) of the Act

¹⁴⁸ With the exception of the first wife.

¹⁴⁹ Argument stated in the Law Commissions Discussion paper.

¹⁵⁰ Sec 7(6)-7(9) of the Act -(the costs involved herein would be extensive) Further each spouse and the relevant registrar of deeds must be furnished with a certified copy of the court approved contract.

¹⁵¹ 'An Analysis of the South African Experience in passing Legislation Recognising Customary Marriages'- unreported paper (Transcript on file with author) obtained from the *Legal Resources Centre-Cape Town*.

¹⁵² Act No. 88 of 1984

marriages, also apply to customary marriages.¹⁵³ This will make the position of women married under customary unions easier, as they will have the same rights accorded to them as women married under the civil law.

Women in customary unions entered into before the commencement of the Act¹⁵⁴ have full status and capacity but are still subject to the matrimonial property system under customary law,¹⁵⁵ which is vague and unclear on the rules and vests control of the marital estate in the husband. According to the Law Commission's discussion paper, the reason that marriages entered into before the commencement of the Act could not be in community of property was because of their polygamous nature. The result of the application of the new regime to these cases would be to make the legal position of spouses very difficult to determine. The Act has made a change to women's rights yet some things have remained the same.

In the landmark case of *Prior vs Battle and Others*¹⁵⁶ the issue of the husbands' marital power was finally laid to rest. The applicant in this case averred that sections 37 and 39(2) (ii) of the Marriage Act¹⁵⁷ violated the fundamental rights entrenched in the constitution and that the marital power of the husband is anachronistic.

The applicant stated that she should not be bound by the restrictions arising from marital power which the Act imposed. Her husband did not oppose the application but

¹⁵³Victoria Bronstein 'Confronting Custom in the New South African State' *SAJHR*(2000) VOL16 @558

¹⁵⁴ The Recognition Act was passed and assented to in 1998 but only came into effect in November 2000

¹⁵⁵ Sec (6) of the Act

¹⁵⁶ 1999(2) *SALR* 850 (Transkei)

¹⁵⁷ Act 21 of 1978-passed by the Parliament of the then Transkei homeland

seven other respondents intervened and they submitted that the Act codified customary law and that therefore the marital power that the Act dealt with was inseparable from the power as understood in customary law. They submitted further that the termination of the marital power in civil marriages between white persons did not justify its termination in civil marriages between black persons. The marital power was seen by the court to violate the fundamental rights entrenched in the Constitution and as a violation of the right to dignity. The court stated that this further constituted unfair discrimination on the grounds of gender. According to Miller J :

“There is no logical or rational basis to conclude that the male partner in a civil marriage must have more rights than the female partner and must have control over the female partner simply because he is male.”

The applicant was declared to be free of her husband’s guardianship and marital power.¹⁵⁸

Divorce

According to customary law, divorce is a private affair involving only the families of the spouses¹⁵⁹.

Prior to the commencement of the Recognition of Customary Marriages Act No120 of 1998, customary marriages were terminated outside the formal legal system and did

¹⁵⁸ Harry Barker ‘Marital power and Ancient Law’ *De Rebus* October 1999 @ 41

¹⁵⁹ Customary law was essentially uncodified and divorces were usually a private affair handled by the families of the spouses.

make provision for maintenance or the distribution of the marital estate.¹⁶⁰ Furthermore, a woman had to be aided by her guardian to procure a divorce and there were no specific grounds for the divorce.¹⁶¹ In addition because she lacked *locus standi*, the woman was at her guardian's whim. If he could not or would not return the bridewealth there was every chance that he would not assist her.¹⁶² The courts were prepared to hold a father liable for the support of his children, but they have yet to give a ruling on the maintenance of former spouses.¹⁶³ Customary law had no concept of alimony.¹⁶⁴ Therefore an aggrieved spouse had no means of obtaining any compensation if her husband had an affair.

Now customary marriages may only be dissolved by a court¹⁶⁵ and can be dissolved the same way as civil divorces, on the ground of irretrievable breakdown. This requirement will be satisfied if the court finds that the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of the normal marriage relationship between the parties.¹⁶⁶ The Act also makes provision for other legislation that regulate civil marriages to be applicable to customary unions,

¹⁶⁰ Because customary law was essentially uncodified and because divorces were usually a private affair handled by the families of the spouses.

¹⁶¹ Like irretrievable breakdown and adultery, which are usually cited as grounds for divorce in civil marriages. In certain groups because of the polygamous nature of their marriages adultery is not considered a ground for divorce.

¹⁶² Supra note 158 above

¹⁶³ T. W. Bennett 'Human rights and African Customary Law'

¹⁶⁴ Ibid

¹⁶⁵ Section 8 (1) of the Act- This would be beneficial in two ways ; women could not be prevented from suing for divorce and the courts would be in a position to apply all the safeguards designed to protect wives and children, such as the rules on equitable division of marital estates, post divorce maintenance, custody and guardianship.

¹⁶⁶ Section 8(2) of the Act

such as The Mediation in Certain Divorce Matters Act¹⁶⁷ and the intervention of the family advocate where minor children are involved. Section 8(4) of the Act states that in granting the Divorce Order the court has the same power as in sections 7-10 of the Divorce Act No 70 of 1979. These provisions give the court powers to order a division of assets, maintenance, the rescission, variation or suspension of orders of maintenance, custody and guardianship, a forfeiture of benefits and the costs of a divorce action. Further the courts may also order the assets of one party be transferred to the other.¹⁶⁸ The discretionary nature of the court's power to make most of these orders permits the accommodation of whatever customary rules may be applicable.¹⁶⁹

In polygamous marriages the court may take any contract into account that regulates the rights of the spouses but in doing so it must make an equitable order¹⁷⁰ and any person who has sufficient interest in the matter can be joined in the proceedings¹⁷¹. The judicial discretion to redistribute assets equitably on divorce has been incorporated into the Act and would be a useful tool to assist women in circumstances where the parties have some property.¹⁷² It is arguable that section 8 (4) of the Recognition of Customary Marriages Act does not extend the judicial discretion to customary divorces, as it does not simply incorporate or apply the sections of the Divorce Act but rather gives the court the powers contemplated under the incorporated sections.¹⁷³

¹⁶⁷ Act 24 of 1987

¹⁶⁸ Section 8 (4) e of the Act is explicit about the inclusion of customary law in regard to maintenance.

¹⁶⁹ T.W. Bennett *Human rights and African Customary Law* @ 203

¹⁷⁰ Sec8 (4) b of the Act

¹⁷¹ Ibid

¹⁷² Section 8 (4) of the Act

¹⁷³ Victoria Bronstein 'Confronting custom in the new South African state' SAJHR(2000)Vol 16 @573

Section 39 (2) of the Constitution enjoins us to interpret legislation in a way that coheres with the Bill of Rights. It is submitted that a judicial discretion to redistribute property on divorce fits better with the Constitution.¹⁷⁴ Cultural arguments about the inviolability of customary property rights would carry little weight in circumstances where a wife has contributed to the estate that she is seeking to share.¹⁷⁵ There is also evidence that living customary law is adapting to accommodate more equitable proprietary arrangements on divorce and there are a number of reasons why the judicial discretion is a good institution for customary law divorces.¹⁷⁶ First the discretion can be fine-tuned to deal with the circumstances of individual cases and second it would apply to divorces that take place after the Act comes into force and any orders would be prospective.¹⁷⁷

In light of the Recognition of Customary Marriages Act it can be concluded that South Africa has attempted to challenge the obstacles placed on women by customary law. However, one of the major obstacles to the Act is that it fails to address the situation of women married before the commencement of the Act.¹⁷⁸ It is submitted that in these cases and others that fall outside the ambit of the Act, the equality clause of the Constitution will have to be used to obtain the remedies sought.

¹⁷⁴ *ibid*

¹⁷⁵ *Ibid*

¹⁷⁶ *Ibid*

¹⁷⁷ *Supra* note 173 above @ 572

¹⁷⁸ *Supra* note 173 above @ 574

It must be remembered when interpreting the Act that one of the tasks of the Special Project Committee¹⁷⁹ was to reconcile the customary law of marriage with the Bill of Rights and the various international conventions ratified by South Africa, one of which was the 1981 Convention on the Elimination of All Forms of Discrimination Against Women.¹⁸⁰

SWAZILAND

Marriage

Most of the gender inequalities that exist in traditional society stemmed from the African concept of marriage. Swaziland recognizes both civil and customary law marriages.¹⁸¹ The consequences of a civil marriage are divided into those that cannot be excluded by ante nuptial contract and those that can.¹⁸² The former includes essential aspects of marriage, such as the inevitable change of status, as well as the duty to live together and provide each other with material and moral support.¹⁸³

The status of a married woman depends upon whether her marriage is with or without the marital power, and whether it is in or out of community of property.¹⁸⁴

¹⁷⁹ The Special Project Committee was charged with ensuring recognition of customary marriages and initiating a through-going reform of the customary law governing marital relations. The result was the Recognition of Customary Marriages Act.

¹⁸⁰ Amongst others – see Human Rights and African Customary Law – T. W. Bennett ADDENDUM @ 193

¹⁸¹ R.T Nhlapo 'The Legal Situation of Women in Swaziland' (eds) Julie Stewart and Alice Armstrong in *The Legal Situation of Women in Southern Africa @ 97 (1991)*

¹⁸² *Idem @ Pg.114*

¹⁸³ *Ibid*

¹⁸⁴ *Ibid*

Marriage out of community of property and without the marital power leaves the wife in the position of a single woman with full contractual and proprietary capacity and full personal autonomy.¹⁸⁵ The husband retains only his rights as head of the family and has a decisive say in matters concerning the family life of the spouses.¹⁸⁶ The most disadvantageous legal position is that of the wife who is married in community of property with the husbands' marital power. She has no *locus standi in judicio*, and has no contractual capacity and very little control over the joint property of the marriage.¹⁸⁷

The *Marriage Act*¹⁸⁸ provides in sections 24 and 25 that in a civil marriage between Africans, the consequences in relation to marital power shall be in accordance with customary law, unless the parties opt out of this procedure. Most parties are not aware of these provisions and discover with shock that the customary law has been imported into their civil marriage. The brunt of this is usually borne by the wife, who usually only discovers this at the end of the marriage.¹⁸⁹

The marital power of the customary union is all encompassing. Because of its patriarchal nature, the wife is reduced to 'one of the children' and this has obvious implications for her personal autonomy as well as for human rights issues.¹⁹⁰ An illustration of this is that most of the hospitals in Swaziland require a woman to prove

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ Supra note 181 above

¹⁸⁸ No 47 of 1964 – This Act is a mix of Swazi Customary Law, Roman Dutch Law, and some innovations and modern trends regarding the conditions and ceremonies of Marriage. As described by R.S.Bhalla 'Some Reflections of Swaziland's Marriage Act' 1964 *SALJ* 1994 @ 542

¹⁸⁹ Supra note 181 above @ Pg 115

¹⁹⁰ Ibid

that she has her husband's permission before she can receive medical attention.¹⁹¹ That an adult woman is required to get permission before attending to the needs of her own body is a violation of her right to self respect and liberty.

Problems of customary marriages are many and girls are generally married around the age of puberty.¹⁹² Their consent is not required, as it is an arrangement between the parties' families.¹⁹³ Bigamy although unlawful under the Marriage Act, is allowed under customary law and the Marriage Act makes it clear that civil marriages are monogamous and cannot co-exist with another marriage, whether civil or customary.¹⁹⁴

There is a misconception that it is acceptable to conclude a marriage in terms of the Swazi custom and one in terms of the civil law, as most people believe that it is only two civil marriages to two different people that is prohibited. As a result, the parties conclude what is termed a dual marriage, which creates a legal anomaly.¹⁹⁵ In the case of *Dladla vs Dlamini*¹⁹⁶ the court stated that:

“A marriage in terms of Swazi law and custom is not dissolved by a subsequent marriage in terms of the statute law. The customary law marriage is a valid marriage contract when entered into and there is no law which provides for its dissolution when it is followed by a civil rights marriage. The two marriage contracts are not

¹⁹¹Katarina Tomsevski 'Women and Human Rights' *Women and Law Development Series* (1995) @ 65

¹⁹² Supra note 181 above @ Pg 109

¹⁹³ Ibid

¹⁹⁴ Supra note 181 above @ 111 and Sections 7(1) &(2) of the *Marriage Act* No. 47 of 1964

¹⁹⁵ Supra note 181 above @ 111

¹⁹⁶ 1977-1978 Swaziland's Law Reports 15 @ 16-17

mutually destructive and can stand side by side. Where however there is a conflict between them with regard to the consequences of marriage it has been held in this court in *Khoza vs Malambe* 1970-1976 SLR 380... that the law of the land applicable to a civil rights marriage prevails over the customary law marriage.”¹⁹⁷

Divorce

This situation of conflict between the civil marriage and the Swazi customary marriage is acute in cases of divorce. The grounds of divorce under the Act are considerably different from the grounds of divorce under Swazi customary law.¹⁹⁸ Under Swazi customary law a man can divorce his wife for a number of reasons namely: adultery, barrenness, witchcraft and gross disobedience. Because the marriage is always potentially polygamous, the wife cannot divorce her husband on the ground of his adultery as he is entitled to go courting because he can at any time decide to take another wife. This illustrates the inequality of the spouses in a customary union.¹⁹⁹

A civil marriage can be dissolved by death or divorce, and the parties thereafter revert to single status.²⁰⁰ A party whose marriage is terminated before he or she reaches the age of 21, does not lose the majority status conferred by marriage.²⁰¹

¹⁹⁷R.S.Bhalla ‘Some Reflections on the Swaziland Marriage Act’ 1964 *SALJ* 1994 Vol. 111 @ 542

¹⁹⁸ Supra note 197 above @ 546

¹⁹⁹Ronald Thandabantu Nhlapo ‘International protection of Human Rights and the Family: African Variations of a Common Theme’ *International Journal of Law and the Family* 1989 Vol 3 @ 1

²⁰⁰ Supra note 181 above @ 116

²⁰¹ Ibid

Under Roman Dutch Common law there are only two grounds for divorce, viz, adultery and malicious desertion.²⁰² Swaziland's divorce laws have not adopted the approach of consensual divorce based on the irretrievable breakdown of the marriage principle. Because of its conservative adherence to the 'guilt' principle Roman Dutch Common Law requires that one party should breach a fundamental obligation of the marriage before divorce can be granted.²⁰³ Adultery would be one such breach.

In the words of Fannin "Divorce is extremely difficult to obtain amongst the Swazi."²⁰⁴ Those who claim that there is no divorce in Swazi customary law cite the fact that a Swazi wife once smeared with "red ochre"²⁰⁵ remains obligated to perform certain functions at the husband's home for the rest of her life. In *R vs Fakudze*²⁰⁶ a court in Swaziland decided that the custom whereby red ochre is smeared on the women's face was the point at which a valid customary marriage came into existence. The most dramatic obligation arising out of this is the requirement that she come back to mourn him as his widow on his death for as long as custom dictates.²⁰⁷ It does not matter if she has subsequently remarried.²⁰⁸ There have been incidences where the women are

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ J.Fannin 'Preliminary notes on principles of Swazi customary law'(Iozitha, unpub,1967)

²⁰⁵ A Swazi tradition where the wife is smeared with red ochre by the family of the groom when she visits her boyfriend before they are married, signifying that she is a wife (known as libovu.) the consent of the women not usually required and in some cases girls have been forcibly smeared with the ochre when visiting her lovers home at night, with no inkling that she was to be married.

²⁰⁶ 1970 *Swaziland Law Reports* @422

²⁰⁷ Supra note 181 above @ 117

²⁰⁸ Ibid

forcibly taken to the home of the deceased to observe this tradition.²⁰⁹ Strangely if she did not have children with the deceased she is usually left alone.²¹⁰

If a woman wishes to remarry, her family must accept *lobolo*²¹¹ from her new husband and take the *lobolo* paid by the first husband back to him. The new husband does not get the “red ochre ceremony”,²¹² as this can occur only once in a woman’s lifetime.²¹³

In customary unions there is no provision made for maintenance for the wife. However the *Maintenance Act No 35 of 1970* provides for the maintenance of children.²¹⁴ The main problem with this Act is that it has failed to bridge the culture gap. Customary practices keep intruding on the statutory efforts to modernize maintenance proceedings with the excuse that it is being done the customary way.²¹⁵

On divorce the civil law wife retains very little property of value depending on the marital regime that she falls under, the most beneficial being out of community of property.²¹⁶ Wives under the customary unions are not so fortunate due to the patrilineal nature of Swazi tradition. She is not entitled to acquire land and therefore all she usually retains are minor personal items and the cattle she acquired on the

²⁰⁹ Ibid

²¹⁰ Ibid

²¹¹ Bride price -paid by the husband to the bride’s family – the marriage is valid even if lobolo does not change hands but it must at least be negotiated and guarantees given as to the mode of payment received

²¹² Supra note 200 above

²¹³ R.T. Nhlapo ‘The legal situation of women in Swaziland’ *The Legal Situation of Women in Southern Africa* (1991) @118

²¹⁴ Idem @ 120

²¹⁵ Ibid

²¹⁶ Supra note 197 above @ 549

marriage of her daughters.²¹⁷ A customary wife has limited access to wealth generating property holdings.²¹⁸

From the above discussion of marriage and divorce, it can be concluded that the situation of the women in Swaziland needs to be improved. Most of the formalities and consequences of marriages, especially customary marriages, indicate discrimination against women and violates the provisions of the various international documents that advocate for equality between the sexes. The fact that the constitution has been suspended could perhaps be a reason for this situation. However, the lack of impact of international instruments and treaties in Swaziland indicates the impossibility of customary laws being challenged on the basis of the country's international commitments.²¹⁹ In the absence of a Bill of Rights, or any other constitutional document against which laws and practices can be tested, the legislature and the courts remain the only sources of redress.²²⁰ Another cause for concern is that there is a 'serious lack of data on women in Swaziland',²²¹ as work of a purely legal nature began only recently and is consequently still relatively scanty.²²²

²¹⁷ Thandabantu Nhlapo 'Law and Culture : Ownership of Freehold Land in Swaziland' @ 40-45 in *Women and Law in Southern Africa* (eds) Alice Armstrong and Welshman Ncube

²¹⁸ Ibid

²¹⁹ Supra note 213 above @ 132

²²⁰ Supra note 213 above @ 132

²²¹ This view has been expressed by Armstrong and Russell, in 'A situation Analysis of Women in Swaziland' in *The Legal Situation of Women in Swaziland* (1991)(eds)J.Stewart A.Armstrong

²²² Supra note 213 above @ 133

ZAMBIA

Marriage

In Zambia during bridal showers the older women usually bid the bride to be "Welcome to the Shipikisha club". Shipikisha is a Bemba²²³ word meaning "perseverance". This indicates the married women's plight in Zambia.²²⁴

In Zambia, like all the other Southern African states, both the civil and customary laws regulate marriage. The status of women in marriage is determined by the type of marriage they contract.²²⁵ Women in customary law marriages in Zambia have been known to suffer untold hardships of wife beatings, property grabbing and general mistreatment by the kin of her husband.²²⁶ The local courts administer the customary laws under which most of the rural Africans contract.²²⁷ The wife is regarded as a minor and must obtain the consent of her family to contract a valid customary marriage.²²⁸ Payment of the bride price also results in her being regarded as property and undermines her position as an individual.²²⁹ The bride price is paid to her parents and if they are not happy they will not consent to the marriage. This discriminates against women by denying them the right to marry men of their own choice.²³⁰

²²³ One of the ethnic tribes in Zambia

²²⁴ Felicia Sekala Violence against women in Southern Africa – *Gender in Southern Africa 1998*@27

²²⁵ C.N. Himonga, K.A. Turner, C.S Beyani 'An outline of the Legal status of women in Zambia' in *The Legal Situation of Women in Southern Africa* (eds) – Julie Stewart and Alice Armstrong (1991)@139

²²⁶ Ibid

²²⁷ Supra note 225 above @ 139

²²⁸ Supra note 225 above @ 149

²²⁹ Ibid

²³⁰ Supra note 225 above

This type of regime is polygamous and the husband does not require the consent of his other wife or wives to remarry. As a result of this a wife has no right of action against a woman who commits adultery with her husband, but a husband can claim for damages for adultery committed by the wife.²³¹ This inequality as to a woman's right to consortium is highly unsatisfactory.

There is no system of compulsory registration of customary marriages and a customary union could come into existence if the parties observe their communities' requirements governing capacity, consent, bridewealth, mode of celebration etc.²³² Nevertheless, the local courts, particularly in the towns, do exercise a measure of control over the formation of customary marriages.²³³

Under the civil law a woman needs to be 21 years of age to contract a marriage without the consent of her parents or guardians. The marriage is regulated by the Marriage Act²³⁴ which grants women equal rights of consortium and this regime is essentially monogamous.²³⁵ Neither spouse may contract a marriage with another person during the subsistence of this marriage.²³⁶ Women retain their right to personal liberty and enjoy a relatively high marital status.²³⁷ In a decided case it was stated, "The shackles

²³¹ Francis Mwangala Zaloumis Paper Presented at Namibian workshop – 'Approaches to Gender Equality under Customary Law' Transcript on file with author-Obtained from *the Legal Resources Centre- Cape Town*

²³² Simon Coldham 'Customary Marriage under the Local Courts in Zambia' *Journal of African Law* @ 67

²³³ *Ibid* @ Pg. 67

²³⁴ Marriage Act (Ordinance) No. 48 of 1963

²³⁵ *Supra* note 225 above @ 150

²³⁶ *Ibid*

²³⁷ *Supra* note 225 above @ 151



of servitude fell from the limbs of married women and they are free to come and go at their own will".²³⁸

Any person who concludes two marriages, a civil one and a customary union may not be charged with bigamy as discussed in the case of *People vs Katongo*²³⁹. Here the accused had entered into a customary union with 'C'. The couple lived together until they converted their customary marriage into a statutory marriage in 1969. In January 1974 the accused and 'S' had entered into a customary marriage. 'S' had confirmed that he entered into this union and a certificate of registration had been produced. The accused was charged with bigamy contrary to section 166 of the penal code. The court held that to constitute the offence of bigamy under section 166 of the penal code, the second marriage must be one capable of producing a valid marriage known and recognised by the law, but for the subsisting marriage, and that both the first and second ceremonies should be christian or western type marriages. It also held that for the purposes of the bigamy offence, a customary marriage is not capable of being a valid marriage in the sense intended under the Marriage Act.²⁴⁰

There is another type of "marriage" in Zambia that is not usually discussed. This is where a widowed woman is given a husband against her will.²⁴¹ This practice is

²³⁸ *Place vs Searle* (1932) 2 KB 497, 500-1 As quoted in An Outline of The Legal Status of Women in Zambia- Supra note 225 above.

²³⁹ 1974 *Zambian Law Reports* @ 290

²⁴⁰ Muna Ndulo 'Widows under Zambian Customary Law and the Response of the Courts' *CILSA* 1995 Vol. 18

²⁴¹ Known as Levirate Marriages – Where another male from the deceased's family may be appointed to stand in the footprints of the deceased and discharge in relation to the widow and her children all the functions of a husband and father.

believed to protect the widow so that she and her children are not left destitute upon her husband's death. The man who she is given to is usually her late husband's brother or cousin. This practice is extremely humiliating for the women.

Divorce

Customary marriages can be dissolved out of court in accordance with customary law.²⁴² In customary law, divorce depends a great deal on the bride price, as it must be repaid to the husband by the woman's family on the dissolution of the marriage.²⁴³ This means that a woman has to again seek her parent's permission before she dissolves her marriage.²⁴⁴ This discriminates against women in denying them the right to terminate marriages in their own right. There is a growing practice among young women in marriage to raise the bride price herself to initiate her own divorce, literally 'buying' her way out. However, this situation usually results in her family and spouse refusing to accept the marriage as over as the customary union is a contract between the wife's parents as well as between the spouses.²⁴⁵

In recent years, the local customary courts have acquired much greater control over the formation and dissolution of customary marriages.²⁴⁶ Their authority to issue marriage

²⁴² Simon Coldham 'Customary Marriages and the Urban Local Courts in Zambia' *Journal of African Law* 1986 @ 67

²⁴³ Supra note 225 @ 149

²⁴⁴ Ibid

²⁴⁴ Chuma Himonga 'Property Disputes in Law and Practice' in *Women and Law in Southern Africa* (eds) Alice Armstrong and Welshman Ncube @ 58

²⁴⁵ Supra note 225 above @ 150

²⁴⁶ Supra note 242 above

certificates has enabled them to lay down the minimum requirements of a valid customary marriage.²⁴⁷ However, these courts are not required to make formal decisions about bridewealth, property and custody as they consider these matters to be settled by the families of the parties concerned.²⁴⁸

On divorce the woman is entitled to all her property but not that of her husband²⁴⁹. The position of divorced women was considered by the High court in the case of *Mwiya vs Mwiya*.²⁵⁰ In this case the parties were married under *lozi* customary law and divorced in a local court where the wife made a claim for maintenance and a share in his property. The evidence led was that the property was acquired by the husband during the subsistence of the marriage, but with no financial help from the wife. The court rejected both claims. On appeal to the high court, where the appeal was dismissed, the court held that there was no *lozi* custom that compelled a man to support his divorced wife or to share his property with her.²⁵¹

Lately, the local courts seem to recognize the hardships of customary law on women and have attempted to ameliorate the position of women and orders of compensation on divorce are usually made against husbands in favour of divorced wives²⁵². In *Benjami Shawa v Mary Zulu*²⁵³, the wife commenced proceedings for divorce on the

²⁴⁷ Supra note 242 above

²⁴⁸ Supra note 242 @ 67

²⁴⁹ Supra note 244 above @ 59

²⁵⁰ 1977 *Zambian Law Reports* @113

²⁵¹ The decision in the *Mwiya* case seems to represent the general traditional customary law position in all tribes of Zambia as regards the non- existence of the rights to maintenance and property of women at divorce. (The *Lozi* is one such tribe.)

²⁵² Supra note 244 above @ 62

²⁵³ LCA 29/1981

grounds that her husband evicted her from the marital home. On granting the divorce the court ordered the husband to pay K1000 as compensation to his wife on the ground that he 'no longer loved her after she had suffered accumulating wealth for him during the marriage.'

Local court justices have explained that compensation is designed to compensate a wife for her 'services' rendered during the marriage and to provide financial rehabilitation.²⁵⁴ It is submitted that in most of the cases where the court ordered compensation to the wife the amounts were minimal and further the idea of compensation for 'services' provided does not even come close to recognizing the non financial contributions of women to family property. In the recent case of *Edna Mwachisanga vs Zimba*²⁵⁵ the plaintiff claimed that the small-holding, the family owned and the investment on it was purchased through resources of them both. The wife claimed that she had contributed to the purchase of the ten-acre plot and at weekends had helped in the construction of the family home. The court held that the wife should be compensated for her contribution in the purchase of the property and whatever she had spent on the construction of the house. It is interesting to note that, although they were married for 15 years, the compensation was made without interest. Women are not usually granted compensation if they are guilty of certain matrimonial offences such as adultery.

²⁵⁴ Supra note 225 above @ 153

²⁵⁵ 1999 *Lusaka Local Court* – Transcript on file with author -See note 225 above

There has been limited changes in some urban areas in property regimes after divorce as some local courts have granted joint ownership of property during the marriage and allowed for the sharing of such property on divorce.²⁵⁶ This was illustrated in the case of *Lyson Ngulube vs Dyness Daka*,²⁵⁷ where the court found that the property in dispute had been built jointly by both parties and ordered that the house be sold and the proceeds thereof be shared equally between the parties.²⁵⁸ It has been noted that on appeal, the subordinate courts regularly overturn local court decisions in favour of women on the ground that they are contrary to customary law.²⁵⁹ An example of this is the case of *Gilbert Wamunyima vs Dorcas Kalebuka*,²⁶⁰ where the Local Court held that the matrimonial home be shared between the parties in that the wife occupy three rooms and the husband occupy the remaining two rooms. This situation would prevail until husband could afford to get the wife a house of her own. The husband appealed to the subordinate court, which overturned the local courts decision and held that the house belonged solely to him. In his judgment the Magistrate said that:

“After listening to the evidence for and against, I am left in no doubt in my mind that it (the house) was built by the appellant, not by his wife. I do not rule out the possibility of any contribution by the respondent and that contribution was made by her as a married woman like any other woman would do in the circumstances”.²⁶¹

²⁵⁶ Supra note 225 above @ Pg. 158

²⁵⁷ LC/ 1306/ 1982 – Transcript on file with author – See Note 225 above –discussed therein

²⁵⁸ It should be noted that the court gave an alternative to the husband .He could pay the sum of K300 to the wife as compensation. He obviously took the alternative.

²⁵⁹ Supra note 244 above @ 64

²⁶⁰ LCA 96/1981-Transcript on file with the author- See note 240 above

²⁶¹ The Magistrates view of the facts is surprising especially since the husband did not refute much of the evidence led by the wife. For example, the husband admitted the wife’s contribution to the house when

Women who are married under the Act are in a much better position as they retain their capacity to acquire, hold and dispose of any property in their own right²⁶² and are entitled to a share in the matrimonial property, including both joint property and their husband's property on divorce.²⁶³ The wife is also entitled to maintenance on divorce²⁶⁴ and the High court has extensive discretionary powers to order one party to maintain the other on divorce.²⁶⁵ However, the idea of maintenance of a divorced woman is alien to the African traditional way of life and legal thinking, and a husband who is ordered to pay maintenance to his wife may therefore feel that he has a right to exercise control over her the way he would his wife.²⁶⁶

Custody of children is another contentious issue on divorce, as traditionally custody of a child depended on the descent group that exists in Zambia. In matrilineal societies that predominate, a child belongs to the mother's kinship group, and in patrilineal societies the child belongs to the father's kinship group.²⁶⁷ The courts in maintenance and custody battles seem to follow a rule of thumb and it was discovered in a study conducted²⁶⁸ that in most cases the courts awarded custody of school going children to the father, and children below school going age were awarded to the mother, or if they

he said that his father- in-law had helped him towards the building expenses and admitted that he (the father- in-law) had put more money into the building than his wife.

²⁶² Supra note 225 above @ 158

²⁶³ Supra note 225 above @ 159

²⁶⁴ Supra note 225 above @ 151

²⁶⁵ Ibid

²⁶⁶ Supra note 244 above

²⁶⁷ Supra note 242 above @ 72

²⁶⁸ Study conducted on 42 Appeals in Lusaka of which 9 were abandoned and of the 33 left 25 school going children were given to the father children below school going age given to the mother and 5 remaining cases custody given to both parents- Supra note 242 above at Pg. 72

gave custody to the mother, they would allow for maintenance from the father, but this rarely occurs and the courts would rather award custody to the father.

Mothers are not given the same rights as fathers, and some government provisions discriminate against women. This was challenged in the case of *Nawakwi vs Attorney General of Zambia*²⁶⁹ where an unmarried mother had to swear fresh affidavits each time she applied for a birth certificate or passport for her minor children. She had to state in those affidavits that she was the mother of the child and they were born out of wedlock. Fathers on the other hand only had to give a letter of consent, to procure the very same documents for their children. The court found that this practice discriminated against mothers on the grounds of sex. High Court Judge Musumali J said in his judgement that: "Discrimination based on gender had to be eliminated from society. Mothers, whether married or not were entitled to the same rights as fathers over their children."²⁷⁰ He went on further to state that a single parent family, whether headed by a male or female was a recognized family unit within Zambian society and that a mother of a child did not require a father's consent to have her child included in her passport²⁷¹

The most notable conclusion that can be drawn from the above discussion of marriage and divorce in Zambia is that the customary practices clearly discriminate against women, in spite of the equality provisions contained in the constitution.

²⁶⁹ *Commonwealth Law Reports* 1993 (3) @ 231

²⁷⁰ *Supra* note 269 above @ 232

²⁷¹ *Ibid*

The judiciary has not been a consistent advocate of women's rights, as the high court with judgments like *Nawakwi*²⁷² would promote women's rights and the subordinate courts would limit them. It is submitted that all the blame cannot be laid at the door of the judiciary because if women do not take their cases to the courts they cannot expect to be heard.

ZIMBABWE

Marriage

There are two types of marriages in Zimbabwe, the civil marriage under the Marriage Act,²⁷³ which is monogamous and the customary marriage under the African Marriages Act which is polygamous and which only Africans can contract.²⁷⁴ Customary marriages that are not registered under section 3 of the African Marriages Act are void,²⁷⁵ but are regarded as valid for the purposes of African law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriages.²⁷⁶ Such customary marriages are very common and most marriages fall into this category.

²⁷² Supra note 263 above @ Pg. 232

²⁷³ *Marriage Act-Chapter 37*

²⁷⁴ *African Marriages Act Chapter 238 @ Sec 13*

²⁷⁵ J. Stewart; W. Ncube; M Maboreke; A. Armstrong 'The Legal situation of women in Zimbabwe' in *The Legal Situation of Women in Southern Africa* (eds) Julie Stewart and Alice Armstrong @173

²⁷⁶ Ibid

Under the African Marriages Act before a marriage can be registered the marriage officer must be satisfied about the *lobolo* agreement²⁷⁷ and the consent of the guardian of the woman is required.²⁷⁸ This usually results in her parents choosing a spouse depending on the amount of *lobolo* paid.²⁷⁹ Under customary law wives do not have property rights and all the property belongs to the husband.²⁸⁰ Husbands also have exclusive rights to divorce their wives and women are not allowed to claim damages for adultery from their husbands' women friends but the husband can sue other men for damages for adulterous relations with their wives.²⁸¹

However the Legal Age of Majority Act No. 15 of 1982 and the Matrimonial Causes Act No. 33 of 1985 recognize women's right to own property independently of their fathers and husbands.²⁸² In *Katkwe v Muchabaiwa*²⁸³ the learned judge, Dumbutshena CJ, concluded that in accordance with the Majority Act, women upon attaining majority, became fully emancipated and thus no longer required a legal guardian to assist them in enforcing their legal rights, as they had *locus standi*. This decision was widely quoted in numerous other cases. However in *Mwazozo v Mwazozo*²⁸⁴

²⁷⁷ Moses Chinyenze 'A Critique of Chigwenderes Book "Lobolo the Pros and Cons" in Relation to The Emancipation of women in Zimbabwe' *Zimbabwean Law Review* 1983/84 @ 229

²⁷⁸ Supra note 275 above @ 173

²⁷⁹ Welshman Ncube 'Underprivilege and Inequality : The Matrimonial Property Rights of Women in Zimbabwe' in *Women and law in Southern Africa*(1987) @11

²⁸⁰ Ibid

²⁸¹ Ibid

²⁸² Section 7 of of the *Matrimonial Causes Act*

²⁸³ 1984 (2) *Zimbabwean Law Reports* @ 112

²⁸⁴ S/ 121/94

Mucheche JA concluded that the disabilities and discrimination suffered by women under customary law were not predicated upon their perpetual minority status, but rather were embedded in the patrilineal nature of African society. He went on further to state that to allow women to sue in their own right would not only 'disrupt the African customary laws of that society, but would be tantamount to bestowing additional rights upon women.'²⁸⁵

It would seem that the judiciary has taken a step forward and two steps backward. The recent case of *Magaya*²⁸⁶ has indicated that discrimination still exists and it is respectfully submitted that the judiciary needs to stop sacrificing women's rights for the preservation of customary law, as when discrimination persists it is the custom that should be ousted.

Divorce

Prior to 1985 the divorce law of Zimbabwe was based squarely on the guilt principle²⁸⁷ that worked against the interests of the woman. The *Matrimonial Causes Act*²⁸⁸ abolished the guilt principle in divorce proceedings and introduced two new grounds for divorce, the irretrievable breakdown of the marriage and insanity or mental illness.²⁸⁹ The test for the former ground is to ascertain whether the marriage

²⁸⁵ He concluded further that the decision in *Katekwe* was wrongly decided. In this case the women tried to inherit (look further at *Magaya v Magaya*) discussed under Inheritance.

²⁸⁶ Discussed fully under inheritance below-ZS16-2-1999

²⁸⁷ Supra note 275 above @ 173

²⁸⁸ No 33 of 1985

²⁸⁹ Supra note 275 above @ 174

relationship has broken down to such an extent that there is no reasonable prospect of a normal marriage relationship between the parties.²⁹⁰

Section 7 of the *Matrimonial Causes Act* makes provision for the court when granting a decree of divorce, judicial separation or nullity of marriage to make an order for the division, apportionment or distribution of the assets of the spouses.²⁹¹ This includes the order that any asset be transferred from one spouse to another and for the payment of maintenance either in a lump sum or in periodic payments.²⁹² These sections of the Act are made applicable to customary law marriages by the Amendment of section 16 of the *African Marriages Act* with section 16 of the *Matrimonial Causes Act*.²⁹³

The matrimonial property rights of women depend on whether they are Africans or not²⁹⁴ and on the system of law under which they are married.²⁹⁵ Two non-Africans or one African and one non-African can only marry under the general law,²⁹⁶ and have a choice to marry either in community of property or out of community of property.²⁹⁷ If they choose the former they should conclude an ante-nuptial contract to that effect. If they marry without one then their marriage is automatically out of community of property, where each spouse retains their own property.²⁹⁸ This used to cause hardship

²⁹⁰ Ibid

²⁹¹ Supra note 275 above @ 176

²⁹² Supra note 279 above @ 12

²⁹³ Ibid

²⁹⁴ Supra note 275 above @ 174 (This is discriminatory on the grounds of race)

²⁹⁵ Ibid

²⁹⁶ Supra note 275 above @ 175

²⁹⁷ Ibid

²⁹⁸ Ibid

to women who spent their lives bringing up the children, taking care of the home etc, as they usually walked away empty handed.

Now with section 7 of the Matrimonial Causes Act the court has the discretion to make an equitable reallocation of the property of the spouses at divorce having regard to their income, assets, financial needs and obligations, the standard of living of the family, their health, the duration of the marriage and their direct or indirect contributions made to the marriage and welfare of the family including domestic duties.²⁹⁹ The main criticism of the reallocation formula is that it includes wide discretionary powers of the court and this leads to a lack of fixed legal rights resulting in uncertainty that leads to unnecessary litigation since there are no fixed standards by which spouses can reach agreement

In the High Court case of *Muchada vs Muchada*³⁰⁰ the wife had taken care of the children and supported them from her income. She had also conducted extensions to the matrimonial home with some financial assistance from her husband who was studying abroad. On divorce, reallocation of property in terms of section 7 was considered and the court held that she was entitled to a half share in the proceeds of the sale of her house. The learned Justice Gibson said:

²⁹⁹ Supra note 275 above @ 176

³⁰⁰ Transcript on file with author - unreported

“In my mind this is a proper case in which the defendant should get a fifty percent share of the sale price of the house because it is largely due to her contribution and industry that transformed the property into the state that it was at the date of the sale”

It is submitted that this is the correct approach for a country attempting to establish equality between men and women. The only problem with the reallocation of property is that it is likely to work against the interests of women who would be deprived of property, because of some conduct deemed to amount to a matrimonial offence and thus reintroduce the ‘guilt’ principle indirectly.

The situation in Zimbabwe as regards marriage and divorce has improved and the judiciary and government are attempting to work hand in hand to promote and stabilize women’s rights. We notice that in some cases like *Mwazozo*³⁰¹ and *Magaya*³⁰² the judges have weakened the status of African women in Zimbabwe. However much work is being done by women’s organizations and non-governmental organizations to improve women’s rights.

³⁰¹ Discussed above @ 59

³⁰² Discussed under Inheritance

CONCLUSION

On comparison generally it can be concluded that all of the countries under discussion have made some attempts to mould their laws of marriage and divorce within the confines of the right to equality. The greatest advancement has been the granting of majority status, as this grants women *locus standi* and legal capacity to take their violations to court.

All the countries seem to limit women's rights when it comes to traditional law. It is apparent that this has caused hardship to women, in all spheres of marriage and divorce. In countries like Swaziland, traditions like the red ochre ceremony make a woman's consent to a marriage non-essential. Even more frightening is that a woman will never be able to leave her obligations in terms of this union even if she divorces. Although traditional concepts such as bridewealth and polygyny are unfair to women, they have not been abolished in all of the countries under discussion and dual marriages are commonplace.

Attempts have been made to harmonize the civil and customary marriages into one, in Swaziland and South Africa. However this has not been without problems. In South Africa a huge gap exists, as regards the applicability to marriages concluded before the coming into force of the Act. In Swaziland it has resulted in making civil marriages concluded between Africans subject to customary laws.

The courts in countries like South Africa and Zimbabwe have attempted to remove discriminatory laws and practices. However this has not been consistent as some judicial officers have considered the right to culture as more important than the right to equality. The constitutions of all the countries have equality provisions and these have effectively been used to help against discriminatory laws and practices. In Swaziland, where the constitution has been suspended, we have seen a strengthening of customary laws and hence not much inroads have been made in the field of women's human rights. Zimbabwe has made significant attempts to promote women's rights and this should be applauded.

The governments themselves have enacted laws that are discriminatory to women, like the now repealed citizenship laws in Botswana. It is submitted that governments need more than a token commitment to international conventions like CEDAW, and should do everything to rid their countries of discriminatory laws and practices.

CHAPTER 3

2. PROPERTY RIGHTS AND INHERITANCE

Land is an important natural resource the world over. Access to and ownership of land is of primary importance to basic survival. Women's access and control of land and property is closely interrelated with their status and personal law. Therefore our examination of the above topic will extend over common characteristics already discussed under the section dealing with marital power and contractual capacity.

Access to property is one of the most sensitive indicators of power relations and the inferior position of women is especially evident in this regard. Although as already noted, women play a vital role in food production and usually have unrestricted control over staple foodstuffs, they are denied control over the means of producing food ie. land and livestock.³⁰³

Article 17 of the Universal Declaration of Human Rights provides that 'everyone has the right to own property alone as well as in the association of others.' It further provides in article 17 (2) that 'no one shall be arbitrarily deprived of his property'. Article 14 of the African Charter states: 'the right to own property shall be guaranteed.' Article 14(2) of CEDAW obliges states to ensure that rural women have the right to equal treatment in land matters and agrarian reform and article 16(h) confers on

³⁰³ T. W Bennett *'Sourcebook of African Customary Law' (1991) @325*

women the same rights as men with respect to ownership, administration, enjoyment and disposition of property.

However, in spite of the above provisions, a combination of customary and contemporary law severely restricts property rights of women in Southern Africa. Under customary law the status of a woman is usually that of a minor whereby she is always under the control of a male, either her father or her husband. This means that in terms of real property, communal or clan property, a woman has no capacity to exercise ownership rights over it as the property belongs to her husband and the male heirs of the clan,³⁰⁴ who retain most of it even upon dissolution of marriage and inheritance.

Control of property is the key to social empowerment, and had women been given clear rights to property their overall position would have been much improved, but unfortunately this aspect of their status appears to be most neglected.

We will now examine the various countries' laws of property and inheritance and how they affect the women who live there.

³⁰⁴ Katarina Tomsevska 'Women and Human Rights' *Women and Law Development Series*(1995)

Botswana

Women legally enjoy the same property rights as men. However in practice discrimination exists, and it is most acute in rural areas where women who are engaged in primarily subsistence agriculture have weak property rights.³⁰⁵

Prior to 1998 the *Deeds Registry Act*³⁰⁶ did not allow for immovable property to be registered in the name of a wife. Now the Act also stipulates that neither spouse can dispose of joint property without the written consent of the other party. However, it should be noted that women are frequently forced and coerced into giving this written consent.³⁰⁷

Women married under customary law and those married under community of property are the most disadvantaged where property rights are concerned. However, since 1996 women married in community of property can own immovable property in their own name.³⁰⁸ Nevertheless, the husband still retains considerable control over the joint estate of the marriage and courts are generally unwilling to interfere with the husbands' powers of administration.³⁰⁹ Under customary law the husband also has the right to administer the separate property of the wife. In the case of *Molomo vs Molomo*³¹⁰

³⁰⁵ <http://www.U.S. Dept. of State/ Human Rights Reports for 1999/ Botswana.htm>

³⁰⁶ *Deeds Registry Act* 1998

³⁰⁷ Supra note 305 above

³⁰⁸ Ibid

³⁰⁹ A. Molokomme 'Marriage in Botswana –What every woman wants or civil death?' in *Women and Law in Southern Africa* @186

³¹⁰ 1979-80 BLR @250

Judge Hannah decided that the common law would apply to the disposal of the spouses property and she said that:

“The spouses lived a sophisticated way of life and it would be unjust and inequitable to apply the customary law”³¹¹

Traditionally women were not entitled to inherit the bulk of a deceased person’s estate³¹² because there was the belief that daughters would marry into another family and take the property with her.³¹³The *Succession Act of 1970*³¹⁴ gave the surviving spouse the right to inherit some of the property of the deceased and also provided for the deceased’s dependants to claim maintenance from the estate should they have been insufficiently provided for in the will.³¹⁵ This Act does not cover customary law estates³¹⁶ and leaves those widows in an unprotected state, dependant on the generosity of their in-laws who are the usual beneficiaries in customary succession.³¹⁷

Women married in community of property are in a better position and are automatically entitled to half of the joint estate on the death of the spouse.³¹⁸

³¹¹ She based her decision on *Dissolution of Marriages Act* of 1926 that makes a provision for the judicial officer to apply the common law if it would be just and equitable to do so.

³¹² A. Molokomme ‘Womens Law in Botswana in *The Legal Situation of Women in Southern Africa* (eds) Julie Stewart and Alice Armstrong @ 21

³¹³ Ibid

³¹⁴ The Succession Rights of the Surviving Spouse and Inheritance Family Provision Act of 1970 (Chapter 31:03)

³¹⁵ Provided there was a will –in most cases there is no will -See note 301 above

³¹⁶ In other words it is not available to the dependents of most Batswana who generally die intestate and whose property devolves in accordance with customary law.

³¹⁷ Supra note 312 above @Pg. 23

³¹⁸ Ibid

Freedom of testation exists and it is suggested that in order to protect the wife, husbands especially in customary unions should make a will. In the case of *Fraenkel and Ano vs Sechele*,³¹⁹ the testator had married according to the common law and had executed a will and codicil bequeathing his estate to his wife. His capacity to do so was contested on the ground that it was contrary to Tswana customary law of succession and that he had not abandoned a 'tribal way of life.' The court rejected both arguments and said that in terms of the Wills Proclamation Act No. 19 of 1957 a general power was given to all people to execute wills even if this meant upsetting the customary law of intestate succession.

South Africa

Many legal barriers to women acquiring and disposing of property have been removed with the improvement of their legal capacity under the marriage laws, especially the *Customary Marriages Act 120 of 1998*. Under Civil Law all women are automatically married in community of property and the joint property is equally administered and owned between the spouses, and verbal or written spousal consent is required for dealing in all joint property. The property clause in the constitution stipulates that the state must take reasonable and other measures within its available resources to foster conditions, which enable citizens to gain access to land on an equitable basis.³²⁰

³¹⁹ 1964 HCTLR 70

³²⁰ Section 25(5) of the Constitution of the Republic of South Africa 1996

Section 28(1) of the Constitution provides further that every person shall have the right to acquire and hold property.³²¹

Before 1998, legal barriers continued to exist for women living under Customary Law as in many instances, women had no independent access to property but were dependant on their relationships with men (husbands, fathers, sons) to gain access to land. In customary law succession is intestate, universal and onerous.³²² Upon the death of the family head, his oldest son succeeds to the status of the deceased and an heir inherits not only the deceased's property but also his responsibility to support surviving family dependants. Widows acquire no more than a personal right against the heir to maintenance out of the estate.³²³ Constitutional norms of equal treatment and non-discrimination pose the major challenge to this order and the customary rule that the deceased's heir be male constitutes discrimination against female descendants.

In 1985 and 1987 limited recognition was given to the problems of women's status in customary law by presuming full legal capacity for the purpose of acquiring, protecting and disposing of leasehold and freehold land in certain urban areas. The position of the surviving spouse in a situation of interstate succession was improved in 1987. However two critical areas of concern remain.

³²¹ Section 28 (1) of the Constitution of the Republic of South Africa 1996

³²² See note 323 below

³²³ T.W. Bennett- *Human Rights and African customary Law* @ 126 – In the case of *Menziwa vs Gqati* (1934 NAC83) It was held that the heir has the power to dispose of assets for the benefit of the family and the widow cannot demand possession of the estate nor can she prevent the heir from alienating it if she is being suitably maintained . Nevertheless widows may be consulted before heirs dispose of major assets . Quoted from T. W. Bennett @ 142

First, women have no rights to inherit directly from the estate of their husbands in African customary law and secondly, African women who are married by civil rites and out of community of property are subject to the customary law of succession by the Black Administration Act 38 of 1927.³²⁴ In the case of *Zondi vs President of the Republic of South Africa and Others*³²⁵ it was held that Regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks³²⁶ offends against the equality provisions of the constitution to the end that it distinguishes between estates of Black persons not married in community of property and those married under antenuptial contract or in community of property for the purposes of intestate succession and was therefore invalid. It was directed that the estates of the deceased devolve in accordance with the Intestate Succession Act 81 of 1987.³²⁷

Further, women experience many administrative and procedural impediments in seeking to claim their inheritance rights. In a leading case of *Mthembu vs Letsela and another*³²⁸ the Pretoria High Court considered the application of the Bill of Rights and it was said, "Women have lost the war for equality between the sexes".³²⁹ In this case, involving succession to the whole of the deceased person's intestate estate, the respondent (father of the deceased) opposed an application by the widow to succeed to the estate. The applicant sought to have section 23 (2) of the Black Administration

³²⁴ Most of the offending sections of this Act have been repealed.

³²⁵ 1999 3 S.A.L.R 49

³²⁶ R200 of 6 February 1987

³²⁷ An important decision of this case was that both legitimate and illegitimate children of a deceased African person would qualify to inherit intestate.

³²⁸ 1997 2 S.A.L.R 936 (T)

³²⁹ Mandla Nkala 'Any Chance of Emancipation for the African Woman' October De Rebus @ 39

Act³³⁰ regulating succession nullified on the basis that it was inconsistent with the Bill of Rights, as the system of primogeniture discriminated on the grounds of sex or gender.³³¹ However, the court granted judgment in favor of the respondent on the basis that everyone has the right to participate in the cultural life of his choice in terms of section 30.³³² Therefore the Customary Primogeniture System was upheld. But section 30 further says that no one exercising these rights may do so in a manner that is inconsistent with any provision of the Bill of Rights.

This can be said to be in violation of the equality clause, which provides that the state, through its judicial organs have to promote equality and may not unfairly discriminate directly, or indirectly on the grounds of sex or culture.³³³ Is the upholding of the primogeniture system not an indirect discrimination against women on the grounds of sex?³³⁴ The judgment turned on the question of unfairness. *Le Roux J* found that, while the estate devolved upon a male heir, the customary law required him to support the surviving widow and dependants. Thus, a widow was entitled to remain at the deceased's homestead where she could continue to benefit from the estate and the heir could not eject her.

³³⁰ Act 38 of 1927

³³¹ The Primogeniture system provide that only male relatives of the deceased may succeed as heirs to the estate.

³³² Section 30 of the Constitution of the Republic of South Africa 1996

³³³ Section 9 of the Constitution of the Republic of South Africa

³³⁴ *Supra* note 329 above

The court therefore decided that customary law does not prejudice women because it gives them rights to maintenance.³³⁵ However one must bear in mind that the right to maintenance is a personal right and surely if we know that women do suffer neglect and deprivation then they should be given the protection of real rights.³³⁶ It is submitted that the judiciary missed an opportunity to grant women in customary unions the powers to acquire real rights to property in succession.

The *Recognition of The Customary Marriages Act*³³⁷ provides equal status and capacity to spouses in Customary Marriages and regulates the proprietary consequences of such marriages. Section 6 of The Act provides that:

“A wife in a Customary Marriage has, on the basis of equality with her husband ... full status and capacity including the capacity to acquire assets and dispose of them”.

In addition to dealing with the specifics of marriage the Act also touches on the broader socio-economic aspects in women's lives. The Act decrees that women in customary marriages have the right to acquire assets and dispose of them, to enter into contracts and to litigate.

³³⁵ This ruling inadvertently raised a complex socio- legal issue, which makes the judgement highly debatable. Traditionally personal rights to maintenance would have been underwritten by the extended family system and a highly developed ethic of helping kin. *Mthembu's* case implicitly regards the fact that customary law withholds real rights from women as fair and acceptable. In the western world, however, real rights guarantee a person's material security. If we bear in mind that traditional African social structures are fast disintegrating, then there is a likelihood that in a modern African context the protections formerly afforded by customary law may no longer work to the benefit of women. (This argument appeared in T. W. Bennett @ note 342 below

³³⁶ Addendum to *Human rights and African customary Law*- T. W Bennett.

³³⁷ Recognition of Customary Marriages Act 120 of 1998.

Whereas women under customary law were previously deemed to be perpetual minors, the Act states that despite customary law rules, the age of majority of any person is determined in accordance with the South African Age of Majority Act.³³⁸ It is a pity that the Mthembu case was decided before the Act was passed; perhaps the plaintiff would have succeeded in her claim to inheritance.³³⁹

Since the 1994 interim Constitution customary law has been attacked on many fronts. In the case of *Amod v Multilateral Motor Vehicle Accidents Fund*³⁴⁰ the learned justice Mahomed C.J found that a widow of a Muslim religious marriage is indeed a dependant for the purposes of a dependant's action. The legislature also extended the action to widows of African customary unions in section 31 of the *Black Laws Amendment Act*. There is therefore no reason why a widow in a customary union cannot inherit especially in light of the Recognition of Customary Marriages Act and the Age of Majority Act.³⁴¹

In the case of succession a court could not simply rule customary norms void. It would have to stipulate how much widows could inherit and under what circumstances. Details of this nature cannot be determined in judicial proceedings and the proper reform would be legislation, which permits full investigation of the social context and consultation with interested groups.³⁴²

³³⁸ Act 57 of 1972.

³³⁹ Any Chance of Emancipation for the African woman? Mandla Nkala *De Rebus* Oct 1999

³⁴⁰ 1999 4 SALR @1319 (S.C.A.)

³⁴¹ Act 57 of 1972

³⁴² T. W. Bennett 'Human Rights and African Customary Law' @ 95

In May 1998 the Special Project Committee on the Harmonization of Common and Customary law published a paper on succession in customary law.³⁴³ However before the normal consultation process could run its course, the Department of Justice submitted a Bill to the National Assembly proposing in essence the abolition of the customary law of succession.³⁴⁴ Elements of age and gender discrimination were removed by a simple provision that whenever a deceased person died intestate the Intestate Succession Act 81 of 1987 would apply to his or her estate. When traditional leaders became aware of the Bill they protested and the Bill was withdrawn.³⁴⁵ This indicates that South Africa needs to change a lot of perceptions before the law of succession is overhauled.

Swaziland

Succession like other areas of law is governed by both general and customary law. Under the general law there is a distinction between testate and intestate succession.³⁴⁶ Where no will is left, the *Intestate Succession Act*³⁴⁷ applies to those who have concluded a civil marriage. Thus a widow who was married in community of property

³⁴³ See Human Rights and African Customary Law T. W. Bennett @ 204-205

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ R. T Nhlapo 'The Legal Situation of Women In Swaziland and Some Thoughts on Research' in *The Legal Situation of Women in Swaziland* – (eds) Julie Stewart and Alice Armstrong 97 @ 123

³⁴⁷ No 3 of 1953

is included among the children of the deceased and qualifies for an equal share with them in the joint estate.³⁴⁸

Where the marriage is out of community of property the widow is entitled to succeed to the extent of a child's share, or so much as does not exceed the amount stipulated from time to time.³⁴⁹ In the absence of children, regardless of the marital regime, she is entitled to a half share. If a parent, brother, or sister of the deceased survives they get the other half.³⁵⁰ If none of the above are alive she becomes the sole heir.³⁵¹

The customary law position however is not as simple. First there is no general recognition of testate succession³⁵² although some men do indicate their preferred heir before they die.³⁵³ Confirmation of this choice however depends entirely on the family council, who may ignore his wishes.³⁵⁴ Swazi customary succession is uncompromisingly patrilineal³⁵⁵ and is aimed at finding only a male heir. Even if the deceased has no son, his widow or daughter still cannot inherit.³⁵⁶

The estate of an unmarried woman devolves upon her father even if she has sons.³⁵⁷

³⁴⁸ Provided that the value of the share does not exceed E1200 (this value was at 1993)

³⁴⁹ The same amount as in note 348 above

³⁵⁰ Supra note 346 above

³⁵¹ Ibid

³⁵² Supra note 346 above @ 124

³⁵³ Ibid

³⁵⁴ Ibid

³⁵⁵ Supra not 346 above @ 124

³⁵⁶ Supra note 346 above @ 125

³⁵⁷ Ibid

In cases where a civil marriage was concluded and the parties did not opt out of section 24 of the Marriage Act, or of a dual marriage, or where the parties agree, the master deals with the estate on the basis of the common law and the statute.³⁵⁸ This practice of the master should be applauded as it protects females from the obvious injustices of customary succession.

Private tenure land is governed by common law rules of ownership and is subject to relatively unrestricted purchase and sale. An unmarried major woman may buy, sell, and have it registered in her name unassisted.³⁵⁹ So may a woman married out of community of property with the exclusion of her husband's marital power.³⁶⁰ Even a woman married under customary law may register private tenure land in her own name. Only a woman married in community of property under her husband's marital power cannot register immovable property in her own name.³⁶¹

Although women can own land in the abovementioned cases, the general practice of town councils has indicated otherwise and it has been reported that when women go there to purchase property, they are told to go and bring their husbands.³⁶²

Swazi state land is inalienable and married women have the right to cultivate this land to sustain their family and sometimes may grow surplus to sell.

³⁵⁸ Ibid

³⁵⁹ Ibid

³⁶⁰ Ibid

³⁶¹ Deeds Registry Act No. 37 of 1968

³⁶² Thandabantu Nhlapo 'Ownership of freehold land in Swaziland' in *Women and Law in Southern Africa* (eds) Alice Armstrong and Welshman Ncube @ 49

Property rights of women in Swaziland are far from satisfactory. Although the Legal Age of Majority Act gives all women over 21 majority status, traditional arrangements that see a woman as a minor continue unabated. Unlike most of the other Southern African countries discussed herein, traditional institutions in Swaziland are rarely challenged and are getting stronger.

Even without presuming to venture into the anthropological and sociological factors underlying African thinking on the position of women in society, it is possible to conclude that in the case of Swaziland, maintenance of the 'proper' relationship between the sexes is a crucial ingredient in the well-being of the nation.³⁶³ Any modernizing influences are resisted at all costs because of the generalized fear that 'a nation which abandons its traditional way of life is doomed',³⁶⁴

Zambia

Access to land for a woman under customary law is dependent on the traditional rights women have in a particular African society.³⁶⁵ The most common system is where the women do not own land but have usufruct rights to the land.³⁶⁶ In the *Lozi* tribe a woman is entitled to land rights but when she gets married that land right is transferred

³⁶³ Supra note 362 above @51

³⁶⁴ Ibid

³⁶⁵ Frances Mwangala Zaloumis Paper presented at a Namibian Workshop titled 'Approaches to Gender Equality under Customary Law' -Obtained from the *Legal Resources Centre* in Cape Town

³⁶⁶ Ibid

to another person in the same family.³⁶⁷ The right to land will be restored to her upon her return to the village or upon dissolution of marriage.³⁶⁸

The husband usually gives his wife a piece of land but any rights thereto only exist during the subsistence of the marriage.³⁶⁹ When he dies his children and family may inherit but his wife is not entitled to any portion of that inheritance including the land.³⁷⁰ Reflections of the traditional societies in Zambia indicate that after a husband or father's death the property would be entrusted to one of the male relatives of the deceased who is 'obliged' to take care of the dependants of the deceased.³⁷¹

This obligation has eroded with a breakdown in traditional values and 'property grabbing'³⁷² is the order of the day, and the deceased's family takes all his property and the widow is left destitute.³⁷³ One such case is that of *Adinar Mkumba vs Phiri*.³⁷⁴ The deceased husband was survived by his wife, Adinar and seven minor children. The defendant was the deceased's brother who was appointed administrator of the estate. Adinar sued the administrator for not supporting her and the children financially. The deceased was a businessman and was operating a fleet of mini buses. After his death

³⁶⁷ Ibid

³⁶⁸ Ibid

³⁶⁹ Supra note 365 above @ 8

³⁷⁰ Ibid

³⁷¹ Supra note 365 above @ 9

³⁷² Because a woman in African customary law is never regarded as part of her husband's clan his relatives upon his death remove from her possession any property that they wish even though she may have acquired it out of her own means, this is known as property grabbing.

³⁷³ The deteriorating economic situation at national level has spread down to household level and made people very greedy, household goods and houses are very expensive hence the grabbing of property from the widow is an easy way of acquiring property.

³⁷⁴ LC131/ 1981 Zambia

the young brother was appointed to 'cleanse' or 'purify'³⁷⁵ her, and subsequently took all the property including buses, from where income had been generated to feed the family. She then claimed for a share of the income from the operation of the buses. The court upheld the plaintiffs claim and ordered the defendant to pay her some money from the deceased estate for the maintenance of the children.³⁷⁶

There are many similar cases that go unreported because the relatives of the deceased and fears of 'bewitchment' intimidate the widow or they do not have funds to pay for legal representation.

However, the widow should take her plight to the courts who are usually sympathetic, as illustrated by the following case *Estate of Pinyolo vs Administrator General*.³⁷⁷ In this case the deceased applied to the High court for revocation of the letters of administration granted to the Admin-General and for the grant of letters of administration to himself. It was submitted on behalf of the applicant that he was the rightful person to administer the estate because the deceased's kin had appointed him, as is the *Bemba*³⁷⁸ tradition. The High Court held that the deceaseds wife and children were the next of kin and not the applicant and the High Court commissioner said that:

³⁷⁵ When the husband dies and immediately after burial the widow is given a man to have sexual intercourse with her usually a relative of the deceased as it is believed that she will go around carrying her late husbands ghost .If it is not performed there is a belief that her new husband might die.

³⁷⁶ Chuma Himonga 'Property Disputes in Law and Practice-Dissolution of Marriage in Zambia' in *Women and Law in Southern Africa* 56 @ 69-70

³⁷⁷ 1983/HP/102- unreported – This High Court decision was discussed in Muna Ndulo 'Widows under Zambian Customary Law and the Response of the Courts' *CILSA* 1995 Vol. 18

³⁷⁸ A predominant tribe in Zambia

“In this era it is compelling that the deceased’s children get the lions share of the estate to guarantee their education and to let them continue in their station in society. Times are changing and me with them, custom cannot claim to be superior if in doing so it retains inequity ... man works not for his relatives but for himself, his wife and his children.”³⁷⁹

Widows do inherit under the statutory laws relating to pension funds, insurance and employment benefits of the deceased but sometimes the relatives demand a share of the money.³⁸⁰ There are two laws that can assist women namely; *The Intestate Succession Act* No. 5 of 1989,³⁸¹ which indicates how property should be distributed without a will and *The Wills and Administration of Estates Act* 1989³⁸² which deals with cases where a will has been made.

A possible reason why many woman have not taken advantage of these laws is because many women do not know about them and further it is regarded as shameful for a woman to be seen to be interested in the family property.

Although women’s access to land varies throughout the country, the laws of inheritance, ownership and control of land typically discriminate women, because the

³⁷⁹ It should be noted that this case only deals with the control over the administration of the estate – but from research has been discovered that the Attorney General usually gives the deceaseds widow a share of the estate regardless of the customary law.

³⁸⁰ Supra note 376 above @Pg. 73

³⁸¹ This Act integrates the customary intestate succession laws, and alters the rights of widows and children in respect of intestate estates – The surviving spouse and children are given the right to inherit directly from the deceased’s spouses parents or deceased estate

³⁸² This Act provides a unified law for the making of wills.

man is seen to be the head of the household he is usually favoured in the allocation of agricultural land.³⁸³

In a study conducted in 1990 it was discovered that although female-headed households represent about one third of all rural Zambian households, few single women farmers received assistance from any programmes funded by donor agencies, except where funds were clearly earmarked for women.³⁸⁴

It has further been noted that the courts in property disputes³⁸⁵ have always favoured granting the woman compensation rather than appropriate land. The only plausible explanation for the court's decision is the general view held by judicial officers that property orders in favour of the women are contrary to customary law.

The courts have not, faced adequately the problem of the unsuitability of the customary rule of inheritance, to modern conditions and to the bulk of marriages under the Marriage Act. The courts when faced with this problem have not enquired into the nature of the property at issue; the differences between traditional society and modern society; and the question of the maintenance of the widow and children after the death of the husband and father.³⁸⁶ In failing to do this, the courts ignore their responsibility for developing the law according to the needs of society.

³⁸³ See note 386 below

³⁸⁴ Felicia Sekula- Violence against women in Southern Africa

³⁸⁵ Whether dealing with a death or divorce

³⁸⁶ Muna Ndulo · *Widows Under Zambian Customary Law and the Response of the Courts* CILSA 1995 Vol. 18

It must also be noted that application of the traditional concepts of the customary law of succession to women in a modern context is unjust, discriminatory and outlawed by the Zambian constitution.³⁸⁷

Zimbabwe

African women may own immovable property and in practice rights of African spouses to immovable property were determined as if they were married out of community of property. It therefore appears that African women have always been capable of owning immovable property (outside of communal or native reserve property) although very few women had the resources to do so.

Under customary law on divorce the husband is entitled to retain all property.³⁸⁸ This inequitable position of the law was one of the reasons the legislature enacted section 7 of the *Matrimonial Causes Act*³⁸⁹, which allows the court to reallocate property equitably on dissolution of marriage by divorce. The problem is that it does not apply to marriages in community of property and has no bearing on succession.³⁹⁰

³⁸⁷ Supra note 377 above

³⁸⁸ except the *mombe yohumai/inkomo yohlanga* property which the woman acquires on the marriage of her daughter. *Maoko/impaphla zezandla* property which a woman acquires through her own skill.

³⁸⁹ See section on marriage and divorce in Zimbabwe for a full discussion of Act.

³⁹⁰ Ibid

The law of succession is governed by general law or customary law and has in the past depended on the race of the deceased. If the deceased was an African the customary law would apply and if the deceased was not an African the general law would apply. Under customary law females are not allowed to inherit and the widow is taken care of by the male heir. If the heir did not honour his obligations of support he could be compelled to do so. This view of the duty of the heir was adopted in *Masongo v Masongo*,³⁹¹ where Justice Beck held that the heir at customary law, in the absence of suitable and available alternatives was obliged to provide accommodation for the widow or widows of the deceased and their children.

However, the situation in Zimbabwe has been precarious as can be seen in the case of *Magaya vs Magaya*³⁹² concerning the application of African customary law to succession. The deceased in this case, had married two wives in terms of the African customary law. One female child was born Venia Magaya, the appellant who claimed heirship to the deceased estate.³⁹³ The community court magistrate held that the applicant could not be appointed as heir as she was a woman.³⁹⁴ In terms of the applicable customary laws³⁹⁵ the eldest male heir succeeds the deceased and in this case there was a male heir.

This decision was taken on appeal.³⁹⁶ The appeal was dismissed and the court concluded that the “disabilities and discrimination suffered by women were not

³⁹¹ Unreported SC/66/86

³⁹² Case SC 210/98- Reported in *Commonwealth Law Reports* 2000

³⁹³ Supra note 392 above @ 1 f-g

³⁹⁴ Supra note 392 above @1 g-h

³⁹⁵ Namely section 68 (1) of the *Administration of Estates Act*

³⁹⁶ Supra note 392 above

predicated upon their minority status but rather were embedded in the patrilineal nature of African society.” The learned judges³⁹⁷ stated further that to allow women to inherit in a broadly patrilineal society would disrupt the African customary laws and would be tantamount to bestowing ‘additional rights’ upon women.³⁹⁸

It is respectfully submitted that the learned judges gave precedence to African customary law over its international and constitutional obligations³⁹⁹ to protect women and failed to advance gender equality. Instead it just reaffirmed male privilege. Further the decision in *Katekwe vs Muchabaiwa*⁴⁰⁰ was criticized and the five judges held unanimously that it was wrongly decided. In *Katekwe* the Supreme Court held that under the Legal Age of Majority Act,⁴⁰¹ a daughter no longer needed a guardian to sue for her and she could do so in her own right.

³⁹⁷ MuचेचेћетереJA; Gubbay CJ; Ebrahim and Sandura JJA concurring

³⁹⁸ Supra note 392 above @13 f-g

³⁹⁹ In this case Zimbabwe’s obligation to respect International conventions to which it is a party and under which it was obliged to advance gender equality, was discussed and the learned *Muchechetere J* said that ‘ while I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society. I am of the view that great care must be taken when African customary law is under consideration. In the first instance it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law In the circumstances it will not be readily abandoned, especially by those such as senior males who stand to lose their position of privilege.’ He justified it by saying that the application of customary law is sanctioned by the constitution.

⁴⁰⁰ SC 87/ 84 – The supreme courts interpretation of the Legal Age of Majority Act was discussed and has been followed in a number of significant decisions like, *Chihowa vs Mangwende*- 1987 (1) ZLR 228 and *Mverecheda vs Mverecheda* SC 52/88 amongst others. Both these cases advanced women’s rights under customary law.

⁴⁰¹ Discussed under marriage and divorce

The court went further and pointed out that an African woman who was a major could now contract a marriage without the consent of her customary guardian and without payment of bridewealth. At the time, *Katekwe* was hailed as a victory for women's rights.

It is disappointing to note that in 1993 the government of Zimbabwe issued a white paper on marriage and inheritance, and it concluded that the customary laws of property were not well suited to modern urban life. It made particular mention of the wife's limited right to own or inherit property and its unacceptability. It proposed that the customary laws of succession should be revised to provide for the equal division of the deceased's estate between the surviving spouse and the children,⁴⁰² and in contrast the judiciary in the *Magaya* case refused to take the opportunity to implement reform.

More surprisingly, in the decision of *Chihowa vs Mangwende*⁴⁰³ the deceased had died intestate leaving his widow and two major daughters. One daughter applied to succeed to her father's estate relying on the *Legal Age of Majority Act*.⁴⁰⁴ The learned judge said, "It is my opinion that there is nothing now in any enactment or at customary law which prohibits a woman from being appointed an intestate heiress". This is a good example of the positive development of African customary law.

⁴⁰² *Journal of African Law* 1994 @67

⁴⁰³ 1987 1 *Zimbabwean Law Report* @ 228

⁴⁰⁴ Act 15 of 1982

However, it is noted, that the *Chihowa* and *Katekwe* cases were decided before the *Magaya* case. Is it then a question of the courts taking one step forward and two steps backward? It is even more disappointing to note that the judges in the *Magaya* case, said that *Katekwe* was wrongly decided knowing full well that the *Katekwe* decision was heralded as a victory for womens rights.

It is submitted that the judiciary and government need to make the advancement of gender equality a priority, especially in light of an article on human rights watch⁴⁰⁵ which stated, 'In August 1998 the government denied a petition by women's groups that one third of the land redistributed under the land reform programme be headed by women' (which reportedly make up one third of all rural households). Joseph Msika, Minister without Portfolio and in charge of the land resettlement said: "I would have my head cut off if I gave a woman land".⁴⁰⁶

⁴⁰⁵ <http://www/humanrts/watch.co.za>

⁴⁰⁶ Ibid

CONCLUSION TO PROPERTY RIGHTS AND INHERITANCE

Women in Southern Africa have suffered discrimination because of the laws relating to property and inheritance. All traditional systems prohibit a woman's accession to property on the death of her father or husband. These laws are a major obstacle to women's rights to equality and go against all that international women's document are hoping to achieve.

Property grabbing is equivalent to violence against women and depletes whatever little resources she has. This practice is prevalent in countries like Zambia and the courts have not addressed this issue adequately. In most cases the courts will grant a woman rights to maintenance and usufructuary rights, but not ownership. It is submitted that traditional mindsets need to change, and governments should enact laws that protect widows.

In general the rules of inheritance are undeveloped. Women in Southern Africa bear the brunt of running the household and it seems ludicrous that they are expected to do so without any real rights to property. The major purpose of succession is to provide for one's dependants after one's death. The presumption that only males can fulfill this obligation is unreasonable as throughout Africa, women are the primary subsistence farmers and the main care givers and bear the sole obligation for child rearing.

CONCLUSION

From the above discussion it can be concluded that international human rights norms are not incompatible with African law and can effectively be utilized by the courts for the advancement of women's rights. All of the countries discussed contain statutory laws that grant women their rights to equality but the courts in their application of these laws have made these rights subject to customary practices that limit women's rights. Some judicial officers in Southern Africa seem to think that by preserving customary law precepts they are protecting 'African heritage.' However this is not the case. Customary law should not be perceived as indistinguishable from 'African heritage' but should be subject like any other law to the changing times and opinions of the people.

The courts should not forget that respect for the law could only be achieved if the law furthers the needs and conforms to the circumstances of the society immediately subject to it. Their failure to use the law to achieve just social solutions to problems and to reform society effectively thwarts development and advancement in customary law, and consequently also reduces respect for it.⁴⁰⁷ We must also remember that the customary law of today is the product of colonialism and capitalism, which has resulted in a somewhat, skewed version of the original customary practices. It is suggested that 'living law' which reflects the real life experiences of people on a day to

⁴⁰⁷ Muna Ndulo 'Widows under Zambian Customary Law and the Response of the Courts' CILSA 1995 Vol 18

day basis should be encouraged as a potential force for the improvement of women's rights.

From the discussions above it has emerged that although courts have exposed and opposed women's human rights violations in Southern Africa, a lot of work still has to be done especially in legal literacy⁴⁰⁸, to ensure that women take their issues to the courts and demand a hearing. Governments also have an obligation to guarantee that women are given these rights and the judiciary is entitled to enforce these rights and should not sacrifice women's rights in the name of culture.

We must remember that women in Africa especially those in rural areas suffer by comparison with men and women in most other parts of the world as a result of cultural barriers interacting with low levels of economic development. Poverty marks more than three-quarters of the residents in sub-Saharan Africa. Further no discussion of sustainable economic development is complete without the input of women, who in many places are the backbone of economic development, and in every place are the persons who must cope on a daily basis with the consequences of inequitable development⁴⁰⁹.

⁴⁰⁸ Legal literacy has been defined as an instrument of empowerment going far beyond the use of laws and procedures as the are. The idea is not to familiarize women with the complexities of the legal system so that they would be trapped within them, but to enable women to take their issues to the court without fear of prejudice or ridicule and to encourage them to be critical of laws that discriminate against them.

⁴⁰⁹ - Marsha A. Freeman 'Women, Law and the Land at the Local level: Claiming Women's Human Rights in Domestic Legal Systems' *Human Rights Quarterly* Vol. 16 1994

Given Southern Africa's precarious economic position it cannot afford to have more than half of its population without basic human rights that are imperative to their personal upliftment and without which they cannot make a greater contribution to the economy of Africa. The full and complete development of a country or a continent requires the freeing of its human potential and the fullest participation of all its citizens in all fields, men and women alike.⁴¹⁰ Those who because of outdated notions of equality cannot support the emancipation of women should at least lend their support in order to achieve economic development in Africa. The economics of African countries will never develop fully unless they promote the rights of women.⁴¹¹

Tremendous potential exists for developing and applying international human rights norms in the endeavor to improve women's rights throughout the world. Non discrimination clauses in laws and constitutions can be invoked to establish women's capacity to function in every respect as adults in their society. It is important for governments to establish women's rights by legislation, even in circumstances in which women may not be able to take immediate advantage of them, because unless they are in place, women have little hope of gaining new ground.⁴¹²

Movements to defend human rights always emerge in response to violations. This has occurred with women's rights as in any other human rights issue and silence enables the continuation of violations. The worst response to violations is to do nothing.

⁴¹⁰ Winston Langley ' *The Rights of Women, The African Charter, And The Economic Development of Africa* ' Boston Third World Law Journal 1987 Vol 7 @ 215

⁴¹¹ Ibid

⁴¹² Supra note 410 above

Violations have to be recognized as human rights issues in order to be reported, prosecuted, condemned and remedied

RECOMMENDATIONS

The following recommendations are suggested:

1. Existing laws should be used for legal activism. Legal reform should be sought through reinterpretation of accepted laws by applying them to women's situations, such as using international human rights conventions for addressing violence against women.
2. The constitutionality of biased laws and justice system practices should be questioned. Linkages between violations of human rights and laws that are oppressive to women in many areas including personal and family law should be identified and remedied.
3. We should affirm and argue the universality of women's human rights regardless of religion or culture.
4. We should use international law and standards to push for reform, either through cases brought in the international arena or by using international principles to set standards for domestic law.
5. Finally, we should hold governments accountable for human rights violations against women that exist in their countries.

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APPENDIX

List of International Documents protecting Women's Rights

1. Charter of the United Nations
2. The Universal Declaration of Human Rights
3. The International Covenant on Civil and Political Rights
4. The International Covenant on Economic, Social and Cultural Rights
5. Convention on the Nationality of Married Women
6. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage
7. Convention on the Political Rights of Women
8. Convention on the Elimination of All Forms of Discrimination against Women