EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS

Journal of the Human Rights and Peace Centre (HURIPEC)
School of Law, Makerere University

Volume 21, Number 1
June 2015

EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS

Volume 21 Number 1, 2015

EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS

Volume 21 Number 1, 2015

EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS

Volume 21 Number 1, 2015

The *East African Journal of Peace and Human Rights*, ISSN: 1021-8858 is a bi-annual published by the School of Law, Makerere University under the auspices of the Human Rights and Peace Centre (HURIPEC). Contributions for publication should be original. The text of the article, including footnotes, should be double-spaced. Footnotes should be placed at the bottom of each page and citations should follow *A Uniform System of Citation* (15th ed). Contributors are requested to indicate their professional, academic, and other qualifications as well as their e-mail and physical address for communication. Published authors will receive a free copy of the Journal in which their contribution appears.

Works published in the Journal do not necessarily represent the views of the Editors, the International Advisory Board, or the Human Rights and Peace Centre.

This journal should be cited as EAST AFR. J. PEACE HUM. RIGHTS.

Further inquiries should be directed to:

Denis Asiimwe Katebire
HURIPEC
School of Law
Makerere University
P.O. Box 7062
Kampala
UGANDA
Telephone: (256-414) 532-954/(256-752) 465185
Fax No: (256-41) 543-110 or 532-956
E-mail: dasiimwe@law.mak.ac.ug

TABLE OF CONTENTS

ARTICLES

DEVELOPMENT OF ENVIRONMENTAL RIGHTS IN INTERNATIONAL LAW AND THEIR IMPACT IN TANZANIA

Elia Mwanga*

ABSTRACT

Today, it is fully recognized that there is a direct link between human rights and environmental protection. Environmental impacts may curtail the enjoyment of basic human rights including the right to life. This has led to a shift from traditional approaches to environmental protection to a human rights-based approach. International and regional human rights treaties clearly stipulate that every person has a right to a clean and healthy environment. These treaties including the African Charter on Human and Peoples' Rights, to which Tanzania is a party, require the member states to ensure that they promote the right to a clean and healthy environment in their territories. This article examines the development of this right in international law and how the same is reflected in the legal framework of Tanzania. The findings show that the country is still lagging behind the international standards. Tanzania is also yet to domesticate international treaties that provide for the right to a clean and healthy environment to which she is a party. The author, therefore, argues that the country should respect its commitments to protect human rights by incorporating the provisions of international and regional treaties, which provide for the right to a clean and healthy environment, in her domestic laws.

I. INTRODUCTION

It is an indisputable fact that there is a direct link between human rights and protection of the environment. It is well understood that environmental impacts such as water, air and land pollution curtail the enjoyment of some basic human rights such as the right to life.[1] A clear illustration of the link between environmental harm and human rights

---

* Assistant Lecturer in Law at the University of Dodoma. E-mail: <mwanga23@gmail.com>

1. Life is a pre-condition for the enjoyment of all internationally guaranteed human rights. This implies that the right to life is the basis for the enjoyment of other human rights. Since degradation of the environment threatens human life, it is correct, therefore, to conclude that in a degraded environment no other human right can be secured. In other words, environmental protection is a pre-condition to the enjoyment of internationally guaranteed human rights, especially the rights to life and health. The

violations is elucidated by Cassel in her article entitled "Enforcing Environmental Human Rights: Selected Strategies of US NGOs."[2] Cassel points out that when air is polluted by toxic fumes, people who breathe those fumes are injured, perhaps even killed. When water becomes contaminated, people who drink that water may become sick, and pregnant women who drink it may pass the contaminants on to their unborn babies. Cassel further points out that when climate change leads to the melting of the polar caps at rates previously unheard of, communities that for millennia have built their cultures atop that polar ice are left to sink, along with the seals, penguins, and polar bears that have depended on them for their nourishment for generations. Cassel concludes that anytime the natural environment is seriously harmed, people that depend on it are inevitably harmed as well.[3]

The recognition of the link between environmental harms and the violations of human rights has led to a shift from traditional approaches to environmental protection to a human rights-based approach. On a factual level, it has already become apparent that preservation, conservation and restoration of the environment are a necessary and integral part of the enjoyment of basic human rights, *inter alia,* the rights to health, food and life including a decent quality of life.[4] It is recognized by various institutions responsible for promoting and protecting human rights including courts that human rights may be infringed upon by environmental harm resulting from various activities including industrial activities.[5]

UNHRC res. 10/4 (2009) on Human Rights and Climate Change noted that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights, *inter alia*, the rights to life, adequate food, the highest attainable standard of health, adequate housing, self-determination and access to safe drinking water and sanitation.

2. J. Cassel, *Enforcing Environmental Human Rights: Selected Strategies of US NGOs* 6 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS (2008) 105.

3. *Id*.

4. C. Philippe, *Definition of an Environmental Right in a Human Rights Context*, 13 NETHERLANDS QUARTERLY OF HUMAN RIGHTS (1995) 26.

5. For example, the European Court of Human Rights has repeatedly recognized that human rights may be infringed upon by environmental harm caused by industrial activities. See the cases of *Lopez Ostra v. Spain*, 20 Eur HR Rep 277 (1994); and *Guerra & Others v. Italy*, 26 Eur. HR Rep. 357 (1998). Klaus Toepfer, the Executive Director of the United Nations Environment Programme, in his speech to the 57th Session of the Commission on Human Rights in 2001, also noted that human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to

Generally, today, environmental issues in international law as well as in many municipal laws are based on the human rights-based approach where environmental rights are considered among basic human rights. Various countries in the world have included environmental rights in the list of basic human rights protected under the constitution. This article focuses on tracing the development of environmental rights in Tanzania, particularly the right to a clean and healthy environment. It analyses the legal framework of Tanzania to find out how the law addresses the right to a clean and healthy environment and the judicial approach to the issue. The article also examines the enforceability of this right and its challenges.

II. CONCEPT OF ENVIRONMENTAL RIGHTS

Before discussing the emergence of the right to a clean and healthy environment both in international and municipal laws of Tanzania, in particular, it is helpful to briefly discuss the concept of environmental rights. In this article, environmental rights are categorized into two, namely, procedural environmental rights and substantive environmental rights. Procedural environmental rights include the rights to access environmental information, to participate in environmental decision-making, and to access justice in environmental matters.[6]

Procedural environmental rights are recognized in various international and regional instruments as well as in municipal laws of various countries. Principle 10 of the Rio Declaration articulates procedural environmental rights as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the

---

recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well. *See,* D. Shelton, Human Rights, Health and Environmental Protection: Linkages in Law and Practice (2002) Health and Human Rights Working Paper Series No. 1, at 3 - 4, retrieved from <http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf>, (accessed 16 July 2014).

6. N. Vlavianos, The Intersection of Human Rights Law and Environmental Law (Paper presented in a Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, 23-24 March 2012, University of Calgary), retrieved from <http://cirl.ca/system/files/Nickie_Vlavianos-EN.pdf>, (accessed on 16th July 2014).

> environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[7]

Apart from being recognized in soft laws, procedural environmental rights are also recognized in various binding international instruments. For example, the Espoo Convention requires the state parties to ensure that the public of the affected party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections to the proposed activity, and for the transmittal of these comments or objections to the competent authority of the party of origin, either directly to this authority or, where appropriate, through the party of origin.[8]

There are also regional instruments that recognise procedural environmental rights. A good example in this aspect is the European Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[9] The East African Community Protocol on Environment and Natural Resources Management requires the partner states to adopt common policies, laws and programmes relating to access to information, justice and the participation of the public in environmental and natural resource management. The Protocol further calls on the partner states to create an environment conducive for the participation of civil society and non-governmental organisations, the public, local communities and the

---

7. UN Declaration on Environment and Development, 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874 (1992) [Rio Declaration]. Procedural environmental rights are also recognised by the World Charter for Nature of 1982. Principle 23 of the Charter states that all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation, G.A. Res. 37/7, UN GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51(1982), 22 I. L.M.455.

8. Art 3(8) of the Convention on Environmental Impact Assessment in a Transboundary Context, 30 I.L.M. 800 (1991) (Espoo Convention).

9. Done at Aarhus, Denmark, on 25 April 1998 (Aarhus Convention).

private sector in environment and natural resource management.[10]

With regard to substantive environmental rights, two approaches exist for recognizing these rights. Firstly, the recognition that substantive environmental rights are implicit within already established human rights. Secondly, the recognition of a free standing right to a clean, safe, and healthy environment.[11] The first approach involves the recognition that existing human rights may be violated by environmental harms resulting from various human activities. Scholars agree that environmental degradation can result in violations of various human rights recognized around the world including the rights to life, adequate food, the highest attainable standard of health, adequate housing, self-determination and access to safe drinking water and sanitation.[12]

Tribunals at the international, regional and domestic levels have given the existing basic human rights a wider interpretation in order to protect environmental rights from state-sponsored violations. For example, the European Court of Human Rights held in the case of *LCB v. United Kingdom*[13] that Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedom[14] obliges states to take appropriate steps to safeguard the life of those within its jurisdiction. The wide interpretation of the right to life would allow extending it to the right to the environment.[15]

With respect to the second approach to environmental rights, a free-standing

---

10. Art 34 of the Protocol on Environment and Natural Resources Management, Done at Arusha, Tanzania on 3 April 2006.

11. Vlavianos, *supra* note 6, at 4.

12. Vlavianos, *supra* note 6, at 4. See also the UNHRC res. 10/4 (2009) on Human Rights and Climate Change. , In the Case Concerning the Gabcikovo-Nagymaros Project, Justice Weeramantry of the International Court of Justice in his separate opinion explained that protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. See *Case Concerning the Gabcikovo-Nagymaros Project* [1997] I.C.J. Rep. 7, 1997 WL 1168556 (I.C.J.) at 88, cited in L.M. Collins, *Are We There Yet? The Right to Environment in International and European Law*3 MCGILL INTERNATIONAL JOURNAL OF SUSTAINABLE DEVELOPMENT LAW AND POLICY (2007) 121.

13. The decision of the European Court of Human Rights 9 June 1998 Appeal No. 23413/94, reported in European Human Rights Report, 1998, 27, 212. See also the cases of *Lopez Ostra v. Spain*, *supra* note 5; and *Guerra & Others v. Italy*, *supra* note 5.

14. Rome, 4.XI.1950

15. A. Andreson and T. Kolk, *The Role of Basic Rights in Environmental Protection: basic right to environment de lege ferenda in the Estonian constitution*, 8 JURIDICA INTERNATIONAL (2003) 141.

environmental right has been variously described as a right to a healthy, safe, clean and/or ecologically balanced environment.[16] Various international and regional instruments recognize this right either expressly or implicitly.[17] It is estimated that more than 90 national constitutions recognize that their citizens have a substantive right to live in a clean and healthy environment.[18] Human rights tribunals enforcing international and regional human rights treaties have built a substantial body of decisions enforcing the right to a healthy environment.

III. DEVELOPMENT OF RIGHT TO CLEAN AND HEALTHY ENVIRONMENT IN INTERNATIONAL LAW

It is important to note at this juncture that the phrase the right to a clean and healthy environment is a modified form of the phrase the right to environment. The right to environment has been modified by a variety of adjectives such as clean, healthy, ecologically balanced, sound, healthful, adequate, viable, decent, sustainable, etc.[19] This article prefers the use of the phrase the right to a clean and healthy environment. The use of this phrase is based on the fact that the emergence of the right to environment as a basic human right has been facilitated by the understanding that a clean and healthy environment is a necessary precondition for the enjoyment of other basic human rights protected in various international instruments. A degraded environment is, therefore, an obstacle to the enjoyment of some of basic human rights. Thus the right to environment achieves a number of objectives. The first is to ensure that the environment is clean, which entails that the environment is free from contamination resulting from environmental harms. Second, the right to environment aims at ensuring that the environment is healthy, which means that the environment protects people from environmental suffering.

---

16. Vlavianos, *supra* note 6 at 4.

17. Examples of international and regional instruments which recognise the right to clean and healthy environment include: the International Covenant on Economic, Social and Cultural Rights of 1966, entered into force on 3 January 1976; the Convention on the Rights of the Child of 1989; the Stockholm Declaration of 1972; the Rio Declaration of 1992; the African (Banjul) Charter on Human and Peoples' Rights of 1981, entered into force on October 21, 1986; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1969; and the Aarhus Convention of 1998.

18. Vlavianos, *supra* note 6, at 4.

19. Collins, *supra* note 12, at 136 – 137.

The right to a clean and healthy environment falls under the third generation rights[20] which depart fundamentally from the traditional human rights as we know them.[21] The right to a clean and healthy environment requires a healthy human habitat, including clean water, air, and soil that are free from toxins or hazards that threaten human health. The right to a clean and healthy environment prohibits governments from interfering directly or indirectly with the enjoyment of the right to a clean and healthy environment. The right also requires the governments to adopt necessary measures to achieve the full realization of the right to a clean and healthy environment. It further prevents third parties such as corporations from interfering in any way with the enjoyment of the right to a clean and healthy environment.[22]

The right to a clean and healthy environment first appeared in the Stockholm Declaration on Human Environment.[23] Principle 1 of the Declaration states that:

---

20. The Czech jurist and first Secretary General of the International Institute for Human Rights in Strasbourg divided human rights into three generations on early 1977. First generation rights refer to traditional civil and political liberties prominent in Western liberal democracies, such as freedom of speech, religion, and the press, as well as freedom from torture, which presuppose a duty of non-interference on the part of government towards individuals. First generation rights are designed to protect the individual against state interference. Second generation rights, also referred as Economic, Social and Cultural Rights, prohibit government from denying access, entitle individuals to get protection from state if third parties interfere with rights, oblige states to take measures to improve overall social situation. These rights include: the right to education; the right to housing, the right to health; the right to employment; the right to an adequate income; and the right to social security. Third generation rights or collective rights are rights which are common to mankind and an individual can only enjoy them as part of a group, a society or community and not merely an individual as such. These rights include: the right to economic development; the right to prosperity; the right to benefit from economic growth; the right to social harmony; and the right to a healthy environment, clean air and water, etc. With the exception of the African (Banjul) Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, third generation rights have not been incorporated into human rights treaties yet. For further reference, see R. Oliver, *Third-generation Human Rights and the Protection of the Environment in Namibia*, in HUMAN RIGHTS AND THE RULE OF LAW IN NAMIBIA (Nico Horn and Anton Bösl eds., 2008), 101 – 103, retrieved from <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/ruppel1.pdf>, (accessed 24 July 2014).

21. C. MAINA HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS (1997) 149 – 150.

22. Oliver, *supra* note 20, at 103.

23. Declaration of the United Nations on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14/ Rev.1, 11 I.L.M. 1416 [Stockholm Declaration]. David states that if human rights trace their roots to a specific historical wrongs, then it is understandable that the right to a healthy environment is not found in pioneering human rights instruments such as the Universal Declaration of Human Rights

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Although the wording of the Declaration does not provide explicitly for the right to a clean and healthy environment, it is sufficient to argue that the purposive interpretation of principle 1 would embrace the right to a clean and healthy environment.[24] This argument is supported by the Travaux Preparatoires of the Committee of the United Nations Conference on the Human Environment which indicate that the draft of the Stockholm Declaration was based on the recognition of the rights of individuals to an adequate environment.[25]

Article 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR) provides that the states parties to the covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[26] The Covenant calls on state parties to take various steps in order to ensure that the right to the enjoyment of the highest attainable standard of physical and mental health is fully realized in their territories. These steps include, *inter alia*, the improvement of all aspects of environmental and industrial hygiene. It may be argued that the CESCR recognises that the right to the enjoyment of the highest attainable

---

(1948), the International Covenant on Civil and Political Rights (1966), or the International Covenant on Economic, Social and Cultural Rights (1966). David assets that society's awareness of the magnitude, pace and adverse consequences of environmental degradation was not sufficiently advanced during the era when these agreements were drafted and negotiated to warrant the inclusion of environmental concerns. According to David, the first written suggestion that there should be a specific human right to a healthy environment came of Rachel Cason in 1972. *See,* D. BOYD THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS AND THE ENVIRONMENT (2012) 12.

24. Commentators point out that at the time of the Stockholm Conference, the United States, which vehemently opposed the inclusion of a similar right twenty years later in the Rio Declaration, proposed the inclusion of a specific right to a clean environment. The formulation proposed by the United States reads as follows: "Every human being has a right to a healthful and safe environment, including air, water and earth, and to food and other material necessities, all of which should be sufficiently free of contamination and other elements which detract from the health or well-being of man." The conference participants, particularly those from developing countries, however, preferred the indirect formulation in Principle 1; therefore, the American formulation was rejected. See Collins, *supra* note 12, at 131.

25. Collins *id*.

26. 19 December 1966, 993 U.N.T.S 3, Can. T.S. 1976 No. 46, U.K.T.S. 1977 No. 6 (entered into force 3 January 1976).

standard of physical and mental health cannot be realized fully in a degraded environment or an environment which is not clean and healthy.

Another significant event in the international development of the right to a clean and healthy environment was the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil. At the end of the conference, the participants adopted a Declaration on Environment and Development, the Rio Declaration. Principle 1 of the Declaration recognizes that human beings are at the centre of concerns for sustainable development.[27] The principle further provides that human beings are entitled to a healthy and productive life in harmony with nature.[28] Commentators argue that principle 1 of the Rio declaration describes the ideals of a human right to a healthy environment, if not explicitly recognizing such a right.[29]

Since the Rio Conference, the right to a clean and healthy environment has been recognized in various international and regional instruments (both soft law and hard law). At the regional level, the African Charter on Human and Peoples' Rights,[30] the East African Community Protocol on Environment and Natural Resources Management and the Additional Protocol to the American Convention on Human Rights in the area of Economic Social and Cultural Rights[31] (the Protocol of San Salvador) serve as examples. The African Charter was the first human rights treaty to contain the right to a clean and healthy environment.[32] Article 24 of the Charter explicitly provides that all peoples have the right to a general satisfactory environment favourable to their development. The Charter further obliges states parties to promote and ensure, through teaching, education and publication, the respect of the rights to a clean and healthy environment as well as freedoms contained in the Charter, and to see to it that the freedoms, rights and corresponding obligations and duties provided in the

---

27. The concept of sustainable development was firstly proposed by the report of Brundtland Commission of 1987. According to the Brundtland Commission Report, sustainable development means the development that meets the need of present generation without compromising the ability of future generations to meet their needs. *See,* BRUNDTLAND COMMISSION REPORT, OUR COMMON FUTURE (1987).

28. UN Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874 (1992) [*Rio Declaration*].

29. Collins, *supra* note 12, at 132.

30. African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, Doc. OAU/CAB/LEG/67/3/Rev.5, 21 ILM 59 (1982), [*African Charter*].

31. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (1969), 9 I.L.M. 673, [*American Convention*].

32. *See* Maina, *supra* note 21, at 149.

Charter are understood.[33]

In addition to international and regional instruments which recognize explicitly the right to a clean and healthy environment, there are also various national constitutions which recognise this right. It is argued that the vast majority of domestic constitutions promulgated since 1970 recognize some form of the right to a clean and healthy environment, and/or correlative state duties to protect the environment.[34] The American environmental NGO, Earthjustice Legal Defense Fund, in its 2005 report to the 61st Session of the United Nation Commission on Human Rights, noted that there are now 117 out of 193 countries whose national constitutions mention the protection of the environment or natural resources. Earthjustice Legal Defense Fund further asserts that of these, 56 constitutions explicitly recognize the right to a clean and healthy environment, and 97 make it the duty of the national government to prevent harm to the environment.[35]

Today, the right to a clean and healthy environment is regarded as a principle of customary international law. Collins argues that the widespread acceptance of Principle 1 of the Rio Declaration indicates that the human entitlement to a healthy and productive life in harmony with nature has become a principle of customary international law.[36] Collins' argument is supported by Rodriguez-Rivera, who particularly argues that:

> ….[T]he proliferation of international environmental law instruments during the last three decades must be explained by something more than a mere assertion that states' participation in this process has been motivated by economic or political self-interest. Most international environmental law instruments do not offer states obvious economic or political gains. On the contrary, most of these instruments impose economic and political liabilities, which are the inevitable trade-offs associated with global environmental protection. States are not in the practice of entering into international legal instruments that limit their sovereignty in the absence of recognized legal or moral duties to do so. Therefore, the exponential growth of international environmental law

33. Article 25 of the African Charter.
34. Collins, *supra* note 12, at 135.
35. *Id*., at 136.
36. *Id.,* at 133.

> instruments, in and of itself, evinces the existence of the right to environment.[37]

Apart from proliferation of international environmental law instruments, state practice and *opinio juris* with respect to the right to a clean and healthy environment can also be seen at the national level. The fact that the vast majority of national constitutions, as indicated above, recognize the right to a clean and healthy environment and the widespread promulgation of domestic environmental protection legislation constitute evidence that the right to a clean and healthy environment is accepted as customary international law. This is where laws are enacted in response to a perceived international legal obligation.

In this regard, Collins argues that national constitutional provisions may be evidence of general principles of law common to major legal systems.[38] Collins further points out that in the realm of human rights specifically, provisions of national constitutions enacted pursuant to a perceived international legal obligation may also constitute state practice giving rise to customary international law. Collins therefore concludes that the prevalence of environmental rights in domestic constitutions is strong evidence of the emergence of the right to a clean and healthy environment as a principle of customary international law.[39]

At this juncture, it is correct to conclude that today the right to a clean and healthy environment is recognized not only as a right protected in the international human rights instruments but a principle of international customary law. State practices accept that countries all over the world have an obligation to ensure the promotion and protection of the right to a clean and healthy environment in their territories.

IV. THE EMERGENCE OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN TANZANIA

The development of the right to a clean and healthy environment in Tanzania is directly linked with its social and political background. Tanzania is a union between two states, namely, Tanganyika and the Zanzibar Isles. Before the Union, Tanganyika was first

---

37. Collins, *supra* note 12, at 135.

38. See Art 38(1)(c) of the Statute of the International Court of Justice, June 26, 1945, Can. T.S. 1945 No. 7.

39. Collins, *supra* note 12, at 136.

under German rule until after the First World War when it was handled over to the British as a mandate territory under the League of Nations. After the Second World War, Tanganyika became a United Nations trust territory under British control before being granted independence in 1961.

On the other hand, Zanzibar was a British protectorate with an Arab Sultan and was granted independence by Britain in 1963. In 1964, a revolution took place and the government was overthrown leading to the establishment of the People's Republic of Zanzibar. In the same year, Tanganyika and Zanzibar united to form a sovereign republic, the United Republic of Tanzania. In the Articles of Union, it was agreed that Zanzibar would retain its autonomy over certain matters referred to as non-union matters. The list of union matters is provided in the Constitution of the United Republic of Tanzania. However, it is worth noting that the Constitution of the United Republic is the supreme law of the state and can overrule the Constitution of Zanzibar. This also means that the basic rights protected in the Constitution of the United Republic cannot be abrogated by the Constitution of Zanzibar.

With respect to the right to a clean and healthy environment during the colonial period, it is worth noting that the main interests of the colonialists were cheap labour, markets and raw materials, which meant that human rights were never respected by the colonial government. During the colonial period, the right to a clean and healthy environment was unknown in the legal system of Tanzania. Even after independence, neither the Tanganyika nor Zanzibar independence Constitutions had provisions on the right to a clean and healthy environment. The 1977 Constitution of the United Republic of Tanzania, which applies to date, initially did not have any provisions on basic human rights; leave alone the right to a clean and healthy environment.[40] The bill of rights was incorporated in the Constitution in 1984 via the famous fifth amendment.

The bill of rights provides explicitly for various basic human rights, *inter alia*, the right to life;[41] the right to own property;[42] the right to privacy;[43] and the right to freedom of movement.[44] However, the Constitution does not explicitly provide for the

---

40. It is argued that Julius Nyerere, the first president of Tanganyika, when negotiating for independence in London and Dar es Salaam rejected the inclusion of a bill of rights in the independence Constitution of 1961. The same position was repeated during the Republican Constitution of 1962, the Interim Constitution of 1965, and that of the United Republic of Tanzania of 1977.

41. Art. 14 of the United Republic Constitution of 1977 as amended from time to time.

42. Art 24.

43. Art 16.

44. Art 17.

right to a clean and healthy environment. Although the environmental framework legislation which regulate the conservation and management of the environment in Mainland Tanzania and Zanzibar—the Environmental Management Act[45] and the Environmental Management for Sustainable Development Act[46]—explicitly provide for the right to a clean and healthy environment, these provisions are not enforceable.[47] For example, in Mainland Tanzania, for individuals to bring a suit before a court of law under the Environmental Management Act even where his right to a clean and healthy environment has been violated, they need first to establish that there was a breach or threatened breach of a provision of the act.[48]

However, although the Constitution does not explicitly provide for the right to a clean and healthy environment, it is correct to argue that Tanzania is under obligation to ensure that this right is protected and promoted in its territory. This argument is based on three grounds. Firstly, from the fact that Tanzania is a signatory to and has ratified various international and regional instruments which recognize the right to a clean and healthy environment. Examples of these instruments include: the International Covenant on Economic, Social and Cultural Rights;[49] the African Charter on Human and Peoples' Rights;[50] and the East African Community Protocol on Environment and Natural Resources Management.

Under Article 8 of the Protocol on Environment and Natural Resources, the partner states recognize that a clean and healthy environment is a prerequisite for sustainable development. They therefore commit themselves to ensure that conservation and management of the environment and natural resources are treated as an integral part of national and local development plans.[51] Importantly, Article 34 of the protocol places an obligation on the partner states to guarantee their nationals the

45. Sec 4(1) of Act 20 of 2004.

46. Sec 6(1) of Act 2 of 1996.

47. The right to a clean and healthy environment under the Environmental Management Act and Environmental Management for Sustainable Development Act falls under the part which provides for general principles. In legislation, general principles are intended to guide the government and decision makers. Principles are not enforceable on their own, unless they are specifically enacted in the enforceable part of the legislation.

48. See section 202 of the Environmental Management Act.

49. Tanzania ratified the International Covenant on Economic, Social and Cultural Rights on 11 June, 1996.

50. Tanzania ratified the African Charter on 18 February, 1984. See http://www.achpr.org/instruments/achpr/ratification/ (accessed 19 July 2014).

51. Art 8(1).

right to a clean and healthy environment.[52]

Tanzania is a dualist state, meaning that for an international treaty to which the country is a party to apply it must be incorporated in the municipal law through an Act of Parliament. This does not, however, imply that treaties and other international agreements signed and ratified by Tanzania are useless as long as they have not been incorporated into municipal law. This point was made clear by the Court of Appeal of Tanzania in the case of *Transport Equipment Ltd. and Reginald John Nolan v. Devram P. Valambhia*.[53] In this case, Ramadhani JA noted that "Our Constitutional protection falls short of that which is provided by the International Covenant on Civil and Political Rights. But since we are a party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogation law extremely strictly."[54]

This interpretation of the law by the supreme court of the land is actually a reflection of the international law principle of *pacta sunt servanda*.[55] The principle of *pacta sunt servanda* requires the state party to an agreement to exercise its obligation under the agreement in good faith. The good faith element of this principle suggests that states should take the necessary steps to comply with the object and purpose of the treaty. States may not invoke restrictions imposed by domestic law as good reason for not complying with their treaty obligations provided the instrument was duly ratified by competent authorities and in accordance with constitutional and statutory requirements. Generally the principle of *pacta sunt servanda* prohibits a state party to an agreement to violate or contravene the intention of the treaty. Thus even if Tanzania has not incorporated international human rights agreements which recognise the right to a clean and healthy environment into her domestic law, the country is still bound by the international agreements it has ratified.

Secondly, as already discussed above, the right to a clean and healthy environment is today considered as a rule of international customary law. According to the International Law Association Committee on the Formation of Customary International Law, a rule of customary international law is one which is created and

---

52. Art 34(3).

53. Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 19 of 1993 (Unreported).

54. Maina, *supra* note 21, at 155.

55. The principle of *pacta sunt servanda* is provided in various international agreements. Article 26 of the Vienna Convention on the Law of Treaties (Concluded at Vienna on 23 May 1969, entered into force 1980) provides for the principle of *pacta sunt servanda* and states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."

sustained by the constant and uniform practice of states and other subjects of international law in or impinging upon their international legal relations in circumstances which give rise to a legitimate expectation of similar conduct in the future.[56]

The rules of customary international law have a universal binding force regardless of whether the party subject to them did or did not sign; and this being the case, Tanzania is duty bound to ensure that it protects and promotes the right to a clean and healthy environment in its territories. Tanzania, like other states, has a duty to observe and comply with the rule of international customary law providing for the right to a clean and healthy environment. The third ground relates to the judicial considerations of the right to a clean and healthy environment in Tanzania. This ground is discussed comprehensively below.

V. JUDICIAL CONSIDERATION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN TANZANIA

The judiciary in Tanzania plays a significant role in the development, protection and enforcement of the right to a clean and healthy environment. Despite of the fact that the Constitution of the United Republic does not explicitly provide for the right to a clean and healthy environment, the court has been using the existing basic human rights to protect the same. In several cases, the court has invariably held that the right to a clean and healthy environment is implied under Article 14 of the Constitution of the United Republic which provides for the right to life. The basis of this argument has been that any environmental degradation which puts someone's life into danger interferes with that person's right to life. The landmark cases in this aspect are the case of *Joseph D. Kessy et al v. Dar-es-Salaam City Council*[57] and that of *Festo Balegele and 749 others v. Dar es Salaam City Council*.[58]

In the case of Festo Balegele, the applicants who were residents of Kunduchi Mtongani in Dar es Salaam approached the court to challenge the decision of the Dar es Salaam City Council to dump waste and refuse in their residential area. The

---

56. G Postema, Custom in International Law: A Normative Practice Account, retrieved from <http://www.law.cam.ac.uk/microsites/philosophical_historical_and_legal_perspectives/documents/part_3/ii/4/GPostema_V1.doc>, (accessed 25 July 2014).

57. *Civ. Case No. 299 of 1988, High Court of Tanzania at Dar-es-Salaam.*

58. Civil Case No. 90 of 1991, High Court of Tanzania (Rubama, J) (Unreported).

applicants sought for the orders of *certiorari* to quash the decision of the Dar es Salaam City Council to dump the city's waste and refuse in Kunduchi Mtongani; prohibit the Council from continuing to carry out its decision; and *mandamus* to compel the Council to discharge its function properly by establishing an appropriate refuse dumping site for its use. The applicants argued that that the refuse generated offensive smells and attracted swarms of flies. The applicants further argued that the dumping of waste was posing a health hazard and nuisance to the residents and thereby making life extremely unbearable. Judge Rubama, reiterating a previous position of the court in the case of Joseph D Kessy[59] stated that:

> I will say at once that I have never heard it anywhere for a public authority, or even an individual, to go to court and confidently seek for permission to pollute the environment and endanger peoples' lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the Court in this infringement.

In conclusion, it may be argued that Tanzania is bound to protect and promote the right to a clean and healthy environment, not only as a response to its obligations under international and regional instruments which recognise the same, but also as a response to its own laws. Although there are no explicit provisions in the Constitution of the United Republic of Tanzanian which recognize this right, the same is implied in Article 14 which provides for the basic human right to life. The existence of judicial decisions which recognize the right to a clean and healthy environment is further evidence of Tanzania's obligation to protect and promote this right.

---

59. In the case of Festo Balegele, the applicants, who were residents of Tabata obtained a judgment from court in which the City Council of Dar es Salaam was ordered, *inter alia*, to cease using the Tabata area for dumping of garbage collected in the city, and to construct a dumping ground at site or place where the activity would not pose a danger to life. After this order, in 1991 the City Council begun to dump city waste and refuse at Kunduchi Mtongani. Hence the residents of Kunduchi Mtongani approached the court to challenge this decision.

VI. LEGAL CHALLENGES TO THE ENJOYMENT OF THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT IN TANZANIA

It is well understood that the constitution is the basic/mother law of the land. No other law should abrogate the rights established in the constitution. It is in the constitution that basic human rights are protected and promoted. The basic human rights protected in the constitution, unlike other rights which are not established by the provisions of the constitution, are inalienable and self-executing. The human right to a clean and healthy environment, like other basic human rights, also needs to be recognised explicitly in the constitution.

The rationale behind having an explicit provision in the constitution providing for the right to a clean and healthy environment may be derived from the understanding that the seriousness, extensiveness, and complexity of environmental problems prompt a need for concerted, coordinated political action aimed at protecting all members of populations on an enduring basis. It should be understood that the Constitution enshrines recognition of the importance a society attaches to environmental protection. Constitutional provisions, unlike ordinary legislation, cannot be easily amended, overruled or altogether nullified. Constitutional provisions can also promote the coordination of environmental protection measures within a jurisdiction.[60]

Express constitutional provisions can greatly strengthen the ability of advocates to use the law to protect environmental rights in a number of ways. Firstly, they can expand the scope of environmental legislative and regulatory regimes that are often insufficiently elaborated to provide comprehensive protection. Secondly, constitutional provisions can raise the relative status of environmental rights which are often viewed as secondary to other priorities.[61] It is not surprisingly to note that even in countries with advanced protection systems, one can still find deficiencies in their laws. Their laws may not address all environmental concerns, thus the importance of having an explicit provision in the constitution providing for the right to a clean and healthy environment.

The Constitution defines the scope of a right and establishes the legal basis under which that right can be enforced. Since the Constitution of the United Republic does not explicitly recognize the right to a clean and healthy environment, the

---

60. T. HAYWARD CONSTITUTIONAL ENVIRONMENTAL RIGHTS (2005) 6.

61. E.S. MASAWE, ENVIRONMENTAL RIGHTS, PROTECTION AND MANAGEMENT IN TANZANIA: JUSTIFICATION FOR THEIR INCLUSION IN THE WOULD-BE NEW CONSTITUTION (OCTOBER 2012) 4.

enforceability of the same is dependent on the actual harm to the environment which threatens someone's right to life. Therefore, where there is no actual harm to the environment which endangers someone's right, it is difficult to enforce the right to a clean and healthy environment for prevention of environmental harms which are foreseeable. In fact, using existing human rights provisions in the constitution, particularly the right to life in this case, to enforce the right to a clean and healthy environment has its own limits. This approach cannot easily resolve threats to other species or to ecological processes if these are not directly and immediately linked to human well-being.[62] Formulating a new human right to a clean and healthy environment in the constitution that is not defined in purely anthropocentric terms, on the other hand, will ensure an environment that is safe not only for humans, but one that is also ecologically balanced and sustainable in the long term.[63]

It is important to note that placing the right to a clean and healthy environment within the category of individual human rights protected in the constitution preserves the same from the ordinary political process. Individual rights significantly limit the political will of a democratic majority, as well as a dictatorial minority.[64] In attempting to attain a widely accepted policy goal, even a representative democracy may not produce legislation that limits or abolishes the individual rights protected in the constitution. This absolute limitation on domestic political decisions is potentially an important consequence of elaborating the right to a clean and healthy environment in the constitution, particularly given the high short-term costs involved in many environmental protection measures and the resulting political disfavour they experience.[65]

Prevention is a cardinal concept of human rights and environmental protection. Environmental law has developed around this central issue that has culminated in the formulation of a precautionary approach that seeks to avoid the creation of any potentially hazardous situation.[66] International human rights law is also built on the premise that any violation of human rights should be averted.[67] Since the right to a clean and healthy environment is not expressly provided for in the Constitution of

---

62. *See,* D. Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY (2008) 131.

63. *Id.,* at 131.

64. *Id.,* at 163.

65. *Id.*

66. Philippe, *supra* note 4, at 34.

67. *Id*.

United Republic, the practice evidenced by case laws shows that the assistance of the court is sought when there are already actual harms which put the life of the people in danger.[68] Thus in practice, case law has tended to compensate individuals for specific violations that have already taken place and then lay out principles aimed at preventing future violations.[69]

The right to a clean and healthy environment as defined under the Environmental Management Act is wider in scope compared to what is articulated under Article 14 of the Constitution. Section 4(2) of the Environmental Management Act stipulates that the right to a clean, safe and healthy environment includes the right of access by any citizen to the various public elements or segments of the environment for recreational, educational, health, spiritual, cultural and economic purposes. If this was constitutionally provided, the enforceability of the right to a clean and healthy environment would embrace more than the enjoyment of clean air and pure water, freedom from unwarranted exposure to toxic chemicals and other contaminants, and a secure climate. It would also cover the right to enjoy public scenic land.

Public awareness is also critical as far as protection and promotion of human rights are concerned. Recognizing the importance of public awareness of their rights, the African Charter on Human and Peoples' Rights obliges state parties to ensure public awareness of the rights provided in the Charter.[70] Public awareness may be achieved through teaching, education, publication or other means of imparting knowledge. However, public awareness on the basic human rights can best be achieved where those rights are explicitly established in the basic law of the land—the constitution.

As noted in the preceding discussion, the right to a clean and healthy environment has fully developed among the basic human rights recognized and protected under various international and regional instruments as well as national

---

68. See Civil Case No. 299 of 1988, *supra* note 57; see also Civil Case No. 90 of 1991, *supra* note 58.

69. *See* Philippe, *supra* note 4, at 34. Section 5(1) of the Environmental Management Act of 2004 provides for general principles of environmental conservation and management and allows a person to file a suit even when there is threat for violation of the right to clean and healthy environment. The provision stipulates that, "Every person may, where a right referred to in section 4 is threatened as a result of an act or omission which is likely to cause harm to human health or the environment, bring an action against the person whose act or omission is likely to cause harm to human health or the environment." If this provision was in the bill of rights, it would be possible to enforce the right to clean and healthy environment even where there are foreseeable harms to the environment that are likely to violate the right.

70. Art 25.

constitutions. Further, the right has attained the status of a rule of international customary law. This justifies the need for guaranteeing the right to a clean and healthy environment explicitly in the provisions of the constitution. Express provision of this right in the constitution may enhance public awareness of the same and enhance its enforceability when it has been actually violated or where reasonable suspicions of its violation exist.

VII. CONSTITUTIONAL REVIEW: A NEW HOPE

Most human rights activists agree that basic human rights need to be explicitly stated in the constitution. Thus, the right to a clean and healthy environment, like other basic human rights, needs to be protected in the constitution. A right established in the constitution is more secured because of constitutional supremacy. As stated earlier, no law enacted by the parliament is allowed to either abrogate or vary significantly the constitutional rights protected in the constitution, unless authorised to do so by the constitution itself.

Currently, Tanzania is undergoing a major constitutional review. The Draft Constitution has signalled that it may fulfil a long desire and calling by the human rights activists to have an express provision in the constitution which establishes the right to a clean and healthy environment. Article 41 of the Draft Constitution is a replica of provisions of section 4 of the Environmental Management Act.[71] The Article explicitly states that every person resident in the United Republic has the right to live in a clean and safe environment. The provision further places an obligation to any person who resides in Tanzania to protect the environment and to inform the respective authorities about the activities or anything that is harmful or is likely to adversely affect the environment.[72]

---

71. Section 4 of the Environmental Management Act of 2004 sets the right to clean and healthy environment as a policy principle guiding the decision makers. When a right is set as a policy principle, it is difficult for an individual to seek its protection since the guiding principles are not binding.

72. Proposed Art 41 of the second Draft of Constitution of United Republic of Tanzania published in June 2014.

VIII. CONCLUSION

The human right to a clean and healthy environment is not only a precondition for sustainable development but also a foundation for the enjoyment of other fundamental human rights protected in various national and regional instruments as well as national constitutions. The right has developed to a rule of international customary law. This evinces the importance and the need to have it explicitly recognized in the basic law of the land like other basic human rights. Although the courts have invariably held that the right to a clean and healthy environment is implied in the right to life, the importance of having it explicitly stated in the constitution cannot be ignored.

The need for clarity in its scope and enforceability, even where there are no actual harms to the environment but where there are foreseeable harms likely to violate the same, can be achieved only with a constitutional provision providing for the right to a clean and healthy environment. The right to a clean and healthy environment should be weighed equally with other human rights. Tanzania should demonstrate her commitments to observe the international human rights agreements which recognize the right to a clean and healthy environment to which she is a party by incorporating the same in the country's domestic laws.[73] Although, as noted in the preceding discussion, the international agreements which Tanzania has ratified are not useless simply because they have not been incorporated into municipal laws through Acts of parliament, a smooth implementation of these agreements, however, requires their incorporation into municipal laws.

73. Maina argues that the experience shows that Tanzania rushes to incorporate an international agreement into municipal law which has financial gain to be obtained by the government or where there is a strong lobby by the agency that is sponsoring the particular treaty. See Maina, *supra* note 21, at 154. This, therefore, might be the reason why Tanzania has not incorporated into municipal law most, if not all, of the international human rights agreements.

MARGINALIZED BUT NOT DISCARDED: CUSTOMARY LAND RIGHTS IN POST-CONFLICT ACHOLILAND OF NORTHERN UGANDA

Rose Nakayi*

ABSTRACT

Customary land rights are regularly marginalized by the actions of a range of actors: from the state and powerful economic actors to the development community. This trend seeps through to the aftermath of armed conflict in Acholiland. The dynamics of marginalization play out at the level of state policies and programmes, and public discourse, amongst others. In Uganda, the dominant development narratives on the protection of land rights tend to privilege land rights embedded in tenures such as mailo, leasehold and freehold, over customary. This strategic marginalization of customary land rights although detrimental to the customary, has not yet led to complete disappearance of the customary tenure in post-conflict Acholiland. Against this background, this article analyses key features of the dynamics around customary land tenure/rights. First, it analyses the way in which this tenure has been weakened by the dynamics of violent conflict and post-conflict transformations. It then shows that law and policy initiatives have to some extent further marginalized customary tenure, instead of fully revitalizing it after the conflict-induced destabilization of the system. Finally, it discusses the reasons for the continued actual existence and relevance of the system in contemporary Acholi. It concludes by making a case for the imperative to protect customary land tenure/rights in post-conflict social formations in Acholi.

I. INTRODUCTION

Customary tenure is prevalent in Africa.[1] By corollary, it is the conduit through which

* Lecturer, School of Law, Makerere University, Uganda. Email:<rnakayi@law.mak.ac.ug>.

1. L.A. Wily, Customary Land Tenure in the Modern World, Rights to Resources in Crisis: Reviewing the Fate of Customary tenure in Africa, Brief 1 of 5, at 1, retrieved from http://www.rightsandresources.org/documents/files/doc_4699.pdf (accessed February 9, 2015).

majority of the population in many jurisdictions including Uganda gain access to land.[2] This fact among others makes management/administration and law and policy that touch customary land an arena of contestation between the powerful and the people they rule over. This article makes the argument that armed conflict and post-conflict developments in Acholi and the ambiguities surrounding land law and policy in Uganda have (among others) contributed to the marginalization of customary land law and rights, although they have not been so far-reaching to make the customary tenure and rights obsolete thus far. This is more so since they are considered relevant by the people. "Marginalization" is used to denote relegation of customary tenure and rights to the periphery, ignoring it, or treating it as less important compared to other tenures recognized in Uganda such as *mailo*, freehold and leasehold.

Customary tenure and rights in Uganda and Africa in general have been under pressure by dominant social forces during both the colonial and post-colonial periods. Access and control over land in general has been used by the respective national leaders to strengthen their grip on power, i.e., to exert their dominance over the people on or dependent on the land[3] and to fuel the entrenched networks of patronage-client relationships that sustained the colonial project or a given post-colonial regime.[4] Practices of the powerful have a tendency to marginalize customary tenure. In other words, dominant powers from colonialism onwards never really promoted customary tenure or tried to make it a dominant tenure system, but rather marginalized and neglected it to advance the officially favoured rights system: private property regimes. This was mainly through imported law.

The trend and effects of imported land law into Africa have been similar in many African countries.[5] There was tension between customary tenure and pro-

2. Margaret Rugadya *et al*, Analysis of Post Conflict Land Policy and Land Administration: A Survey of IDP Return and Resettlement Issues and Lesson: Acholi and Lango Regions, 2008, available at http://www.oicrf.org/document.asp?ID=8048, (accessed 10 February 2015).

3. H.W. WEST, THE MAILO SYSTEM IN BUGANDA: A PRELIMINARY CASE STUDY IN AFRICAN LAND TENURE. ENTEBBE PRINTERY (1964).

4. The distribution of land in Buganda- giving the king and his royals as an indirect impetus to support the colonial project is significant among the examples.

5. P. McAuslan, *Only the name of the country changes: the diaspora of "European" land law in Commonwealth Africa*, *in* EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA (IIED, London) (Toulmin C, Quan, J. 2000) 75-96.

capitalist forces, for the former is considered a renege on capital creation.[6] However, while this marginalization of customary tenure was de facto state policy, the system was never fully abolished and discarded, in part because it still served (and still serves) political and other functions. Scholars have highlighted a number of these. Customary tenure is imbued within social relations and networks thereby increasing the "risks and costs of altering them or discarding them;[7] in the customary land systems is security at a low cost;[8] and the customary tenure is malleable."[9] The preceding explains the limited outright intervention, or "minimalist approach," in dealing with the customary land tenure system and the ensuing customary rights.[10] The choice to (indirectly) marginalize rather than outrightly discard customary tenure could also lend credence to state legitimacy by "protecting" people and "observing" their interests, i.e., not dispossessing them of their customary land rights or declaring their customary rights obsolete.

In Uganda's history throughout the 20th century, a number of aspects to do with the customary tenure system in terms of regulation and dispute resolution were left in the hands of the people. The outcome of the preceding was 'neglect and marginalization' of customary land tenure and therefore rights; relegating them mostly to the private domain, which is often less regulated and not adequately facilitated by the state and its structures.

Yet outright discard of customary tenure and rights (although arguably the preferred long term outcome of forces of 'modernization' of Africa) was from the colonial days to-date not an option, for a number of reasons. First, fear of backlash from majority customary land holders; second, for the purpose it serves to structure or skew the relationships between the powerful and the masses thereby presenting a situation that can be exploited by the powerful through interventions to arrest situations

---

6. H. DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

7. Benda-Beckmann, F. von, *Anthropological Approaches to Property Law and Economics*, 2 EUROPEAN JOURNAL OF LAW AND ECONOMICS (1995) 309-36.

8. WORLD BANK, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION, WASHINGTON, DC (THE WORLD BANK 2003).

9. *Id.*

10. D. Fitzpatrick, '*Best Practice' Options for the Legal Recognition of Customary Tenure* 36 (3) DEVELOPMENT AND CHANGE (2005) 449-475 at 450.

of land conflicts.[11] Today, the customary facilitates neoclassical and neoliberal populism, clientelism and neo-patrimonialism for the powerful, just like it aided imperialism in the colonial days.

The above context forms a background against which the specific situation of post-conflict Acholi is discussed in this article. This article specifically analyses first the way in which customary rights have been weakened by the dynamics of violent conflict and post-conflict transformations. It goes further to show how law and policy initiatives have further marginalized the customary land tenure and rights, instead of revitalizing them after the conflict-induced destabilization of the system.

II. CUSTOMARY LAND RIGHTS/ LAW

Customary "law" is a body of (usually unwritten) rules with its legitimacy in "tradition" and should have been applied for time (usually but not always) immemorial.[12] In their pure sense, customary rules concerning land are applied in such a way that they only bestow rights to land to those that belong to a particular social grouping, in return for performance of obligations.[13] The system emphasizes more the survival of the group with their land as a resource, than the individual rights to the land. That notwithstanding, customary tenure has today evolved to accommodate both individual and group rights to land.[14]

We cannot speak of uniform customary land rights or law in Uganda, since it varies from region to region, tribe to tribe or smaller grouping such as the clan or the family to family.[15] Whether the customary norms are loosely codified[16] or somehow

---

11. *See,* R. Nakayi and J. Wiegratz, *They are all my people': Museveni's neoliberal populism and the politics of land disputes in Uganda,* AFRICAN AFFAIRS (under review).

12. J. COMAROFF AND S. ROBERTS, RULES AND PROCESSES – THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT UNIVERSITY OF CHICAGO PRESS (1986); CHANOCK M LAW, CUSTOM AND SOCIAL ORDER – THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA, CAMBRIDGE UNIVERSITY PRESS (1985).

13 H.W. Okoth –Ogendo, Principles of a National Land Policy Framework for Uganda (Paper prepared for Uganda Land Alliance, 2002) at 23.

14. LORENZO COTULA (ED), CHANGES IN "CUSTOMARY" LAND RIGHTS IN AFRICA. IIED (2007).

15. S. Mabikke, Escalating Land Grabbing in Post Conflict Regions of Northern Uganda: A Need for Strengthening Good Land Governance in Acholi Region (unpublished paper presented at the international conference on Global Land Grabbing 6-8 April 2008), at 8, available at <www.future-agricultures.org/papers-and-presentations/...mabikke/file>, (accessed 7 February 2015).

16. T.W. BENNETT, THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA – THE CONFLICT OF PERSONAL LAWS (1985).

preserved in reports determines their nature.[17] That further determines the levels at which they are preserved for future reference.

Customary norms on land are not static; they keep evolving. Cotula has argued that changes in culture, socioeconomic circumstances and political set-up among others bring about changes in the customary norms.[18] The role of changes in population as a factor affecting the customary norms and rights to land has also been highlighted in the literature.[19] This is more so where it leads to scarcity of land and an individualistic culture where individuals assert private property rights in the place of the communal or group claims to land.[20]

A. Customary tenure in Uganda

Prior to the new constitutional dispensation in Uganda ushered in by the 1995 constitution, customary tenure was among the tenures abolished by the Land Reform Decree of 1975. It is revived in the 1995 constitution by Article 237 (1) (3) and the 1998 Land Act section 3 (1) (a) - (h). It has two broad classifications: communal customary tenure predominantly in the northern and eastern parts of Uganda and individual/family/clan customary tenure prevalent in the central and western regions, and in parts of the north and south-western Uganda. In Buganda, holding a *kibanja* denotes holding land under custom, although of a kind resulting from the introduction of western property concepts.[21]

Over 75 percent of land in Uganda and 90 percent of it in northern Uganda is held under customary tenure, which is the largest tenure.[22] Customary land law is

---

17. COMAROFF & ROBERTS, *supra* note 12.

18. COTULA, *supra* note 14. See also, J.P Platteau, *Does Africa need land reform? in* EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA (TOULMIN C AND QUAN J. 2000, EDS), LONDON, DFID/IED/NRI.

19. E. BOSERUP, THE CONDITIONS OF AGRICULTURAL GROWTH – THE ECONOMICS OF AGRARIAN CHANGE UNDER POPULATION PRESSURE, (1965).

20. *Id.*

21. H. Businge, Customary Land Tenure Reform in Uganda: Lessons for South Africa (Paper presented at an International Symposium on Communal Tenure Reform Johannesburg, 12-13, August, 2002), retrieved from <http://www.mokoro.co.uk/files/13/file/lria/customary_land_tenure_reform_uganda.pdf>, (accessed 11 February 2015).

22. Rugadya et al, *supra* note 2; C.K Petracco & J. Pender, Evaluating the Impact of Land Tenure and Titling on Access to Credit in Uganda, International Food Policy Research Institute (2009), citing 99.19% as the percentage of customary land in northern Uganda and Ker Kwaro Acholi, Principles

unwritten law and found in the customs and traditions of the people.[23] These then prescribe modes of access to land, and whether use is communal or exclusive to individuals.[24]

Specifically for northern Uganda, the elderly are the custodians of these customary rules and they run the system.[25] The *Rwot Kweri* (chief of hoes) or the *Won Pachu* are responsible for distributing land and validating boundaries to plots of land.[26] The clan leaders (*Rwodi Kaka*) are central in running the land dispute resolution system.[27] Just like in other African customary spaces, land has to be held in a way that maintains the chain linkage between those that hold it, their successors and predecessors.[28] Customary land is for the core continuity of a social grouping. It facilitates identity, class and social relationships among people on land.[29] The preceding might be considered antithetical to market oriented approaches to regulation of control on use and access to land motivated by capital production imperatives.

III. MARGINALIZATION OF CUSTOMARY RIGHTS IN HISTORICAL LAWS: A ROUTE TO DISCARD THEM?

The historical making of customary land rights in Uganda helps in understanding their position in post-conflict Acholi today. Although times have changed, little change is registered in terms of attitude of elites, policy makers, foreign and domestic proponents of land-based capitalist versions of economic development, towards the customary land rights. The historical context to some extent therefore heralds the contemporary status quo, although with new dynamics embedded in current neoliberal-capitalist transformations.

---

and Practices of Customary Tenure in Acholiland, (Gulu, Uganda: *Ker Kwaro* Acholi, June 2008) at 1, putting the percentage at 93 %.

23. Land Act Cap. 227, s.3 (1) (a).

24. J.W. Bruce, African tenure models at the turn of the century: Individual property models and common property models (Paper prepared for a Conference on Land Tenure Models for Twenty-first-Century Africa, 8-10 September, 1999, The Hague, Netherlands), at 459.

25. Mabikke, *supra* note 15, at 10-13.

26. *Id.,* at 11.

27. *Id.*

28. N.A OLLENNU, PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA (1962).

29. E. Colson, *The Impact of the Colonial Period on the Definition of Land Rights, in* COLONIALISM IN AFRICA (Lewis H. Gann eds., 1971) at 193-196.

Since colonialism to-date, a number of efforts at land law and policy reform have been undertaken to open up land for capitalist purposes, i.e., to vest its control in the state and promote its use for 'development projects'.[30] However, land law and policy reform is not always a guarantee of tenure reform, especially if not followed by efforts at implementation of the reforms. In as much as there were changes in the laws at various times in the 1900 to 1975 period, some of which undermined the customary norms, these did not necessarily lead to changes in the ways in which people related with each other on customary land, and the practical rules that governed these relationships. Such reforms, according to some scholars, were geared towards promoting self-interests; colonial governments were unwilling to recognize indigenous land rights as they evolved.[31] The preceding situation was further entrenched by a culture of non-implementation of laws, and state preference for commodification of land arguing that it would bring about development.[32]

At the national level, the introduction of freehold type tenure in Uganda is important as one of the key markers for the beginning of hierarchized interests in land depending on the tenure in which those rights are embedded. In Buganda, the vernacular of *mailo land* resulting from the signing of the 1900 Buganda agreement, for example, introduced private property rights for a few, while making others tenants on those lands. In the national context, it meant that private property rights were higher in hierarchy than the customary rights to land. No wonder that law and policy during some years during the period1900-1975 tended to entrench the above as will be seen below.

The period 1900-1975 can be said to have been a period to promote capitalist development in Uganda, by using land – and the restructuring of land-related social relationships. The delicate balance that was hard to strike was between the protection of customary owners' rights to their land, and at the same time availing land to those that can use it for investment and therefore contribute to 'national development'.[33] This balance was many times tilted in favour of the latter, since the customary occupier was most likely a subsistence farmer who could not invest in his/her land to the tune expected by the bourgeoisie imperialist or the capitalist elites.[34]

---

30. See, the Land Reform Decree (LRD), 1975 Laws of Uganda.
31. Colson, *supra* note 29, at 196.
32. See LRD, *supra* note 30.
33. W. NABUDERE, IMPERIALISM AND REVOLUTION IN UGANDA (1980), at 202.
34. *Id.*

In order to meet the capitalist move of easy transfer of land from those that according to official discourse cannot develop it to those that can (i.e. from peasants to 'investors'), it was important to pass a law that removed control over (customary) land from the hands of the owning/controlling entities to the state.[35] This overrode the pre-colonial situation during which communal entities owned and controlled land, and individual access and use was on the basis of being a member of such an entity.[36] Rights over land in that context were understood in a wider context for the purpose they served. That purpose was the continuity of the group entity, which was more important than the individual.[37] Introduction of the state as the controlling entity under the 1903 Crown Lands Ordinance to some extent distorts the preceding social reality.

Also important in the post-1900 legal regime is the preference for private property rights. A "class of interests" between the local and the foreign is seen in the introduction of western notions of "proprietary" interests where concepts of individual rights or private property rights are considered better than the communal rights that were most times disregarded.[38] No wonder that, in Uganda's case, by virtue of the1903 Crown Lands Ordinance, all land that had not been alienated and claimed by individuals by title was vested in the Crown in England.[39] Yet, individual titles issued prior to 1903 were mostly to the royalty and persons in significant social and political positions. Technically, the Crown in England by law acquired control over all customary land in the country and the 'owners' were only occupiers i.e. tenants of the Crown. This act of dispossessing customary land owners (at least by law) continued in the Public Lands Act 1962 and later in 1969. Under these, customary land became public land that was controlled by the government through the Land Commission. The customary "tenants" on public land were not evicted. They continued to live and use their land in the rural areas without lease or any license as long as it was not alienated (i.e. given out to a developer).[40] At the same time, the law did not preclude them from applying for leases from the government on the land that they occupied.[41] If the customary "tenant's" land had to be issued to someone else in leasehold or freehold by the technical "owner" (the government), the tenant's consent to such a transaction was required by law, and so was

35. Crown Land Ordinance 1903 and LRD, *supra* note 30.
36. Colson, *supra* note 29, at 200.
37. *Id.*
38. *Id.*, at 196.
39. *Id.*
40. PLA, s.24 (1).
41. PLA, s.25.

compensation to the tenant.[42]

The above legal developments show that customary tenure was unwanted, considered secondary to leasehold, freehold (and *mailo*) estates, although it was not completely discarded. The customary tenant was in law not an owner, but the law somehow gave him/her "permission" to continue legally occupying his/her land and an option to convert permission into "right" by acquiring leaseholds. The customary tenants enjoyed a limited amount of tenure security; they by law had to give consent before their land was given away as leasehold or freehold estate to a potential developer.[43] Aside from the oral evidence that customary occupiers were evicted to create Murchison Falls National Park, the author has not come across written evidence of persons that were evicted or who lost their land as a result of implementing the above laws.[44] That notwithstanding, it is clear that the spirit and letter of the above laws was to promote marginalization of the customary tenure, by removing ownership and control of land from the customary centres of authority and individuals to the state that would lease it out, leaving them with only "permission" to occupy. So their minimal protection is in continued occupation and opportunity to consent to having their land leased to someone else—an investor.

Much of the above fragile protection was lost by subsequent laws such as the Land Reform Decree 1975 passed in a similar spirit of encouraging utilization of land for economic development. First, the customary land holders lost tenure security since they became "tenants at sufferance" who could be evicted any time.[45] Although they could still acquire leases on the land they occupied, customary tenants could not pass on their "tenure"; doing this was illegal, since they were not considered as having "title" to the land.[46] Further, no new customary interests would be acquired in land without state permission in writing.[47] This was meant to make it cumbersome to create new estates of a customary nature, by requiring state permission and therefore regulation. That notwithstanding, existing customary interests could be passed on by will or the law of intestate succession, although developments on the land could only be sold or given away after giving three months' notice to an Authority. In principle,

---

42. PLA, s.24 (2), (3) & (4).

43. PLA.

44. This information was given by various respondents during the author's field research in northern Uganda for her doctorate in 2010.

45. LRD, *supra* note 30, s.3 (2).

46. LRD, *supra* note 30, s.4 (2).

47. LRD, *supra* note 30, s.5 (1).

the state over-limited the space for the continued survival of the customary tenure, constrained options of controlling land for the customary occupier by promoting state control and supervision over it. Technically, the customary owner needed state sanction of key decisions such as one in which s/he wanted to sell his/her customary land.

In the law of property, proprietary interests are interests in the land itself.[48] To the colonizers, these had to vest in individuals, as it was in Europe.[49] This was in disregard to the difference in the role that land played in Africa and how this differs from those roles that it played in Europe. To the European, the claimant (private proprietary) has the right to transfer his/her interest, and create lesser interests in his/her land.[50] A provision in the Land Reform Decree to the effect that customary land owners cannot transfer their land but developments on it, after acquiring consent, is confirmation that in principle, customary tenure was discarded in law, although the nomenclature (customary) was retained. Indeed, laws such as the Land Reform Decree were building on the spirit and letter of pre-colonial law that reduced the space for the survival of customary tenure.

Although there was limited implementation of laws such as the Land Reform Decree of 1975, the period 1903-1975 can be said to be that during which customary land rights were in essence discarded in the laws of Uganda by necessary implication although not outrightly. This is more so since, as described above, the space within which the customary rights existed was over-legalized and constrained.

In essence, colonialism across Africa and in Uganda specifically led to a number of changes in custom.[51] The use of European legal norms embedded in Uganda's written law as the criteria for judgment and, as the standard litmus to test African customs, meant that much of the latter would be assessed to be of less value and thus marginalised and 'lost'.[52] This is more so since in Uganda and elsewhere customary tenure systems were responsible for setting the boundaries within which land use, access and transfer could take place.[53] Using European standards meant that the whole land holding system would be affected, i.e., western conceived notions rather than the local custom would be applied to determine entitlement to land.

---

48. K. GRAY AND S. GRAY, LAND LAW, 7TH ED, OXFORD UNIVERSITY PRESS (2011) at, 41-46.

49. Colson, *supra* note 29, at 196

50. GRAY & GRAY, *supra* note 48, at 41-46.

51. R. DAVID, (ED.), CHANGING PLACES? WOMEN, RESOURCE MANAGEMENT AND MIGRATION IN THE SAHEL, (1995).

52. *Id.*

53. COTULA, *supra* note 14.

The above indicates that even outside of formal armed conflict periods, customary tenure in Acholi had been under pressure at various stages of the political and economic transformations in Uganda's history to date. Yet, the entrenchment of the customary within social parameters of custom presupposes a correlation between its survival and social stability. Armed conflict in Acholi greatly destabilized society and eroded its social fabric. A great deal of literature points to its devastating effects including displacement, lawlessness, and absence of state presence.[54] The continued survival of customary tenure in the post-conflict period is still precarious. As much as customary tenure is revived in the legal regime, the same regime promotes other aspects that might threaten customary tenure as seen in the discussion below.

1. Post-1995: *The need to protect land rights and armed conflict in Northern Uganda*—The Acholi sub-region was among those tremendously affected by the armed conflict that raged in northern Uganda for decades.[55] As much as the post-1995 years present the peak of the conflict in that region, it was a period of constitutional and legal reforms at the national level.[56] The questions that arise include: to what extent did the peculiar situation of northern Uganda inform the law reform processes particularly concerning land? Further, how applicable are the outcomes of these processes of land law reform to northern Uganda in light of its peculiarities associated with armed conflict?

Having come to power in 1986, the NRM government saw a political imperative to undo some of the policies of the past regimes, including those related to regulation of rights to land. Customary tenure had been scrapped in the pre-1995 era.[57] Among the vital developments in the 1995 constitution was the recognition of

---

54. E.K Baines, *The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda*, 1 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 91-114 (2007) at 101-102; S. SVERKER FINNSTRÖM, LIVING WITH BAD SURROUNDINGS: WAR, HISTORY, AND EVERY DAY MOMENTS IN NORTHERN UGANDA (2008).

55. Finnström, *supra* note 54. R. Atkinson, *Land Issues in Acholi in the Transition from War to Peace,* THE EXAMINER, Issue 4 (2008), at 3-9, 17-25; Baines, *supra* note 54, at 101-102; HUMAN RIGHTS WATCH, UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA, HUMAN RIGHTS WATCH REPORT, VOL. 17, NO. 12(A) (SEPTEMBER 2005); HUMAN RIGHTS WATCH ABDUCTED AND ABUSED: RENEWED CONFLICT IN NORTHERN UGANDA, VOL. 15, NO. 12 (A) (JULY 2003).

56. INTERNATIONAL CRISIS GROUP (ICG), NORTHERN UGANDA: SEIZING THE OPPORTUNITY FOR PEACE, AFRICA REPORT NO. 124, at 2 (26 APRIL 2007). Armed conflict had heightened by 1995 and displacement started in 1996.

57. LRD, *supra* note 30.

customary tenure as one of the tenures in Uganda, ostensibly on the same footing with others such as *mailo*, leasehold and freehold.[58] In as much as northern Uganda has been peculiar as a result of armed conflict, the legislative framework on land in Uganda has to a great extent followed a one-size-fits-all approach with limited adaptability to the peculiarities brought about by armed conflict in northern Uganda.

The Land Act 1998 (Cap 227), the Land (Amendment) Act 2010 together with the National Land Policy have provided detail on how to operationalize the reforms embedded in the constitution on customary land tenure. For instance, tenants on former public land now enjoy security, and may no longer be evicted as the case was before. This has been reinforced by enabling a tenant to acquire a certificate of customary ownership.[59] The certificate is conclusive evidence of customary rights and the interests in the land to which it refers. It does not change the nature or status of rights, but only acts as "evidence" for such rights. Although the law recognizes customary rights to land to be at the same footing with other rights sourced from the written law, it is reported that sections of society still consider them of less value.[60] The majority of Ugandans and investors seeking to purchase land have a preference for registered or privately owned land to customary land.[61] A number of reasons explain this.

First, the legal and policy framework pursues a paradigm that promotes "land market for liberalized production, thereby essentially privileging private tenure and undermining customary tenure."[62] Second, it may be a result of lack of knowledge of the customary rules that govern land in a given society, which makes outsiders fear to acquire it. Third, there is a general belief that customary land is associated with insecurity of tenure. Fourth, there are restrictions to transferring it to persons outside the group, and lastly, customary land may not easily be accepted by banks as collateral.

The condescending attitudes towards the customary are not by accident, but are partly a result of over two decades of state and donor discourse against it and pro-private property rights. People's belief in the system is invaluable as an indicator of relevance, and therefore value in sustaining it. This means that legal protection of

---

58. Constitution of the Republic of Uganda 1995, Article 237 (3).

59. Land Act Cap 227, s.4.

60. See, The Uganda National Land Policy 4.3 Para 38.

61. J.A. Lule, V. Kirabo & B. Kembabazi, 80% of Uganda's land unregistered – minister", THE NEW VISION, 26 NOVEMBER 2013.

62. Anders Sjögrena, *Scrambling For The Promised Land: Land Acquisitions and the Politics of Representation in Post-War Acholi, Northern Uganda,* 12(1) AFRICAN IDENTITIES , 62-75 (2014) at 67.

customary tenure without efforts aimed at attitude re-engineering in favour of it may not make positive strides in an effort to make it relevant. Creating confidence in the customary tenure system and a positive attitude towards it would lead to a group of persons ready to hold government accountable whenever it falls short on issues to do with the tenure. This is more so since powerful actors such as the World Bank have since changed attitude and now believe that customary tenure can be used as a conduit for development.[63]

That notwithstanding, the legal and policy regime is crafted in a framework that privileges some tenures over others; customary tenure bearing the brunt. This is also seen in the subsequent attempts at implementation of the provisions of the Constitution and the Land Act 1998 that are characterized by opportunistic tendencies to use land issues to entrench personal political power.[64] The choice of issues to prioritize is to some extent shaped by their value in terms of contribution to achievement of the above agenda. This is why land issues between the landlords and the tenants on mailo land have been more central to the debates than customary land issues.[65]

The above situation may also be explained by the central location of *mailo* land (in central Uganda); where the seat of government is, and the historical political status and significance of this region.[66] It was an indispensable agent in the imposition of colonial rule in Uganda and also central in efforts leading up to the establishment of the post-independent state of Uganda.[67] All this is not only of historical significance, but entrenches central Uganda's clout to influence processes and outcomes from public discourses on various aspects including land.

With the foregoing obvious privileging of tenures depending on the political /economic benefits derived from them, customary tenure in northern Uganda and elsewhere has not been central to the debates on land. The sections below discuss the position of customary land rights in Acholi. It positions it within the law, policy and other interventions. Further, it shows how the armed conflict environment and other realities have influenced the status of customary land rights in Acholi.

---

63. WORLD BANK, *supra* note 8.

64. C. Medard & V. Couliard, Creating *dependency: Land and gifting practices in Uganda*, JOURNAL OF EASTERN AFRICAN STUDIES (2013) a, 555.

65. See for example: I. Okuda and F. Muzaale, *Museveni wants two weeks to fix Kayunga land wrangles*, DAILY MONITOR, July 5, 2013 at 1 & 5.

66. C. Johannessen, *Kingship in Uganda. The Role of Buganda kingdom in Ugandan Politics*, CMI Working Paper 8 (2006).

67. *Id.*, 2-4.

IV. CONFLICT AND POST-CONFLICT DYNAMICS MARGNINALIZING CUSTOMARY LAND RIGHTS

There are a number of factors in conflict and post-conflict settings of northern Uganda, specifically Acholi, that indicate marginalization and weakening of rights anchored in customary tenure. These arise from the conflict situation, the existing legal framework and other social, economic and political factors, some of which are discussed in this section of the article.

A. Armed and Post-conflict Dynamics and Customary Land Rights in Acholi

Customary tenure is highly fluid and informal, characterized by limited recordation of incidents and rights, semi-permanent boundary demarcations, legitimacy deriving from the social embrace of the rights and also existence of an old generation core responsible for ensuring their continuity. The customary system therefore survives and reproduces itself better in a settled and relatively peaceful society bound together by social ties. Among the devastating consequences of the armed conflict in northern Uganda and Acholi in particular was the disruption of the social ties by disordering society. This was majorly through internal displacements of the biggest percentage of the population from their homes into internally displaced people's camps.[68] It is estimated that the number of persons displaced and interned into camps since the first rounds of displacement in 1996 was over 1.7 million.[69] It is hard to point to a specific date as one at which displacement ended, since the process of return was more sporadic, mainly taking place after the start of the Juba Peace talks in June 2006.[70] It is also noteworthy that by 2009-10, many in the Acholi sub-region had returned home.

Displacement was an abrupt suspension of enjoyment of customary land rights (at home), and for many the situation lasted as long as displacement. A number of persons and families could not access their land for agriculture for most of the time they were in displacement.

In a number of ways, this and the whole armed conflict environment weakened customary tenure. First, it made people absentee land claimants without a close

---

68. A. BRANCH, DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA (2011); C. DOLAN, SOCIAL TORTURE: THE CASE OF NORTHERN UGANDA, 1986-2006 (2009).

69. INTERNATIONAL CRISIS GROUP, *supra* note 56.

70. See BRANCH, *supra* note 68; Finnström, *supra* note 54.

physical connection to the land, thereby distorting how the people relate with each other on the land;[71] a key aspect in tenure relations, security and governance. Second, internally displaced people burdened the land on which camps were established, limiting the ability of the owners to use it. The situation also led to post-return land conflicts between genuine owners and those that lay claim to their land including powerful individuals.[72]

Power is a key factor in the elders' ability to assert authority as enforcers of customary land rights; yet armed conflict and the resulting displacement vitiated it.[73] The disordered society during displacement meant that social hierarchies were skewed and so were social structures of land governance.

Also, during displacement, the population's ability to fend for itself was hampered and reliance was mainly on humanitarian aid for all including elders. Amidst the deplorable health and living conditions during displacement, securing the customary land tenure system could not be an urgent need during the armed conflict, but ensuring access to the basic everyday survival needs.

As mentioned earlier, the 1995 Constitution, the Land Act 1998, all made key reforms to the customary land tenure system. This was during the time that armed conflict in northern Uganda was at the peak and not much would be done to implement the changed law in that region, even if the resources were available. Technically, the customary land tenure system in northern Uganda was suspended during the period of armed conflict and displacement. The neglect of the customary tenure system at the time is both as a result of both internal and external factors.

Internally, the peoples' ability to draw benefits from it was hampered by the prevailing circumstances. The customary structures of governance and the elders were not in positions of control to assert the relevance and defend customary tenure.[74] Externally, it is obvious that the resolution of the armed conflict was a priority. Inability to enjoy and also enforce rights accruing under customary tenure during this

---

71. H.W.O Okoth-Ogendo, Land Rights in Africa, Interrogating the Tenure Security discourse (unpublished Key note address presented to the Workshop on Land Tenure Security for Poverty Reduction in Eastern and Southern Africa, Kampala, Uganda, 27-29 June, 2006).

72. Mabikke, *supra* note 15, at 10.

73. MercyCorps, Land Disputes in Acholiland; A conflict and Market Assessment, June 2001, at 6, available at <http://www.mercycorps.org/sites/default/files/mercy_corps_acholilandconflictmarketassessment_aug_2011.pdf>, (accessed 30 September, 2014).

74. *Id.,* at 6.

conflict period is more by default on the part of the people. For the government, in as much as the circumstances made implementation of the land reform in the north complex, the absence of any documented attempts supports the possibility of lack of a will to do so.

Turning to the post-conflict period, it is cumbersome to point to a particular date as the beginning of this phase. The silencing of the guns, reappearance of relative calm and sporadic return of people from displacement after the collapse of the Juba Peace Talks around April through July 2008 are pertinent markers of the post-conflict phase.[75] This was expected to be the phase in which the customary land tenure system would be resuscitated. This author suggests this is not the case. Rather, the factors that are marginalizing to the customary are galore. These include the heightened disputes over land, caused by a number of factors such as blunt boundaries to land, increased economic value of land, and conflict between customary land tenure-based claims to land and those anchored in national written laws.[76] This is within an environment where the institutions that would play a role in the resolution of land disputes were greatly weakened.[77] All this is in the face of paucity of government efforts to empower the traditional authority to handle the cases, and also equip other institutions of justice to do the same, in a manner that is responsive to the post-conflict circumstances.

The situation is further exacerbated by the government's attempts to acquire land for post-conflict development amidst resistance by sections of the public.[78] No wonder that some provisions in the land Act about issuance of certificates of customary occupancy were seen as an attempt by the government to grab land.[79] In addition, the government's and investors' idea of land use and development in northern Uganda is to some extent seen to be at variance with that of sections of the community in the post-conflict era.[80] The divide is characterized by a capitalist driven agenda of the government in the face of heightened mistrust on the part of the people that are victims of soaring inequality at the national level that was worsened by the armed conflict. Yet

---

75. Refugee Rights News, Northern Uganda since the Collapse of the Juba Talks, , Volume 4 Issue 6, October 2008 available at http://www.refugee-rights.org/Publications/RRN/2008/October/V4.I6.NorthernUganda.html, (accessed 20 January 2015).

76. MercyCorps, *supra* note 73, at 5.

77. Mabikke, *supra* note 15.

78. *Hon. Ocula Michael & others v. Amuru District Land Board, Major General Oketa Julius, Christine Atimango and Amuru Sugar Works Ltd.* Hct-02-Cv-Ma- No. 126 of 2008.

79. Sjögrena, *supra* note 62, at 68.

80. *Id.*

also, no significant efforts are seen on the part of the government to investigate cases of attempts by private investors and powerful individuals to grab land that belongs to the local communities.[81]

The conflict and post-conflict incidents show high levels of neglect and marginalization of the customary land tenure system. This, in face of mistrust between the people and the government, thereby complicating government's urgency for any changes in the customary norms for that region. Although not directly discarded, the customary claims to land remained on foot but in a weakened state as seen below.

B. Likely Impact of Land Law and the Uganda National Land Policy on Customary Land Tenure.

Among the positive strides of the 1995 Constitution was the recognition (at least on paper) of customary tenure as one of tenures in Uganda under Article 237; going beyond previous laws such as the Land Reform Decree that had outlawed it. Technically, the tenure and ensuing rights got recognition. The protection is further entrenched in the Land Act section 3(1), stipulating its content and specifically ascribing pertinent aspects of the customary such as: (i) the value of local binding rules and local custom; (ii) personal, family, communal and traditional institutions' right to own customary land; and (iii) perpetual ownership. Communal land is an important aspect of customary tenure. The Land Act creates a framework for its management and regulation through Communal Land Associations and clarifies on aspects of common land use.[82]

In addition, the recognition of traditional authority under section 88 of the Land Act as agents of mediation of disputes over customary land is a positive stride in the recognition of customary tenure. This is recognition of the role entities such as clans and their leaders played in traditional Ugandan societies.[83] The foregoing provisions are coupled with availability of the option to certify customary rights through application and issuance of Certificates of Customary Ownership (CCOs).[84] The

---

81. R. Nakayi, *The Challenge of Proving Customary Tenure in Courts Of Law in Uganda: A Review of The Case of Hon. Ocula Michael & others v. Amuru District Land Board, Major General Oketa Julius, Christine Atimango and Amuru Sugar Works Ltd. Hct-02-Cv-Ma- No. 126 OF 2008,* 19 EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS (2013).

82. Land Act Cap 227, s.15-26.

83. NABUDERE, *supra* note 33.

84. Land Act Cap 227, s.4 - 6.

certificate would replace or add to the value of oral evidence in cases of proof of customary rights to land. It is argued, however, that titles are not a guaranteed mechanism of reducing land-related conflicts.[85]

The value in the above constitutional and legal provisions cannot be underestimated. Note, however, that mere provision for protections in the law without implementation is as good as no provisions at all. For a long time, there have been financial and other hindrances to the implementation of the laws.[86] The insufficiency in the efforts aimed at implementation could also cast doubt on the genuineness behind including such provisions in the law. Their inclusion could be a reflection of a populist agenda to portray the powerful as genuinely concerned about improving the situation of customary tenure systems through law reform, but at the same time leave them on paper and maintain the status quo, in which case the intrinsic and systemic deficiencies in protecting the customary tenure in Uganda offer raw material for populist politics. In such a situation, the seemingly progressive provisions of the law do not displace the assertion in this paper that the customary is marginalized.

Also worth noting is that the Land Act and the Uganda National Land Policy bear evidence of privileging of freehold land tenure systems to the detriment of the customary.[87] Customary tenure and leaseholds can be converted to freehold under the Land Act sections 9 and 28 respectively, but one cannot convert freehold or freehold to customary. Among the "unintended consequences" of the above over the years may be the disappearance of the customary when it is converted into other tenures.[88] Further evidence of the above is seen in the National Land Policy which acknowledges that despite the efforts to "formalize" customary tenure under the land Act, it continues to be "… (v) disparaged and sabotaged in preference for other forms of registered tenures, denying it the opportunity to progressively evolve."[89]

The policy statements on customary land tenure in the National Land Policy begin by reasserting assumptions that have widely been questioned in the academic literature. It states that this tenure is often associated with three problems: (a) it does not provide security of tenure for landowners, yet a World Bank report compliments the

85. Fitzpatrick, *supra* note 5, at 465.

86. K. Deininger and R. Castagnini, Incidence and Impact of Land Conflict in Uganda, World Bank Policy Research Working Paper 3248, (2004).

87. The Uganda National Land Policy, strategy 38.

88. D. Hunt, *Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act* 22 -2 DEVELOPMENT POLICY REVIEW (2004) 173-191.

89. The Uganda National Land Policy, 2014, Strategy, strategy 38 (v).

affordability of the security the customary offers;[90] (b) it impedes the advancement of land markets—there is evidence that this is not always the case;[91] and (c) it discriminates against women—research shows that women in Acholi have land rights but face huddles to enjoying them.[92]

Ascribing to the foregoing negative views about customary tenure buttresses official discourse towards marginalizing it. Indeed, other government policies and strategies follow suit. Uganda's Vision 2040 is developed with a vision to promote "..... optimal use of Uganda's land based resources…"[93] According to the Land Sector Strategic Plan II (LLSSP II), this vision may only be achieved if there is a change in the land ownership pattern towards the kind of land ownership that facilitates development.[94] The LSSP II makes provision for integration of the customary tenure into the formal system as a way to increase market performance and improve chances of access to credit by its holders.[95] The foregoing policy discourse shows that customary tenure is antithetical to the optimal use of land resources within a market context. It therefore has to be rinsed of its organic nature, formalized to make it suitable, an aspect that further marginalizes it. Among the other objectives of LLSSP II is to implement at National Program for Systematic Adjudication, Demarcation, Survey and Certification or Registration of land, following which freehold titles are issued; phasing out customary tenure. All this in the name of "… integrating customary lands into the formal property and land market systems."[96]

In line with the above, but also in order to facilitate the evolution and development of customary tenure, the National Land Policy strategizes to among others: start a registry for customary land; issue CCOs, equivalent to those issued under

---

90. WORLD BANK, *supra* note 8.

91. J. Adoko & S. Levine, A Land Market for Poverty Eradication? A case study of the impact of Uganda's Land Act on Policy Hopes for Development and Poverty Eradication (2005), retrieved from <http://land-in-uganda.org/lemu/wp-content/uploads/2013/11/A-Land-Market-for-Poverty-Eradication.pdf>, (accessed 10 February 2015).

92. P. Veit, Women and Customary Land in Uganda, Focus on Land in Africa- Placing Land Rights at the heart of Development". *A brief,* April 2011 at 1.

93. See, the National Planning Authority of Uganda, *Vision 2040,* available at <http://npa.ug/wp-content/themes/npatheme/documents/vision2040.pdf>, (accessed April 28, 2015)

94. Land Sector Strategic Plan II, 2013-2023, (herein after LSSP- II) Ministry of Lands, Housing and Urban Development (December 20, 2013) at 38.

95. *Id.,* at 34.

96. *Id.,* at 55.

freehold; promote conversion into freehold; document customary land rules; and promote demarcation of customary land.[97] Further, the policy strategizes to recognize customary institutions that make rules, resolve disputes in addition to recognizing and supporting their decision making processes.[98] Some of the above are not necessarily new, but a reiteration of key provisions in the Land Act. Embedding them in a policy theoretically puts them on the government's 'to do list,' especially if followed by steps towards implementation. Mere policy pronouncements without the will to implement them would not salvage and strengthen customary land rights. It could only be an indication of the fact that there is no more reticence about customary land rights on the part of the government, but does not necessarily undo the likely obstructions to the survival of the customary that are entrenched in the capitalist society and the operations of its class and power structures.

In some cases, some of the strategies suggested in the policy will have an effect of modifying the customary, using state crafted tools that are not necessarily conceived from within the customary spaces. Examples of these include strategy 41, in an effort to

> …facilitate the design and evolution of a legislative framework for customary tenure, the government shall..... (iii) modify the rules of transmission of land rights under customary tenure to guarantee gender equality and equity; (iv) make provision for joint ownership of family land by spouses.

Similarly, with an aim of strengthening the traditional land management and administration institutions, strategy 42 (iv) provides that the government will "Develop guidelines and procedures under customary land law for the allocation and distribution of land complying with the principles of equity and natural justice." Customary norms or rules generally gain legitimacy from acceptance by society and repeated usage.[99] They, however, evolve and change accordingly in response to their environment.

Modification of these rules by the government to promote "gender equality and equity" and to promote co-ownership of family customary land is commendable in the

---

97. Uganda National Land Policy, *supra* note 87, Strategy 40 (i) - (vi).

98. *Id.,* 41 (v) & 42.

99. P.D. Alexander, *Customary and indigenous law in transitional post conflict states: A South Sudanese case study*, 30 MONASH UNIVERSITY LAW REVIEW (2004) at 203.

reign of human rights. But it is questionable whether top-down new norms introduced by the government and deposited into the customary spaces will become "customary," acquire legitimacy and operate effectively. The combination and application of what is locally customary and that crafted and deposited by the government will not be customary per se; but a new form that is neither purely local nor purely foreign (government or donor community-driven). It is important to borrow a leaf from what is stated in the LLSP-II on the need for a decentralized and highly participatory approach in all processes of formalization of customary tenure to ensure accommodation of the needs of all groups including women and other vulnerable groups.[100]

Government- or donor-driven initiatives with little or no participation from the community would naturally face resistance when implemented. The same argument applies to the distribution guidelines that comply with natural justice principles.

On the whole, this is not to say that efforts to accustom the customary rules to gender equity and natural justice are irrelevant. It is to push forward a point that they might trump some customary norms on land and introduce others leading to modifying or vanishing of the old. There would also be issues to do with legitimacy; thus, care has to be taken to involve the communities in negotiating the new pro-gender equality and natural justice notions of customary land law. The new strategies will partly undermine some customary practices that some regard as undesirable but may still deepen the problem by unleashing new problems like introducing new norms not envisaged as customary. They may not tackle the bigger problems arising from customary land law which is state neglect and marginalization and the entrenched stereotypes amongst sections of the population especially the elites. At the same time, corruption in the land management and administration bodies may not be tackled by these efforts;[101] in the end it will only be a scratch on the surface that leaves the customary on a steady decline.

C. Other Weakening Factors in the Customary Practices and Beyond

There are aspects of the customary tenure system that have an effect of weakening it. First, the world in which it is situated is increasingly becoming capitalistic, promoting

---

100. LSSP II, *supra* note 94, at 34.

101. Sarah Kulata Basangwa, Commissioner Land Registration Before Anti-corruption Court, retrieved from <http://www.igg.go.ug/updates/news/sarah-kulata-basangwa-commissioner-land-registration-before-anticorruption-court/>, (accessed 26 May 2014).

land holding and transfer systems that are in tune with capital accumulation. Barrow and Roth have argued:

> …individualized tenure, typically defined as demarcation and registration of freehold title is viewed as superior because owners are given incentives to use land most efficiently and thereby maximize agriculture's contribution to social well-being.[102]

Traditional/customary conceptions of land use and holding systems for the most part do not fit within the above paradigm of capital production. This puts them on a collision course with the dominant entrenched capitalist configurations that in the end work against the customary system. For instance, the Land Act and Land Policy promote conversion of customary land into other forms such as freehold and privatization of land.[103] On the other hand, the local rules governing land, which have been written down as the *Principles and Practices of Customary Tenure in Acholiland*,[104] are organically presented in such a way that limits adaptation to the world around the customary; more towards land exchange modes for economic development.[105] Section 1(a) and (b) of the Principles and Practices of Customary Tenure in Acholiland[106] provide that land vests in a clan, individual or household and that it is not to be sold. The weakening factor in this lies in the fact that the customary can be condemned for being anti-capital and not 'modern'. The irony, however, is in the fact that this provision has a preserving effect on the customary; protecting it from mutating to the forms acceptable to the capitalistic world around it.

Further, the contemporary world is moving towards greater protection of equal rights for all including women.[107] There are a number of customary practices that are contrary to this. Women have in some instances been discriminated against in the

---

102. R. Barrows and M. Roth, *Land tenure and Investment in African Agriculture: Theory and Evidence*, 28, 2 265-297 JOURNAL OF MODERN AFRICAN STUDIES (1990), at 265.

103. Land Act Cap 227, s.9 and Land Policy Strategy 40 (iii).

104. *Ker Kwaro Acholi*, *supra* note 22.

105. Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them. CSOPNU, December 2004.

106. *Ker Kwaro Acholi*, *supra* note 22.

107. Convention on the Elimination of all forms of Discrimination against women, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19.

customary spaces of Acholiland,[108] more so since they do not in most cases, directly "own" land but do so through their male counterparts (husbands, brothers or fathers).[109] This means that their rights are traditionally only enforceable through indirect interventions of those rights holders, the men. Loss of connection to those male "agents" dissipates the women's rights to land.

Section 2(c) of the principles and practices of customary tenure in Acholiland provides that land rights are lost by death or divorce. If a wife claimed rights through a husband, divorce or death of a husband renders extinct the woman's right to land. Such discriminating practices are contrary to Article 33 in favour of equality between men and women and also for "affirmative action to get rid of asymmetries brought about by among others tradition or custom" in order to achieve equality between men and women. The discrepancy between the ideal on protection of women and what is actually happening on the ground puts the customary out of line with dominant expectations on gender equality and thereby its castigation as bad. The gender imbalances can therefore be used to delegitimize it leading to its marginalization.

In addition to the above, there is evidence that after conflict, the imperative for survival and the need to "catch-up with life" brought about desperation and the desire to do anything to achieve that goal even if in total disregard of what was considered 'customary' or normal.[110] Examples of the above include the rise in incidence of unlawful land sales,[111] and individuals claiming exclusive rights to family/clan/community land, etc.[112]

Some of the above factors within the customary space make customary tenure

---

108. M. Kane *et al,* Reassessing Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor (Paper presented at the World Bank Conference in Arusha Tanzania, New Frontiers of Social Policy, 12-15 December, 2005).

109. M. Kimani, Women struggle to secure land rights; Hard fight for access and decision-making power (2008), retrieved from <http://www.un.org/africarenewal/magazine/april-2008/women-struggle-secure-land-rights>, (accessed 11 February 2015).

110. For example, see M. Oosterom, A matter of 'catching up'? Public Authority in post-conflict northern Uganda (unpublished paper presented at the Human Security: Humanitarian Perspectives and Responses Conference, Istanbul, 24-27 October, 2013).

111. P. Hetz *et al,* Land Matters in Northern Uganda Anything Grows; Anything goes Post-Conflict "Conflicts" lie in Land, Research report written for USAID (Nov 2006 and April 2007), available at <http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Land_Matters_in_Northern_Uganda_Report.pdf>, (accessed 7 February 2015).

112. *Id.*

enigmatic, not attractive to outsiders, and also not in line with contemporary capital oriented functions of land in society. This makes it subject to marginalization by society and state.

D. Marginalized but still strong

Customary tenure in Acholi and the rights that ensue from it has persisted for a long time despite its overall marginalization from various sections of society and the government and its development allies. Through the legal and policy regime, the state tries to regularize and increase its grip on customary land, a thing that could lead to changes in its form if not its disappearance over time.

The system of land allocation and land transactions is important in determining equity, land administration and dispute resolution mechanisms in the customary tenure.[113] A number of factors offer an explanation as to the continued relevance of the customary in Uganda generally and in Acholiland, despite the marginalization.

First, there has been preoccupation with certification of the customary, and provision of options to convert it into freehold as seen in the Land Act.[114] The customary is not given space to evolve. Yet, some scholars have opined that the best would be to free customary tenure to evolve without interference.[115] Options at certification and conversion are promoted to among others secure ownership rights and make the customary competitive in this era of capital. Competitiveness in this case is also seen in comparison to other private property systems. The private property systems, alternatives offered by the state/development establishments to inform changes in the customary tenure are, however, not perfect.

The registered land system, for example, has for long been associated with corruption, forgeries and land thefts.[116] This is not to say that there is no corruption associated with the customary tenure; research conducted in Acholi revealed that there is some level of corruption in handling cases of customary land.[117] The absence of proven better alternatives to the customary system arguably creates a situation in which persons claiming rights under the customary hold on to it. After all there are more

113. Businge, *supra* note 21.
114. See, s.9.
115. Barrows and Roth, *supra* note 102.
116. See *supra* note 101.
117. MercyCorps, *supra* note 73, at 7.

controversies and imperfections in other tenure systems. More so, the major social systems which are the basis of customary tenure are after all not as bad, however much they were damaged by the impact of armed conflict. The social systems and structures are within the communities and therefore more accessible and less bureaucratic. This is as opposed to the highly legalistic and bureaucratic changes introduced by the law, such as in cases of communal land associations where constitutions have to guide all processes.[118]

Secondly, the recognition of customary tenure by the law as one of the land tenure systems in Uganda has played a part in its continued value. The 1995 constitution of the Republic of Uganda for the very first time ever recognizes customary tenure as one of the land tenure systems in Uganda.[119] The detail of this is elaborated in the Land Act 1998, thereby recognizing customary land holders as landowners with valid rights to land defensible in law. Note, however, that mere recognition without efforts to change the general condescending attitude toward the institutional power of the customary, or ensuring translation of law into reality, may lead to discard the customary or to leave it in the marginalized state.

In addition to the above, the simplicity and accessibility of dispute resolution mechanisms in the customary space means it is open to the majority poor. There is in Acholi an elaborate structure in which disputes are handled at various levels: in a family, by the family head; between or among families, by the *Rwot Kweri,* with appeals going to the clan elders or to a higher clan chief, the *Rwot Moo*.[120] These structures are within the communities and therefore accessible to those willing to receive their services.[121]

The existence of the above structures alongside other statutory institutions such as Local Council Courts, and courts of judicature such as magistrate courts, however, presents a challenge to the traditional structures. Personnel in these traditional structures mediate in land cases, yet the magistrate courts issue enforceable judgments that make them more appealing to those who can afford their services. Theoretically, the traditional institutions that deal with land cases did not have the legal recognition prior to 1998. Technically, in the absence of the legal legitimacy, the other protected institutions were way above the customary and could unfavourably outcompete them.

---

118. Land Act Cap 227, s.15-17.
119. Article 237 (4) (a).
120. Mabikke, *supra* note 15, at 12.
121. *Id*., at 10-12.

In the circumstances, one can argue that the recognition of the role of traditional authorities in land administration and dispute resolution structures of the Land Act 1998, as mediators alongside the formal land tribunal system (s.89), is a step in the right direction. If the law is implemented and some support given to these institutions, their strength and legitimacy can be buttressed to better handle the conflicts that arise on customary land. Other than that, the pre-1998 situation highlighted above would be maintained.

E. Political Significance and Continued Relevance of Customary Tenure

As alluded to earlier in this article, customary tenure is the largest in Uganda. By corollary, the majority of Ugandans claim rights to land under customary tenure. Therefore, the ability to control it is significant for political reasons. When the state wields power over land, it does so over people as well.[122] Weakening of the customary system of land holding through state controls and intervening in the various conflicts and emergencies that the weakened system produces makes political sense. Therefore, nurturing the customary system to such a level that it will require less state control is to some extent to remove the basis on which the state would exercise power over customary land and the people.

Customary land denotes social identities of the people that subscribe to it. Social and cultural rules are used to determine entitlement, inclusion or exclusion. Leaving this unit or community with no state control could result into reproduction of rules and processes that might not auger well within the state context. It is argued that "social transformation has a tendency to shape bases of authority".[123] Such bases could be shaped in an exclusionary manner against the state, in the interest of localized centres of power and authority. So, if the customary is left to evolve as a consequence of inevitable social changes (without state interventions), the state could lose out if the consequence of such social change makes the elders or customary rules and institutions the dominant regulators of the customary spaces on land matters.

It has further been argued that exerting control over land is very significant in controlling or taking charge of the dynamic processes of social, economic, and political

---

122. P. Peters, *Conflicts over land and threats to Customary Tenure in Africa*, Center for International Development at Harvard University (CID), working Paper No. 247 Sept. (2012) at 8.

123. *Id.*, at 16.

processes in a given country.[124] The customary land tenure system in Acholi remains significant in availing the state a platform for exercising such political power. It has been stated that "… (in turn), the salience of localized identities, whether regional or ethnic or linguistic, has been intensified as parties vie for the support of the traditional authorities in bringing in the vote."[125] In that regard, mere neglect or marginalization of the customary tenure system is a better vice than total discard. The latter yields little benefit to the state than the former, by which the customary is preserved although in a weakened state for the political end it may serve—the vote.

Closely related to the above are the linkages between control over customary tenure in Acholi and the wider constitutionally important notion of citizenship, which makes the customary system still relevant for that and other purposes. Any legal and policy reforms around it therefore have connotations for citizenship.[126] Citizenship bestows belonging and entitlement to rights from the state; in other words, it makes the state a duty bearer to actualize rights for people. This paradigm of duty bearers and entitlement to rights between state and citizens respectively creates a state-society relationship that is so pertinent for the continuance of state legitimacy. It means there is value in the continued existence of claimants to customary rights in Acholi who require state protection for those rights and the process of offering that protection, state authority, is entrenched.

V. CONCLUSION

Customary land tenure and rights are regularly marginalized by a wide spectrum of actors including the state. Strands of marginalization play out at the level of state policies, programmes, public discourse, and in the context of (international) relations about land tenure reform with players such as development partners. The consequences of such marginalization become worse in the post-conflict situation of Acholi in northern Uganda, as shown in this article.

The customary is embedded in a highly informal and fluid social setting, greatly dependent on traditional norms and institutions of elders as custodians of customary

---

124. *Id*., at 15-17.

125. *Id.,* at 8.

126. C. Boon, *Property and Constitutional order: Land tenure reform and the future of the African State*, AFRICAN AFFAIRS 106 (425): (2007) 557-586.

land law and also as agents in mediating land cases.[127] This article has made the analysis within the milieu of armed conflict that ravaged northern Uganda for over two decades.[128] The resulting displacement of the people in Acholi is among the greatest shapers of the nature of transformation that surfaced; shaping society and dynamics of capital and land as a source of the latter. Such transformations have far reaching consequences such as questioning existing institutions or persons exercising power over land issues or even entrenching legitimacy of new power wielders on matters of customary land.

This article has shown that some trends in the law and policy, although presented as those with strengthening value, will in the long run have a marginalizing effect on customary tenure and rights in Acholi. Among these are: section 89 of the Land Act which recognizes traditional Authority as mediators without facilitation or technical support (at the time of writing; and since the passing of the land act in 1998); populist approaches to matters of customary tenure which lead to short termism in dealing with the myriad of post conflict customary land conflicts; and contestations at the inter-, intra-personal and community levels. The manner in which the imperative for post-conflict reconstruction, development and capital creation has been handled depicts the levels of marginalization of the customary in higher-level conflicts among customary land rights claimants on the one hand and investors such as the Madhvani Group and government.[129]

It is important to understand the social relationship and vocabulary of customary land tenure/ rights and how this conditions legitimacy of the customary within some social classes. Such logics of social power and relationships and their outcomes ought to inform law and policy aimed at customary land reform. In the absence of this, the ridge between the realities in the customary spaces of Acholi and the national legal, policy and other processes and realities is wide. With the culture of non-implementation of laws, the dynamics reproduced as a result of the social and cultural on-the-ground realities are entrenched. This makes the national processes relatively out of touch with those realities on the ground, thereby marginalizing the customary tenure systems in post-conflict Acholiland.

Marginalization of the customary system goes back to the colonial era and through the formation of the post-colonial capitalist state and only exacerbated in

---

127. Mabikke, *supra* note 15.
128. DOLAN, *supra* note 68.
129. See *supra* note 78; also see Nakayi, *supra* note 81; Sjögrena, *supra* note 62.

contemporary legal and other regimes. The new post-1995 era heralds a distinct pattern of subtle marginalization since the law and policy to a great extent attempt to "streamline" customary tenure. However, the limited levels of enforcement and implementation of the laws and policies unveils the de facto political priorities of the state and those that exert state power on the matter. They provide skin-deep protection that does not offer ultimate protection to the customary system and claimants of rights in it. Instead, it is saved in a relatively weak form, for that form makes it raw material for populist politics. In as much as that is the case, the marginalization of the customary system has not led to its total irrelevance to the communities in Acholi; it serves a number of valid social and other functions for which it is embraced. Although marginalized, in principle, it is not yet discarded. It is therefore imperative to facilitate and strengthen customary tenure instead of marginalizing it.

FIGHTING COUNTERFEIT GOODS IN UGANDA: FROM CRIMINAL SANCTIONS TO MARKET SURVEILLANCE

R. Kakungulu-Mayambala*

ABSTRACT

The proliferation of regional and national markets with counterfeit goods is one of the major challenges that the Ugandan consumer is currently faced with. This poses not only a health risk to the consumers owing to the mainly poor quality of such goods, but also cheats the consumers as they do not get value for their money since most of the counterfeit goods are actually substandard. Counterfeiting affects a wide range of sectors in Uganda, ranging from household items, electronics appliances, building materials especially cement to car tyres. There is therefore need to review the existing legal and policy frameworks geared towards eradicating counterfeits from Uganda. Several attempts are currently being undertaken at the international, regional and national levels to curtail counterfeiting since it distorts the market. This article advocates for a move from exclusive focus on criminal sanctions to market surveillance in Uganda.

I. INTRODUCTION

One of the major problems the Ugandan consumer is currently faced with is counterfeit goods.[1] Most, if not all, of the goods on the Ugandan market are counterfeits.[2] This poses not only a health risk to the consumers owing to the poor quality of such goods, but is also utter fraud as the consumers actually never get value for their money.[3] Counterfeiting affects a wide range of sectors in Uganda, ranging from household

* Senior Lecturer, Human Rights and Peace Centre, Makerere University School of Law. I dedicate this paper to my Consumer Law and Protection teacher, Professor Susan Block-Lieb of Fordham University School of Law, New York, New York, USA. Email: <rkakungulu@law.mak.ac.ug>.

1. UNBS, *UNBS Poised to Fight Counterfeits*, 4 STANDARDS JOURNAL 1 (2010); also reprinted in the DAILY MONITOR, February 5, 2010.

2. David Muwanga, *UNBS warns of fake goods*, THE NEW VISION, May 20, 2007. For a thorough discussion of counterfeit goods in Uganda, see the Uganda National Bureau of Statistics (UNBS) website at <www.unbs.go.ug>, (accessed April 30, 2010).

3. DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW 1 (2009).

items, electronic appliances, building materials especially cement to car tyres.[4] The fact that the goods are counterfeits is rarely incorporated into the price, except where the consumer would have been sophisticated enough to have detected the good as being counterfeit.

In this article, the author looks at the law currently in force in Uganda, from its common law origins through the colonial days to the post-independence era alongside the current proposals for reform and how all these strides attempt to deal with the issue of counterfeiting in Uganda. The main focus here is on imported goods, that is, goods that go through customs clearance before going on the Ugandan market. A comparative analysis with a developed jurisdiction like that of the United States of America as an example is appropriate to this article.

The article assesses the institutional framework and mandate to fight counterfeits in Uganda. This mandate is vested in the Uganda National Bureau of Standards (UNBS), a central government (similar to a federal) agency in Uganda under the Ministry of Trade, Industry and Co-operatives (MTIC). The article critically examines the role and effectiveness of the UNBS in fighting counterfeit products on the Ugandan market. Through effective product testing, product certification, quality management systems certification, import inspection and clearance schemes, the UNBS would be able to weed out a majority of the counterfeit goods currently on the Ugandan market. However, it seems that UNBS, practice, is ineffective.

The article further examines cutting edge issues relating to the difficulties associated with fighting counterfeit products on the Ugandan market. These include the 'affordable' but poor quality products on the market especially from the emerging 'Tiger' economies in Asia. There is also the problem of smuggling whereby goods do not go through imports and customs for checks and quality certification. Even for those goods that go through customs, the UNBS lacks the capacity to check such goods for quality purposes. Lack of capacity and poor funding are the causes of some of UNBS' difficulties and inability to tame counterfeits in Uganda.

Dumping is another difficulty associated with fighting counterfeits in Uganda. Internal counterfeiting through the 'mimicry' of famous international trademarks, standard symbols and patents within Uganda's borders, though a major challenge, is outside the scope of this article.

Precautions taken against counterfeiting in Uganda have involved prosecuting

---

4. UNBS, *UNBS ups Fight against Fake Goods,* 1 STANDARDS JOURNAL 1 (2009); also reprinted in the DAILY MONITOR, June 5, 2009.

offenders and those breaching UNBS laws in Uganda. For a long time, criminal law. One of the major tools used by UNBS to discourage counterfeiting, has been ineffective. Instead, market surveillance, if well employed, would yield better results in preventing counterfeit goods from going on the Ugandan market in the first place. The article ends with conclusions and recommendations.

II. THE NATURE OF CONSUMER PROTECTION IN UGANDA

It is very difficult to describe with precision what the nature of consumer protection could or should be in Uganda. This is mainly because, whereas consumer law and protection is very important in Uganda, much of the jurisprudence on the subject is foreign and largely based on the Anglo-Saxon legal system. Attempts at domesticating consumer law and protection in Uganda can be said to be in high gear, but are mainly in the infant stage. Nonetheless, it is imperative to discuss the problem of consumer protection in Uganda.

According to V .L. Kwesi Essien, "consumer protection" is:

> an amorphous conception that cannot be defined. It consists of those instances where the law intervenes to impose safeguards in favor of purchasers and hire-purchasers, together with the activities of a number of organizations, variously inspired, the object or effect of which is to procure fair and satisfying treatment for the domestic buyer.[5]

Kwesi continues:

> From another viewpoint, "consumer protection" may be regarded as those measures which contribute, directly or indirectly, to the consumer's assurance that he will buy goods of suitable quality appropriate to his purpose; that they will give him reasonable use, and that if he has just complaint there will be a means of redress.[6]

---

5. V.L. Kwesi Essein, *Consumer Protection in Nigeria: The Case for Reform,* 16 N.Y.U. J. INT'L L. & POL. 516, quoting verbatim from the COMMITTEE ON CONSUMER PROTECTION, FINAL REPORT 8 (1962) (Cmd. No. 1781) quoting from a Nigeria Report.

6. *Id.*

As much as the term consumer protection poses a challenge in relation to its precise definition, so does the term consumer. For, before one can even talk of 'consumer protection', it is of great relevance first to define who a consumer is. Uganda does not have a Consumer Protection Act[7] and the country has no universally agreed definition of the term 'consumer'. A number of statutes, both criminal and civil, attempt to define it for their own purposes in a variety of jurisdictions.[8] One example of such definition is found in s.20(6) of the Consumer Protection Act 1987 of the UK, which states that a consumer:

> (a) In relation to any goods, means any person who might wish to be supplied with the goods for his own private use or consumption;
> (b) relation to any services or facilities, means any person who might wish to be provided with the services or facilities otherwise than for the purposes of any business of his; and
> (c) In relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his.[9]

Consumer law and protection is still evolving in Uganda. But its origins are clear, having been modeled and tailored to that of the United Kingdom or more less the English common law system. Legislation currently is pending before the Ugandan Parliament to modernize the country's consumer law. The proposed Ugandan Consumer Protection Bill is narrow in scope and only provides for the basics in relation to consumer protection.[10] This is largely due to the fact that Uganda is a developing country. However, the proposed legislation, if enacted, should be adequate to ensure a modicum of consumer protection. The bill in its current state provides for mechanisms of countering the exploitative devices that producers and sellers rely on.[11] Since consumer protection connotes the use of legal methods to ensure that the

---

7. There is only a draft Bill titled 'The Consumer Protection Bill, 2002' currently before the Parliament of Uganda.

8. P. CARTWRIGHT, CONSUMER PROTECTION AND THE CRIMINAL LAW: LAW, THEORY AND POLICY IN THE UK 2 (2001).

9. *Id.*

10. This is based on my personal opinion of the Bill after comparing it with similar legislation in other jurisdictions such as the US, the UK and Canada.

11. Kwesi Essien, *supra* note 5, at 517.

consumer gets a fair return on his spending, this bill should be effective, if adequately enforced.[12]

Uganda also introduced in 2009 the Anti-Counterfeit Bill, which aims to '…prohibit trade in counterfeit goods…' and stipulates stiff penalties against violators.[13] According to Zweli Lunga, the bill has elicited very strong reactions from both local and international civil organizations for a number of reasons, key of which are the manner in which it defines counterfeits and counterfeiting, the mischief it is designed to cure, and its impact on access to medicines and the right to health.[14] The following section provides a more detailed discussion of the proposed Ugandan legislation on consumer protection and counterfeit goods.

III. THE PROBLEM OF COUNTERFEIT GOODS IN UGANDA

The number of counterfeit products on the Ugandan market has escalated, putting consumers' lives at risk.[15] The sub-standard goods range from electrical materials such as cables, conduits, sockets, switches, bulbs and tubes, to building materials such as steel products including re-enforcement bars, ring wires, profiled sections, undersize and re-labeled iron sheets, as well as wrong chemical compositions and mattresses.[16] On several occasions, the UNBS and police have impounded bags of fake cement.[17] Cement is also often adulterated or underweight.[18]

Most of the fake goods on Uganda's market are from Asia's fast-growing economies where Ugandan traders go looking for cheap products from which to reap higher profits.[19] Locally, unscrupulous people manufacture products illegally and others adulterate original products.[20] It is upon this background that the UNBS in conjunction with the line ministry are pushing for legislation to tame the vice of

---

12. *Id.*

13. Zweli Lunga, *Problems in Defining Counterfeiting: The Case of Uganda's 2009 Proposed Anti-Counterfeit Law*, 15 EAST AFR. J. PEACE HUM. RIGHTS 503 (2009).

14. *Id.*, at 15.

15. David Muwanga, *Fake, deadly products increase*, THE NEW VISION, April 26, 2007, at 39.

16. UNBS, *Help! Counterfeiting is Killing Mattress Business,* 3 STANDARD JOURNAL V (2009).

17. Cannon Busingye, *450 bags of fake cement impounded,* THE NEW VISION, July 2, 2009, at 1.

18. *Id.*

19. Muwanga, *supra* note 15.

20. *Id.*

counterfeits in Uganda.[21]

Both the existing laws relating to consumer protection and the proposed Consumer Protection Bill do not define counterfeiting. This creates enforcement problems. What is clear, however, is that almost everyone agrees that counterfeit products are bad and indeed the proposed Uganda Counterfeit Goods Bill, 2009, attempts to curb counterfeiting.[22]

Section 2 of the bill states that "counterfeiting" is, without the authority of the owner of any intellectual property right subsisting in Uganda in respect of protected goods:

> (a) the manufacturing, producing, packaging, re-packaging, labeling or making, whether in Uganda or outside Uganda, of any goods by which those protected goods are imitated in such manner and to such a degree that those other goods are identical to or substantially similar to protected goods;
> (b) the manufacturing, producing or making, whether in Uganda or outside Uganda, of the subject matter of that intellectual property, or a colorable imitation of it so that the other goods are likely to be confused with or to be taken as being protected goods of the owner or any goods manufactured, produced or made under his or her license;
> (c) the manufacturing, producing, or making of copies, in Uganda or outside Uganda, in violation of the author's rights or related rights.[23]

The section further defines "counterfeit goods" to mean goods that are an imitation of

---

21. Hellen Wanene, *Counterfeit Bill*, DAILY MONITOR, July 3, 2009.

22. Lunga, *supra* note 13, at 505-506.

23. The Kenya Anti-Counterfeit Bill, 2008 uses almost similar words. The Kenyan proposed legislation just like that of Uganda is in line with the harmonization process that is sweeping across all the five East African countries in their economic bloc – the East African Community Customs Union. The East African Community (EAC) is the regional intergovernmental organization of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Rwanda and Republic of Burundi with its headquarters in Arusha, Tanzania. The Treaty for Establishment of the East African Community was signed on November 30, 1999 and entered into force on July 7, 2000 following its ratification by the Original three Partner States – Kenya, Uganda and Tanzania. The Republics of Rwanda and Burundi acceded to the Treaty on June 18, 2007 and became full Members of the Community with effect from July 1, 2007, see < http://www.eac.int/about-eac.html> (accessed April 30, 2010).

something else with an intent to deceive, and includes any device used for the purposes of counterfeiting.[24] Thus, it seems clear that Uganda's proposed legislation on counterfeit goods encompasses intellectual property and customs regulations, but mainly misses the main purpose of consumer protection law, especially in the context of a developing country. That the good is a counterfeit or an imitation of another does not necessarily mean that that good is substandard or harmful or dangerous to the Ugandan consumer. The law in Uganda should therefore specifically address the sale and distribution of unsafe goods as opposed to merely counterfeits.

However, counterfeit goods remain as such and anybody dealing in them should be punished. The fact that the counterfeit goods are dangerous or harmful to the consumer should be an 'aggravating' ground for additional penalties. This in turn points to the blurring of the nexus between intellectual property law, customs regulations, and consumer law and protection. This paradox, especially as it relates to a developing country such as Uganda, is best captured by Zweli Lunga:

> From the definition, there is no doubt that the proposed law protects the very substance of patents, copyright and trademarks as it strictly prohibits the making, production, copying and labeling of any product without the authority of the owner. It is not immediately clear why this has to be outside the well established comprehensive and appropriate legal framework governing IP in Uganda. Moreover, this definition goes beyond mechanisms ordinarily found in IP laws allowing for exceptions and limitations to IPR such as compulsory licensing through which governments are able to give persons other than the owners certain rights in relation to a product. The effect of the definition is thus to prohibit the listed activities without the authority of the owner.[25]

The traditional intellectual property regime in Uganda would be adequate to cover the issue of counterfeits through Uganda's Trademark Act.[26] This Act was designed to deal mainly with infringement of trademarks. However, the act lacks the consumer law and protection flavor necessary to guard the Ugandan consumers against dangerous

---

24. *Id.*
25. Lunga, *supra* note 13, at 506.
26. Cap. 217, Laws of Uganda, 2000 Edition.

counterfeit goods, and not only counterfeit goods. Lunga observes further:

> Therefore, any person manufacturing say a drug under a compulsory licensing scheme through appropriate patent law provisions given without the authority of the owner would be counterfeiting. The implication of such an interpretation is clearly very grave to the manufacturers of generic medicines who are only able to do so through the imposition of necessary limitations on the owner's IPRs. It is primarily because of this reason that the anti counterfeit bill in Uganda is TRIPS-PLUS, essentially derogating from the benefits that the country has in relation to implementing certain provisions under the TRIPS up to 2016.[27]

Whereas certain counterfeit goods are harmful to both the consumer and public health, the core goal of the Counterfeit Goods Bill should be a focus on consumer protection from mainly substandard goods that put consumers' lives at risk and not merely as a tool to duplicate the already existing and stringent intellectual property regime [IPR] in Uganda. In any case, as Lunga rightly observes, if the mischief behind anti-counterfeit is really trade in Intellectual Property [IP]-protected goods, then the IP laws proper should be adequate and sufficient to regulate this illicit trade.[28] In this regard, it is incumbent upon the owners of the violated IPR to take action and seek protection, and not the burden of the state to do so.[29] This is the case especially since the protection and enforcement of IPRs is agenerally a private right and enforcement is vested in the rights holder.

The section below discusses the role of the UNBS in regulating and fighting counterfeits on the Ugandan market. It traces the legal and policy mandate of this central government agency in Uganda.

---

27. *Id.*
28. *Id.*, at 507.
29. *Id.*

IV. THE ROLE OF UNBS IN FIGHTING COUNTERFEIT GOODS IN UGANDA

The UNBS is a statutory body under MTIC.[30] It was established by an act of parliament—the UNBS Act[31]—and became operational in 1989.[32] It is governed by the National Standards Council and headed by an executive director.[33] According to Deusdedit Mubangizi, the Manager responsible for Quality Assurance at the UNBS, the key objectives of the UNBS are: (a) promoting the quality and competitiveness of locally manufactured goods, (b) promoting fairness in trade and (c) protecting the health and safety of consumers.[34]

Section 3 of the UNBS Act gives the functions of the UNBS, which include obligations to:

> (a) Formulate national standard specifications for commodities and codes of practice required from time to time;
> (b) Promote standardization in commerce, industry, health, safety and social welfare;
> (c) Require certain products to comply with certain standards in manufacture, composition, treatment or performance and to prohibit substandard goods where necessary;
> (d) Enforce standards in the protection of the public against harmful ingredients, dangerous components, shoddy material and poor performance;
> (e) Promote trade among African countries and the world at large through the harmonization of standard specifications demanded in various countries;
> (f) Provide for the testing of locally manufactured or imported

30. See s.3 of the Uganda National Bureau of Standards Act, Cap. 327, Laws of Uganda 2000 Edition.

31. *Id.*

32. Deusdedit Mubangizi, The Role of the Uganda National Bureau of Standards in Ensuring Consumer Protection in Uganda: Opportunities and Challenges (Paper presented to Third Year students of the Consumer Law and Protection Class at the Faculty of Law, Makerere University, Kampala, Uganda, June 2, 2007), at 2.

33. *Id.*, and see also §§ 4-12 of the UNBS Act.

34. Mubangizi, *supra* note 32, at 5.

> commodities with a view to determining whether the commodities conform to the standard specification declared under this Act;
> (g) Make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus for determining their degree of accuracy.[35]

In a nutshell, UNBS' mandate is to develop and promote standardization, quality assurance, metrology (measurement science) and testing of commodities.[36] Because there is currently no legislation in Uganda that deals specifically with consumer protection,[37] UNBS faces a major challenge of fighting counterfeit products. According to the Uganda Law Reform Commission [ULRC],[38] there are some portions of legislation that deal with certain aspects of consumer protection.[39] Examples of these include the Sale of Goods Act[40] (dealing with the quality of goods), the Customs Management Act[41] (incorporating the East African Customs and Transfer Management Act),[42] and several statutes dealing with prohibited or restricted imports: the Weights and Measures Act,[43] regulating weighing and measuring, pre-shipment inspection,[44] the Adulteration of Food and Produce Act,[45] meant to ensure produce of good quality products that are free of defects, the National Drug Policy and Authority Act,[46] intended to regulate the distribution and consumption of drugs, the Food and Drugs Act,[47] enacted to regulate the prevention of adulteration of food and drugs and the Public

35. *Id.*, at 6-7.
36. *Id.*, at 4.
37. Uganda Law Reform Commission [ULRC], Executive Summary on the Reform of Consumer Law and Protection in Uganda (2000), at 26.
38. *Id.*
39. *Id.*
40. Cap.82, Laws of Uganda (2000) Edition.
41. Cap.337, Laws of Uganda (2000) Edition.
42. Cap.27, Laws of the East African Community.
43. Cap.103, Laws of Uganda (2000) Edition.
44. See s.27(5)(6), all adopted from the ULRC, *supra* note 37.
45. Cap.27, Laws of Uganda (2000) Edition.
46. Cap.206, Laws of Uganda (2000) Edition.
47. Cap.278, Laws of Uganda (2000) Edition.

Health Act,[48] regulating the security and maintenance of health.[49]

However, of all the above-scattered legislation, the UNBS possesses jurisdiction over only two laws, i.e., the UNBS Act of 1983 and the Weights and Measures Act,[50] as well as a host of regulations derived from the latter Act.[51] Section 21(1) of the UNBS Act gives the UNBS regulatory authority by providing that:

> No person shall import, distribute, sell or have in his or her possession or control for sale or distribution any commodity for which a compulsory standard specification has been declared unless the commodity conforms to the compulsory standard specification.[52]

Additional regulations that are key to fighting counterfeit goods on the Ugandan market are derived from the UNBS Act.[53] They are: the UNBS Certification Regulations (1995) and the UNBS Import Inspection and Clearance Regulations (2002).[54]

The most effective way to curb counterfeit goods in Uganda is through imports inspection,[55] market surveillance[56] and factory inspection.[57] The three form the bedrock of practical and meaningful consumer protection especially in the context of a developing country like Uganda.[58] The law must be strong enough, but so must its enforcement. However, market surveillance and factory inspection still operate under the parent law [the UNBS Act] without separate regulations.[59]

---

48. Cap. 281, Laws of Uganda (2000) Edition.

49. This summary of Consumer Related Legislation in Uganda is taken from ULRC, *supra* note 39, at 26.

50. Mubangizi, *supra* note 32, at 9.

51. *Id.,* at 11. See the Weights and Measures Rules (1964), the Sale and Labeling of Goods Regulations (1972), the Bread Rules (1969), the Repair Rules (1971), and the Liquid Fuel and Lubricating Oil Rules (1964).

52. Mubangizi, *supra* note 32, at 13.

53. *Id.,* at 10.

54. *Id.*

55. *Id.,* at 32 defines market inspection as the inspection of imports to ensure that they meet national standards before they are placed on the market.

56. *Id.*, at 32 defines market surveillance as the removing of fake, substandard and expired goods from the market.

57. *Id.,* at 32 defines factory inspection as the inspecting and monitoring of local industries to ensure that their products conform to standards and are not harmful to consumers.

58. *Id.,* at 10.

59. *Id.,* at 10.

In the absence of a strong market surveillance and factory inspection in Uganda, trademark law which plays a key role in the fight against counterfeits should be strictly enforced by the trademark owners with assistance from the government. Border customs and clearing should also be intensified in an effort to prevent counterfeits from accessing the Ugandan market. The UNBS has the unenviable task of fighting counterfeit goods amidst the weak laws in Uganda. The next section discusses additional challenges faced by the UNBS in executing its role.

V. CORE ISSUES RELATING TO COUNTERFEIT GOODS IN UGANDA

The UNBS faces serious and major constraints in its core role of enforcing standards to protect consumers and ensure fairness in trade in Uganda.[60] The challenges that the UNBS faces range from archaic laws and low penalties, to weak enforcement and a complacent population.[61] Amidst all these challenges, UNBS cannot abandon its statutory mandate and still has to continue with its core mandate.

A. Weak Laws

The rise and proliferation of counterfeit and substandard goods on the Ugandan market can to a great extent be attributed to the weak laws currently in force.[62] Even in instances where the UNBS has been vigilant and arrested persons suspected to be dealing in counterfeit and substandard goods, archaic laws provide for ridiculously low penalties for people found with such goods.[63] The frustration with which the UNBS is faced in relation to the archaic laws and low penalties was expressed as follows:

> …recently, we impounded 260 cartons of expired beer, took the culprits to court and the fine was sh3,000, while the one who had 800

60. J.F. Mpanga, The Effectiveness of Consumer Protection in Uganda (LL.B. Dissertation, Makerere University, 1998).

61. A.O. Oyuku, The Enforcement of Consumer Protection Laws in Uganda (LL.B. Dissertation, Makerere University, 1998).

62. D. Mabirizzi, Ideals and Realities in Uganda's Consumer Protection: The Case of Price Control and Products Liability (LL.M. Dissertation, Makerere University, 1979).

63. Deusdedit Mubangizi, The Importance of Standards and Quality Assurance in Trade Promotion and Consumer Protection (Paper presented at a Workshop for District Commercial Officers, Shangrai-La Hotel, Kampala, Tuesday, April 24, 2007).

> bags of adulterated cement was charged sh30,000.[64]

Thus, generally speaking, the non-deterrent archaic laws and low penalties provide for fines of UGX 3,000 to UGX 30,000 (i.e., $1.50 to $30)! This is very little money for a person engaged in a harmful and dangerous activity like counterfeiting to be asked to pay as a fine. Most of these laws were enacted over 30 years ago when Uganda's currency was very strong. Over time and due to inflation, the Ugandan currency has been weakened and is no longer in line with the fines provided for by the old legislation. This scenario is exacerbated by the long process that comes with law reform in Uganda. These figures should therefore be revised by passing a new legislation which should contain provisions to increase the fines automatically as economic indices indicate in the value of the Ugandan shilling.

B. Weak Enforcement

As noted earlier, the laws relating to consumer protection in Uganda are not only scattered but also weak. It is for this reason that Uganda is in the process of having a comprehensive act covering consumer protection.[65] The ULRC noted that:

> …there is at present no legislation in Uganda, which deals specifically with consumer protection. There is, however, legislation, which deals with certain aspects of consumer protection.[66]

On top of the non-deterrent archaic laws and low penalties, there are also weak laws covering counterfeits in Uganda.[67] The proposed legislation on counterfeit goods in Uganda should thus be a welcome idea. The Parliament of Uganda should therefore pass the Consumer Protection Bill (2002) on consumer protection and also the Counterfeit Goods Bill (2009) on counterfeit goods in Uganda into Acts of Parliament.

---

64. Muwanga, *supra* note 15.
65. ULRC, *supra* note 37, at 14.
66. *Id.*, at 7.
67. Harriet Diana Musoke, The Plight of Consumers in Liberalized Economies: The Ugandan Experience (Unpublished).

C. Complacent Population

The Ugandan populace has over time become complacent to substandard products. This is indeed a major impediment in the fight against counterfeit goods. On the one hand, consumers buy substandard products either out of ignorance or because they appear cheaper[68] while on the other, dealers and manufacturers of those products do not fully appreciate the terrible implications of the fake products that they sell.[69] The consumer, if well informed and empowered, plays a key role in reporting any substandard goods on the market. This scenario is well summarized by Essien:

> …it should be noted that the success of consumer protection also depends on the existence of a literate and highly discerning consuming public, willing and able to register its complaints and to seek redress where necessary. Effective consumer protection relies on consumer interest in the disclosure of product information. The availability of such information would counter the sophisticated methods employed by producers to influence and to determine the choice and purchasing patterns of the general public.[70]

The "resigned culture" of Ugandan consumers as expressed in their lack of a willingness to register complaints and to seek redress for defective goods can in part be attributed to UNBS' failure to effectively exercise its mandate to encourage and undertake educational and outreach work in connection with standardization. UNBS should take a lead role in sensitizing both the consumers and sellers about the dangers associated with substandard and counterfeit goods. This, too, augurs very well with the notion of market surveillance, since the now sensitized public would easily identify and then notify UNBS of traders dealing in substandard goods.

Another terrible blow to the fight against counterfeits and substandard goods in Uganda is the high degree of illiteracy. Literacy data published by the UNESCO Institute of Statistics in 2007 shows that Africa and South Asia have the lowest adult

---

68. Mubangizi, *supra* note 32, at 40.

69. *Id.*

70. Essien, *supra* note 5, at 519, *quoting* M. NADEL, THE POLITICS OF CONSUMER PROTECTION, 143-45 (1971).

literacy rates.[71] For the demographic and health surveys done in Uganda for the period 2003 to 2006, the adult literacy rate of the population aged 15 to 49 years stood at 68.6% for males and 48.9% for the females and 58.4% for the overall population.[72] Despite legislation such as the Illiterates Protection Act[73] which was passed in 1918 for the protection of illiterate persons in Uganda, the enforcement of this legislation is very weak and persons who are unable to read and understand are the worst victims of unscrupulous traders.

VI. CONSUMER PROTECTION IN OTHER JURISDICTIONS AND LESSONS FOR UGANDA

A. The United States of America and Lessons for Uganda

In the US, counterfeits are handled as an issue of infringement of trademarks. The US law dealing with counterfeits is the Lanham Act. As Loren and Miller observe:

> Trademarks are protected by both state and federal law. Most trademark owners prefer to bring claims under the federal trademark law, known as the Lanham Act.[74] Congress has provided that the federal district courts may hear trademark infringement claims brought under the Lanham Act, and that plaintiffs may join state law claims with those federal claims.[75]

Thus, because US legislation on trademarks and unfair competition is very strong and well implemented alongside well-designed customs regulations, counterfeiting is rare in the country. Trademark law is rigorously enforced in the US by rights owners to prevent infringement and dilution of famous marks.[76] The registration of a mark is another major component of US trademark law which is equally vital in preventing any

---

71. Friedrich Huebler, International Education Statistics, retrieved from <http://huebler.blogspot.com/2008/05/literacy.html>, (accessed April 9, 2010).

72. *Id.*

73. Cap.78, Laws of Uganda (2000) Edition.

74. 15 U.S.C. §§1051 et seq.

75. See 28 U.S.C. §1338; L.P. LOREN & J.S. MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 527 (2009).

76. *Id.,* at 579.

likelihood of counterfeiting. This is tied to the fact that the "test to determine the registrability of a mark is identical to the test to determine infringement. Thus, one cannot register a mark whose use would infringe another's mark."[77] This presents a sharp contrast with Uganda where relatively similar and confusing trademarks can be easily registered. As Deusdedit Mubangizi noted, "We [in Uganda] have got increasing imports of counterfeit products with names like Philibs instead of Philips, SQNY instead of Sony" and the list is endless.[78]

The determination for infringement of a trademark is very clear and more elaborate in the US than in Uganda, thus leaving no grey areas in this field of the law. As Loren and Miller note:

> Trademark infringement of a plaintiff's mark occurs when a defendant's mark is used in commerce and that mark is likely to cause consumer confusion between plaintiff's and defendant's mark.[79] The test for likelihood of confusion is the likely reaction of typical buyers including, those who are ignorant, unthinking, and credulous.[80]

As much as Uganda has the Illiterate Protection Act,[81] whose aim is to protect illiterate persons, this legislation has not been enforced to the letter, thus leaving the mainly illiterate and careless consumers at the mercy of unscrupulous business people.

Loren and Miller further observe that issues relating to the determination of confusion in infringement of trademarks and by implication, counterfeits, has for long been a settled matter in the US. Likelihood of confusion is analyzed using the eight so-called *Sleekcraft* factors: (1) strength of the mark, (2) proximity or relatedness of goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) convergence of marketing channels, (6) degree of care customers are likely to use when purchasing goods of the type in question, (7) intent of defendant in selecting the mark, and (8) likelihood the parties will expand their business lines.[82]

It is indeed so hard for a counterfeiter to escape falling within any of the above

---

77. *Id.,* at 586.
78. Muwanga, *supra* note 15.
79. 15 U.S.C. §1114.
80. LOREN & MILLER, *supra* note 75, at 590.
81. Cap. 78, Laws of Uganda, 2000.
82. LOREN & MILLER, *supra* note 75, at 590.

eight grounds used in determining the likelihood of confusion. The criteria used in determining the likelihood of confusion is totally in line with the theoretical underpinnings of trademark law. If Uganda were to have a stringent and elaborate criteria for determining the likeliness of confusion, it would be very easy for the law enforcement and standards monitor – the UNBS – to apprehend and prosecute counterfeiters.

> For, it is clear that traditional trademark protection prohibits a competitor from using a word or symbol in association with its products or services in a way that is likely to cause consumers to be confused about the source of those products or services. Such confusing use would cause harm to the consumers who thought they were getting a product from a different source, and would also cause harm to the owner of the trademark by diverting those sales to the competitor.[83]

Registered marks are easier to enforce compared to their unregistered counterparts. The Trademark Act of Uganda[84] is not as detailed or up-to-date as the US law on trademarks. The US law at both federal and state levels is indeed comprehensive, and makes it hard for counterfeiters to go about their business.

The Lanham Act permits trademark owners to register their marks. Registration is not required for protection; one may sue for the infringement of an unregistered mark under § 45 of the Act.[85] State law, both statutory and common law, can also provide protection for unregistered marks. Additionally, many states do permit the registration of trademarks, trade names, and 'd.b.a.' (doing business as).[86] This is also in line with the Lanham Act's definition of a trademark as 'any word, name, symbol, or device, or any combination thereof.'[87]

The US' comprehensive legislation on trademarks and counterfeiting sets the stage for Uganda's development of her legislation in this field. "Likelihood of

---

83. *Id.,* at 528.
84. Cap. 217, Laws of Uganda, 2000 Edition.
85. *15 U.S.C. §1125.*
86. LOREN & MILLER, *supra* note 75, at 542.
87. See 15 U.S.C. § 1125; LOREN & MILLER *id.,* at 551.

confusion forms the gravamen for a trademark infringement action."[88] Similarly, although the plaintiff need not set forth evidence of actual confusion to prevail in a trademark infringement action, "[a]ctual confusion in the marketplace is often considered the best evidence of likelihood of confusion"—*Universal Money Ctrs.*[89]

Through sweat and hard work, the owner of a trademark builds consumer loyalty. He or she does this through the consistent supply of usually quality products, which in turn are reciprocated by consumer loyalty. On the contrary, however, "the counterfeiter is benefiting from the goodwill of the mark owner—a true 'free-rider.'"[90] Counterfeits distort trade and create unfair competition in the trade chain. "Trademark owners suffer significant harm from this counterfeiting activity. For example, one industry trade group in the US claims counterfeiting is a $600 billion a year problem."[91] This is a staggering figure and indeed a big loss to the "genuine" trademark owner. The consumer too is on the losing side when it comes to counterfeits, not only monetarily but also at a health risk. It is for this reason that the US as compared to Uganda has taken drastic actions against counterfeiters.

> Counterfeit marks can mislead consumers. They give the ring of authenticity to goods of lower quality. They can even mask serious health or safety risks to consumers, as the cases of counterfeit food products, batteries, prescription drugs, or automotive parts … sales of counterfeit products can hurt … third parties who use the goods or services after the initial purchase … these are the types of situations that Congress sought to eradicate by criminalizing trademark infringement.[92]

Since counterfeits operating on a large scale are in brisk business, criminalizing trademark infringement by the Congress was a rational decision. "Counterfeiting trademarks weakens modern commercial systems."[93] Counterfeits also confuse

---

88. LOREN & MILLER *id.*, at 598.
89. *See 22 F.3d at 1534; LOREN & MILLER id.*, at 601.
90. LOREN & MILLER *id.*, at 602.
91. *Id.*
92. *Id.*, at 603.
93. *Id* also quotes David J. Goldstone & Peter J. Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 17-19 (1998).

consumers as to the source of the goods.[94]

The increased use and proliferation of counterfeits on the US market and its apparent infringement led to the enactment of new legislation in this field including the Trademark Counterfeiting Act of 1984.[95] The trademark Counterfeiting Act of 1984 provides criminal and civil penalties for anyone who intentionally traffics 'in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services.'[96]

Faced with the danger of counterfeits and infringement of trademarks, the US was compelled to bring about further legislation in this field in the late 1990s. The danger posed by counterfeits to consumers was another driving force behind the new legislation. In a bid to counter the counterfeit problem in the US, Congress enacted three different statutes directed at the problem: the Anti-counterfeiting Protection Act of 1996;[97] the Stop Counterfeiting in Manufactured Goods Act[98] in 2006; and finally, in 2008, the Prioritizing Resources and Organization for Intellectual Property Act.[99] The trio of legislation drastically changed the landscape relating to the counterfeit problem in the US. Each of these new enactments came with enhanced civil and criminal penalties for counterfeiting, provided for mandatory restitution awards, and devoted more government resources to combating counterfeiting.[100] The civil judgments that can be obtained for counterfeiting include statutory damages, mandatory attorney fees and trebling of damages.[101]

In addition to the civil judgments that trademark owners can obtain, trafficking in counterfeit goods can bring hefty criminal consequences[102] as well fines of not more than $5 million and imprisonment of up to 10 years.[103]

Unlike Uganda which has no legislation specifically addressing the issue of

---

94. *Id.,* at 605.

95. J.C. GINSBURG, J. LITMAN & M.L. KEVLIN, 2009 CASE SUPPLEMENT AND STATUTORY APPENDIX (2009).

96. LOREN & MILLER, *supra* note 75, at 603, also quoting the Lanham Act which defines a counterfeit mark as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127.

97. (Pub. L. No. 104-153).

98. (Pub. L. No. 109-181).

99. ("PRO-IP Act") (Pub. L. No. 110-403).

100. LOREN & MILLER, *supra* note 75, at 603.

101. *Id.*

102. *Id.*

103. 18 U.S.C. § 2320(a)(1)

counterfeits, the US has comprehensive legislation on counterfeiting. The criminal sanctions that come with counterfeiting are very serious in the US context. The law imposes hefty fines, and imprisonment for counterfeiters, making counterfeiting much riskier in the US. Therefore, whoever may or could be thinking of engaging in the activities of counterfeiting in the US must brace him or herself for the stringent criminal law and whoever deals in counterfeits in the US does so at his or her own peril. Even trafficking in counterfeit labels is also illegal in the US.[104]

Another main feature and indeed strength of US law on counterfeiting is her customs regulation and border control. The importation of goods bearing infringing marks or names is forbidden.[105] And any breach thereof gives birth to a host of hefty fines, criminal sanctions and a likelihood of imprisonment. This has been indeed an effective tool of safeguarding the US against the danger of mainly imported counterfeits as is the case in Uganda. 15 U.S.C. § 1124 [LANHAM ACT § 42] is the main law relating to the forbidding of importation of goods bearing infringing marks or names.[106] Section 42 of the law provides as follows:

> Except as provided in subsection (d) of section 1526 of Title 19, no article of imported merchandise which shall copy or stimulate the name of any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or stimulate a trademark registered in accordance with the provisions of this Act or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customs house of the United States.[107]

The customs service regulation of the US is very strong compared to that of Uganda.

---

104. 18 U.S.C. § 2320(a); LOREN & MILLER, *supra* note 75, at 604.

105. J.C. GINSBURG, J. LITMAN & M.L. KEVLIN, TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND MATERIALS 985 (2007).

106. *Id.*

107. *Id.*

Customs regulations are reinforced by meaningful and powerful remedies such as goods being subject to seizure and forfeiture if found to be counterfeit.[108]

With a strong customs regulation and border control measures, the US has been able to effectively control the importation and/or smuggling into the country of goods bearing infringing marks or names. It is also important to note that it is not only the law on counterfeits which is very strong in the US but also its enforcement. Unless effectively enforced, a strong law would not yield positive results. To this, extent, therefore, Uganda has a lot to learn from the US in terms of anti-counterfeiting legislation and enforcement.

VII. A PROPOSAL FOR REFORM (RECOMMENDATIONS)

Uganda's proposed legislation on counterfeiting should provide for stringent criminal sanctions and hefty fines especially in the presence of "extenuating circumstances" where there has been an "intentional" use of a counterfeit mark.[109] Similarly important is that:

> Enhanced remedies exist to combat not only the normal harms trademark owners suffer, such as diverted sales, reputation loss and potential injury to mark distinctiveness and goodwill, and that potential purchasers can suffer, such as obtaining the wrong goods or increased search costs, but also to redress other potential injuries to the public (consumers).[110]

Uganda should intensify its customs regulation and border patrols so as to curb smuggling and to effectively handle the issue of counterfeit. Strong customs laws and regulations should be enacted so that goods that infringe the rights of trademark owners are not admitted into the country. Uganda too should actively fight smuggling. Since smuggled goods do not go through customs, it is easy to smuggle into the country counterfeits and to put them on the market.

---

108. *Id.*, at 985 and 996.

109. *Id.*, at 958.

110. *Id.* See also, 18 U.S.C. § 2320 of the Trademark Counterfeiting Act of 1984, as amended, on trafficking in counterfeit goods and services.

VIII. CONCLUSION

The Parliament of Uganda needs to pass comprehensive legislation to counter the vice of counterfeits in Uganda.[111] The current legislation is inadequate and obsolete.[112] The UNBS, which is mandated to enforce standards to protect consumers in Uganda, is under-funded and grossly under-staffed with a current 60 per cent deficit in technical staff enrolment.[113] The UNBS currently has a total of 208 staff but needs 457.[114] UNBS should not only strive to enforce the law but also 'be on the ground' and exercise its mandate of market surveillance as the only way through which the market can be cleaned of counterfeit goods.[115] UNBS should also work hard to tackle rampant smuggling in the country.[116]

The government of Uganda through MTIC should build a permanent home for UNBS, offer adequate facilitation and equip its testing laboratories and other areas of metrology. The transport of UNBS too needs to be enhanced. UNBS currently has too few vehicles to effectively carry out its mandate of market inspection and surveillance. The levels of awareness amongst consumers, traders, professionals, government officials and policy makers as to the dangers of counterfeit and sub-standard goods should be increased.[117] The UNBS has put in place an Import Inspection and Clearance Scheme for all imported products whose standard specifications were declared compulsory under the provisions of the UNBS Act of 1983 to be inspected for conformity to the relevant Ugandan standard by UNBS before release onto the Ugandan market.[118] Quality inspection is done by the UNBS at the entry point during the customs verification exercise.[119]

---

111. UNBS, *Counterfeit Bill: Culprits face 5 – 20 years in Jail,* 2 STANDARDS JOURNAL ii (2009); also reprinted in the DAILY MONITOR, July 3, 2009.

112. Benon H. Oluka, *Why sub-standard goods flood the market,* DAILY MONITOR, April 26, 2010.

113. *Id.*

114. *Id.*

115. Milton Olupot and Catherine Bekunda, *MPs to probe Mukwano Group over fake seeds,* THE NEW VISION, April 7, 2010.

116. Amazia Dradenya, *Smugglers Overwhelm Revenue Body,* THE NEW VISION, April 5, 2010, at 2.

117. Mubangizi, *supra* note 32, at 40-43.

118. UNBS, Import Inspection and Clearance Schemes, retrieved from, <http://www.unbs.go.ug/main.php?menuid=60> (accessed April 30, 2010).

119. *Id.*

The Ugandan courts should also reorient themselves towards protecting the weaker party—the consumer—against unscrupulous business people in the marketplace, by lifting the veil on the long established notion of freedom of contract.[120] Consumer law will only achieve its objectives if it is enforced effectively. It is thus imperative that the criminal law in consumer protection is rigorously enforced.[121] But, the enforcement of criminal law against culprits apprehended as counterfeiters may be too late and in fact ineffective.[122] It too needs a lot of enforcement officers to be on the ground in order to catch and prosecute counterfeiters.[123]

The Uganda Parliament should enact stiff legislation intended to curb counterfeits and protect the Ugandan consumer. Such legislation should match its American counterpart in breadth and coverage.[124] In order not to be overtaken by events, such legislation if passed should provide for periodic reviews through which the law can be automatically adjusted so as to match with the economic indices of the day in line with the prevailing value of the Ugandan shilling at the time. This will not only keep the law from becoming obsolete but should also maintain the deterrent fines and penalties in the law.[125] Consumer protection must similarly become part and parcel of the work of all the law enforcement agencies in Uganda. This shall increase UNBS' visibility on the ground and thus spur market surveillance.

---

120. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

121. G.A. MARCH, CONSUMER PROTECTION LAW (1999).

122. A.J. Uelmen, *Toward a Trinitarian Theory of Product Liability,* 1(2) JOURNAL OF CATHOLIC SOCIAL THOUGHT 645 (2004).

123. R. SCHULZE, H. SCHULTE-NOLKE & J. JONES, A CASEBOOK ON EUROPEAN CONSUMER LAW (2002).

124. J.A. SPANOGLE, *ET AL*, SELECTED CONSUMER STATUTES (2009).

125. See generally, P.S. ATIYAH, J.N. ADAMS & H. MACQUEEN, THE SALE OF GOODS (2001).

SAME SEX MARRIAGE IN NIGERIA: THE HUMAN RIGHTS APPROACH

M. K. Adebayo Esq* and S.M. Olokooba**

ABSTRACT

Lesbian, gay, bisexual, and transgender persons in Nigeria face unique legal and social challenges not experienced by those not in that category. There is no well articulated legal protection against same sex marriage discrimination in Nigeria. Most Nigerians believe that homosexuality is a way of life that the society should not accept, a position that has been widely criticized by human and civil rights organizations as well as the United Nations for not upholding and even violating the rights of lesbian, gay, bisexual, and transgender people. This article, therefore, examines same-sex marriage from a human rights point of view. The paper elucidates arguments for the recognition of same-sex relationships in Nigeria, the anti-discriminatory protections, and the implication of legislating otherwise considering Nigeria's obligations under international law and treaties that guaranteed human rights, to which Nigeria is a signatory.

I. INTRODUCTION

Sex acts between men are illegal under the criminal code that applies to southern Nigeria and which carries a maximum penalty of 14 years of imprisonment.[1] Sex acts between women are not mentioned specifically in the code, although it is arguable that the gender neutral term person in section 214 of the code includes women. The section provides (in parts) that: any person who has carnal knowledge of any person against the order of nature, or permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for 14 years. Section 217 of the Code provides further that:

---

* Lecturer, Faculty of Law, University of Maiduguri, Borno State, Nigeria. E-Mail: <makayode@gmail.com>.

** Lecturer, Faculty of Law, University of Ilorin, Kwara State, Nigeria. E-Mail: <sakaskydlaw2002@gmail.com>.

1. Criminal Code, sections 214-217.

> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures an another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for three years.[2]

In the northern states, section 284 of the Penal Code which applies to all states in the north provides that:

> Whoever has carnal intercourse against the order of nature with any man or woman…shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to a fine.[3]

Equally, section 405 of the Penal Code provides that a male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession is a vagabond. And under section 407, the punishment is a maximum of one year's imprisonment or a fine, or both.

The Shariah Law enacted by certain states in the north and adopted into criminal statutes contains provisions that prohibit sexual acts against the order of nature, like sodomy, lesbianism, and gross indecency.[4] For instance, in Kaduna and Yobe states, sodomy is committed by whoever has anal coitus with a man,[5] and in Kano and Katsina states, sodomy is committed by whoever has carnal intercourse against the order of nature with a man or woman through her rectum.[6]

---

2. *Id*., section 217.

3. Section 284 Shariah Penal Code (Northern States) Federal Provisions Act, 2000.

4. P. OSTIEN, SHARIAH IMPLEMENTATION IN NORTHERN NIGERIA 1999-2006: A SOURCE BOOK, (2007) VOL. IV, CAP 4, PART III.

5. See section 130, Shariah Penal Code Law, Cap 345 (Northern States) Federal Provision Act, 2000 which provides that such a person shall be liable to imprisonment for a term of one year and may be liable to fine.

6. See section 284 Penal Code Law, Cap 89 Laws of the Federation of Nigeria, 2004 which provides that such a person …shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine. Also in section 131 (a)(b), Shariah Penal Code Law, Cap 345 (Northern States) Federal Provision Act, 2000, there is a similar provision thus; 'whoever has canal

In states like Bauchi, Gombe, Jigawa, Sokoto, and Zamfara too, sodomy is committed by whoever has carnal intercourse against the order of nature with any man or woman.[7] The offence carries a punishment of caning with 100 lashes if unmarried, and shall also be liable to imprisonment for a term of one year. For married offenders, the crime is punishable with stoning to death.[8]

In the states of Bauchi, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, and Zamfara, lesbianism is committed by whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another.[9] The offence is committed by the unnatural fusion of the female sexual organs and/or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement. The offence carries a punishment of caning which may extend to 50 lashes and the offender could in addition be sentenced to a term of imprisonment which may extend to six months.[10]

The Shariah Penal Law in the northern states also forbids acts of gross indecency. A person commits an act of gross indecency by exposing nakedness in public and other acts of a similar nature capable of corrupting public morals. Examples of such acts are kissing in public and unusual standards of behavior.[11] The offence carries a punishment of caning which may extend to 40 lashes and may be liable in addition to imprisonment for a term not exceeding one year and/or a fine.[12]

The Shariah Penal Law also makes provision against vagabond and incorrigible vagabond by providing that any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a

---

intercourse against the order of nature with any man or woman is said commit the offence of sodomy ….shall be punished (a)with caning of 100 lashes if unmarried, and shall also be liable to imprisonment for term of one year; or (b) if married, with stoning to death *(rajm*).

7. In all these states, the provision of section 130 Penal Code Law, Cap 345 (Northern States) Federal Provision Act, 2000 applies.

8. See Shariah Penal Code of Zamfara State 2000, section 131 (a) and (b).

9. *Id.,* section 134.

10. *Id.,* section 135.

11 *Id.,* section 138.

12. According to section 138 of the Shariah Penal Code of Zamfara State 2000, whoever commits an act of gross indecency upon the person of another without his consent or by the use of force of threats compel a person to join with him in the commission of such act shall also be liable to imprisonment for a term of one year and may also be liable to fine. A similar provision is in section 285 of the Penal Code Law, Cap 89 Laws of the Federation of Nigeria, 2004 and such person …shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

profession is a vagabond.[13] Furthermore, any female person who dresses or is attired in the fashion of a man in a public place is a vagabond.[14] This equally attracts a term of imprisonment for a term which may extend to one year and shall be liable to caning which may extend to 30 lashes.[15]

In the state of Borno, the secular criminal law provides that a person who engages in lesbianism or a homosexual act commits an offence and any sexual intercourse with another person of the same sex shall upon conviction be punished with death.[16]

The legalization same sex marriage in some developed countries is viewed in the larger part of Africa and other developing countries as a sacrilege of religious, philosophical and ethical proportions. Some developing countries in parts of Africa and Latin America, for instance, have reacted to the idea of same sex marriage with anger and resentment. Debate over same sex marriage is growing across the world.[17] While some countries have legalized it, others are considering adopting it.[18]

In the face of the progressive value of mankind reflected in the pursuit of equality of all men and the need to provide every human being with the opportunity to express his/her views and be tolerated, a phenomenon as strange to the majority of mankind as same sex marriage deserves considerable attention. This is especially so at a time when more countries across the world are permitting, legalizing and legitimizing same sex marriage in an increasing global community. This article is relevant in pushing the issues further into the limelight of discourse.

---

13. Amongst the definition given to vagabond in section 405 (1) and (2)(d),(e) 284 of the Penal Code Law, Cap 89 Laws of the Federation of Nigeria, 2004 are that '…any person who knowingly lives wholly or in part on the earning of a prostitute or in any public place solicits or importunes for immoral purposes, and any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession.'

14. *Id*.

15. Section 407 of the Penal Code Law, Cap 89 Laws of the Federation of Nigeria, 2004 states that 'whoever is convicted as being a vagabond shall be punished with imprisonment which may extend to one year or with fine or with both.'

16. Shariah Law Administration and Implementation of Borno-State 2003.

17. Some of the countries where this debate is growing are Netherlands, Belgium, Spain, Canada, South Africa, Norway, Brazil, Argentina, USA, Nigeria, Denmark, etc.

18. A. Oyeniyi and A. Adedapo, Globalization and Same Sex Marriage: The Nigeria Experience, retrieved from <http://ssrn.com/abstract=2193727>, (accessed 3 October 2013)

II. RECOGNITION OF SAME SEX RELATIONSHIPS AND THE DIVERGENT VIEWS

Undoubtedly, the institution of marriage is the bedrock upon which society is founded. Therefore, marriage as a universal institution is recognized and respected all over the world.[19] The definition of marriage as laid down in the case of *Hyde v. Hyde*[20] by Lord Penzance—'*the voluntary union for life of one man and woman to the exclusion of all others'*—has received world-wide acceptability and has been adopted in most common law countries. This definition raises fundamental issues in view of the recent developments in human evolution. Notable among such developments is the existence of hermaphrodites (individuals with both testis and ovary and some of the other physical characteristics of both sexes) and pseudo-hermaphrodites (i.e. individuals that possess the internal reproductive organs of one sex while exhibiting some of the external physical characteristics of the opposite sex).

Lord Penzance's definition of marriage is also weakened and challenged by the emerging concept of same sex marriage (which is a term for a legally or socially recognized marriage between two people of the same sex). It is also undermined by the modern emerging classification of marriage into Polyandrous (a form of polygamous marriage or other sexual union in which a woman takes two or more husbands at the same time) and Polygamous (a marriage which includes more than two partners, for instance a man marrying more than one wife at a time especially in Muslim-dominated communities).[21]

However, modern trends have shown that there is a disconnect between what was obtainable in the past and the present practice, especially with the advent of the concept of human rights across the universe.

The Netherlands was the first country in 2001 to legalize same sex marriage. Since then, over 15,000 gay couples have been married in the country. This was followed by Belgium in 2003, Spain and Canada in 2005, South Africa in 2006, Norway in 2009, as well as Portugal, Norway, Argentina and Denmark all in 2010.[22]

---

19. *Id.*

20. *(1866) L. R 1 P. & D at 130.*

21. Retrieved from <http://en.m.wikipedia.org/wiki/samesexmarriage>, (accessed 14 April 2013).

22. Retrieved from <http://en.m.wikipedia.org/wiki/same-sexmarriage/in.the/Netherlands>, (accessed 14 April 2013).

After this development, an unprecedented avenue opened for a more serious agitation for the recognition of same sex marriage globally. Despite this agitation, some people feel that same-sex marriage cannot be allowed on moral and religious grounds, so it must be strictly prohibited so as not to contribute to the already moral decadence in society.[23]

Proponents of same-sex marriage regard it as a human rights issue to have all the benefits of marriage regardless of sexual orientation,[24] while those opposed to it often base their reasons on tradition, religion, lack of parental concern, and the unintended or unforeseen consequences of same-sex marriage. Both Islam and Christianity forbid same-sex marriage. Likewise, the African traditional religion also forbids the act on the ground that it will lead to the breakdown of society. The former Attorney General of the Federation and Minister of Justice, Bayo Ojo, stated that 'same sex marriage is un-African and is prohibited in both the Bible and the Quran. According to him, '…it is un-African to have a (sexual) relationship with the same sex. If you look at the holy books, the Bible and the Koran, it is prohibited.'[25] This was also echoed by former President Olusegun Obasanjo at the conference of Nigerian bishops in 2004 where he stated that homosexuality is un-African.[26]

---

23. See the statement of Bayo Ojo, the former Attorney General of Federation, Nigeria in 'Nigerian Government Proposes to Ban Same Sex', retrieved from <http://m.irinnews.org/report/57879/nigeria-goverment-prposes-law-to-ban-same-sex-marriage>, (accessed 9 January 2015). See also, Olusegun Obasanjo, the Nigerian former president's statement, retrieved from <www.nigerianobservernews.com/24012014/24012014/editorial/editorial.ht#.VK5DKdlf_2M>, (accessed 9January 2015); and the dissenting judgment of Justice Alito cited in Anthony Michael Kreis, Unhinging Same-sex marriage from the Constitutional canon: The Search for a Principled Doctrinal Framework, at 3, retrieved from <http://www.law.emory.edu/fileadmin/journals/elj/63/eljonline/kreis.pdf>, (accessed 10 June 2014).

24. The Nigerian Humanist Movement, led by their executive secretary Leo Igwe and Reverend Jide Macaulay, a Nigerian gay based in United Kingdom belong to this category. The US, UK and Canada expressed the same opinion in 'The Strom over Same Sex Marriage Prohibited' THIS DAY LIVE (Nigeria), 25th January, 2014. Also available at <www.thisdaylive.com/articles/the-storm-over-same-sex-marriage-prohibited/169716/>, (accessed 9 January 2015).

25. See Nigerian Government Proposes to Ban Same Sex, retrieved from <http://www.irinnews.org/report/57879/nigeria-goverment-prposes-law-to-ban-same-sex-marriage>, (accessed 9 January 2015).

26. Retrieved from <BBC News/Africa/Nigeria in news.bbc.co.uk/2/hi/Africa/4626994.stm>, (accessed 9 January 2015). Also available at <www.nigerianobservernews.com/24012014/24012014/editorial/editorial.ht#.VK5DKdlf_2M>, (accessed 9 January 2015).

On 18 January 2007, the President approved the Same Sex Marriage (Prohibition) Bill, 2006[27] and sent it to the National Assembly for urgent action. The bill, however, was not passed. Also in the same vein, the Senate of Nigeria had on 29 November 2011 passed the same bill, but it was not passed by the House of Representative until lately. Beyond prohibiting same-sex marriage and civil union, the Nigerian Same Sex (Prohibition) Bill, which the President has just assented to, provides grounds for massive infringement on fundamental rights, not only of homosexuals, lesbians, gays, bisexuals and the transgender (LGBT), but also heterosexuals.[28]

The law also makes void and unenforceable in Nigeria a marriage contract or civil union entered into between persons of the same sex by virtue of a certificate issued by a foreign country;[29] prohibits the solemnization of any marriage or civil union entered into between persons of the same sex in any place of worship or any other place whatsoever called in Nigeria;[30] it also prohibits the registration of any gay clubs, societies, and organizations and their sustenance, procession and meetings; prohibits the public show of same-sex amorous relationships directly or indirectly;[31] makes a person who enters into same-sex marriage contract or civil union liable for 14 years imprisonment;[32] it further makes a person or group of persons that witness, abets, and aids the solemnization of a same-sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria liable for 10 years imprisonment.[33]

The Same Sex Marriage Prohibition Bill drew a reaction from the United States Assistant Secretary for Democracy, Human Rights and Labour, Michael H. Posner. Speaking to journalists during a news conference at the United States Consulate in

---

27. Appendix: A Bill for an Act to Make Provisions for the Prohibition of Sexual Relationship Between Persons of the Same Sex, Celebration of Marriage by them and for Other Matters Connected Therewith, retrieved from <http://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167#appendix>, (accessed 10 March 2013).

28. Femi Aborisade, Same Sex (Prohibition) Act: A Critical Analysis, retrieved from <http://dailyindependentnig.com/2014/01/same-sex-prohibition-act-a-critical-analysis-2/>, (accessed 30January2014).

29. Same Sex Marriage (Prohibition) Act, 2013, section 2(2).

30. *Id.,* section 2(1).

31. According to *id., section* 5(3), such a person shall be liable on conviction to a term of 10 years imprisonment.

32. *Id.,* section 5.

33. *Id.,* section 5(2). See further, LGBT rights in Nigeria- Wikipedia, the free encyclopedia, retrieved from <en.wikipedia.org/wiki/LGBT_rights_in_nigeria>, (accessed 10 March 2013).

Lagos on 16 November 2012, he said that there is little the United States or other foreign governments can do to stop the passage of a bill that criminalizes gay marriage, gay advocacy groups and same-sex public display of affection in Africa's most populous nation.[34]

In a similar vein, President Barrack Obama had described the Nigerian anti-gay bill as anti-human rights and undemocratic and even threatened to cut off U.S. aid to Nigeria.[35] Equally too, according to another critic, the bill has the potential of actually tearing apart families and opening the doors to persecution of those perceived to be gays. It also provides ground to falsely arrest innocent people, and could also lead to loss of employment, extortion, attacks, and death.[36] However, Justice Alito,[37] in one of his dissent judgments, argues that same sex marriage falls outside the boundaries of what constitutes a fundamental right. At the heart of his argument is a contention that the analysis of a purportedly fundamental right's history and tradition should be constructed at a granular level. He thus observes as follows:

> It is beyond dispute that the right to same sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

Amnesty International, Human Rights Watch, the Nigerian Bar Association, and several

---

34. Associated Press 'Nigeria Poised to Pass Anti-gay Bill', retrieved from <http://www.newsinfo.inquirer.net/308408/nigeria-poised-to-pass-anti-gay-bill>, (accessed 3 October 2013).

35. See, 'Obama Fights Nigerian Anti- Gay Bill, Threatens to cut-off Aid', retrieved from <www.forbes.com/sites/mfonobongnsehe/2011/12/09/obama-fights-nigerian-anti-gay-bill-threatens-cut-off-aid>, (accessed 9 January 2015). Also available at <www.nairaland.com/821817/obama-fights-nigerian-anti-lover-bill>, (accessed 10 January 2015).

36. Sexual Minorities and HIV Status, retrieved from <http://www.asylumlaw.org/legal_tools/indexcfm?category=391&countryID+233>, (accessed 3 October 2013).

37. Cited in Anthony Michael Kreis, Unhinging Same-sex Marriage from the Constitutional Canon: The Search for a Principled Doctrinal Framework, at 3, retrieved from <http://www.law.emory.edu/fileadmin/journals/elj/63/eljonline/kreis.pdf>, (accessed 10 June 2014).

Nigerian human rights non-governmental organizations expressed concerns over the Same Sex Marriage (Prohibition) Bill as being in contravention of the constitution and inconsistent with the country's obligations under international and regional human rights treaties which it ratified.[38]

During the 14th International Conference on AIDS and STIs (ICASA) held in Abuja in 2005,[39] there were calls for the acceptance of same sex marriage. Despite this, the fact still remains that marriage is indeed a unique institution between a man and a woman. This fact is not only constitutionally acknowledged, it is contained in the two Holy Books—the Quran[40] and the Bible.[41] However, it is only a matter of time before this kind of lifestyle would be accepted. For instance, before 1973, the American Psychiatrists Association considered same sex attraction as abnormal behavior and offered treatment accordingly. But a decision that year reversed this long held stand. No longer was same sex attraction classified as abnormal.[42] This is to show that a similar decision had already been made in other Western nations. In a span of time, homosexuals would go from being considered criminals by society to being accepted, if not fully embraced, by much of the heterosexual community.[43]

In recent years, same sex couples have increasingly pressed for the legal option of entering a full marital status. There are ongoing debates throughout Europe and parts of Africa over proposals to legalize same sex marriage as well as civil unions. Presently, 22 out of the 51 countries in Europe recognize same sex marriages. France was the 14th country in the European zone to join in legalizing same sex marriage, and the first to have a same sex couple celebrate their wedding in a cathedral in southern France on 29 May 2013.[44]

---

38. *Id.* See also, Amnesty International 'Nigeria: Same Gender Marriage (Prohibition) Bill violates Constitution-AI 01/26/2009. Also see, Y. Olatunbosun 'War Against Homosexuals?' This Day Life (Nigeria) 6 December 2011, retrieved from <http://www.thisdaylive.com/articles/war-against-homosexuals-/104401>, (accessed 12 January 2015).

39 *Id.*

40. In the holy Quran 4:3, Allah decreed 'marry women of your choice two or three or four of them….' Similarly in Quran 2:27, Allah says 'Those who break the covenants of Allah after ratifying it and tear apart what Allah ordered to be joined (Marriage)…they are the ones who are losers '

41. The holy Bible in Genesis 2:18 says: 'And the Lord said, it is not good that the men should be alone, I will make him a help mate for him.' See also Mathew 6:19 where God says 'Let man not put apart those whom God has joined.'

42. See <http://www.ucgstp.org/ht/gp048/same-sexmarriage.tmp>, (accessed 27 October 2012).

43. Oyeniyi & Adedapo, *supra* note 18.

44. http://en.wikipedia.org/wiki/Recognition of same- sex union in Europe.

III. ANTI-DISCRIMINATION PROTECTION IN NIGERIA

It should be noted that the constitution of the Federal Republic of Nigeria does not specifically protect or contain provisions for the protection of lesbians, gays, bisexuals, and transgender, but it does contain provisions guaranteeing all citizens equal rights as well as other rights.[45] Section 37 of the 1999 constitution (as amended) is often used as the basis for the entrenchment of same sex marriage in the country under the cover of the 'right to privacy'. The section provides that "the privacy of citizens, their homes, correspondence, telephone conversation, and telegraphic communications is hereby guaranteed and protected." According to Ese, every person has the right to privacy and family life.[46] Where one person or public authority trespasses or invades the privacy of home of an individual, such individual may be entitled to sue for trespass and so forth. He furthermore stresses that an invasion of private life may amount to defamation, or other tort or crime. A person so defamed may sue under defamation law or other relevant tort and recover damages, except if the defendant has a defence. Action may also be brought in criminal law.

According to Yakubu, section 37 of Nigeria's 1999 constitution (as amended) allows a citizen to assert his privacy including the privacy of his home and correspondence in whatever way either by telephone conversation, telegraphic communications, letters or any other method of communication.[47] Thus, in the case of *Medical and Dental Practitioners' Disciplinary Tribunal v. Okonkwo*,[48] the court had to determine whether a patient had the right to consent to blood transfusion or not in defence of his privacy. The Supreme Court emphasized section 34 of the 1979 constitution (repealed) which is now Section 37 of the 1999 constitution (as amended). It maintained that the patient's constitutional right to object to medical treatment or, particularly, as in this case, to blood transfusion on religious grounds was founded on fundamental rights protected by the constitution with respect to the right to privacy, and the right to freedom of thought, conscience, and religion. In the words of Ayoola JSC (as he then was):

45. Chapter II of the 1999 Constitution (as amended), Sections 33-45.
46. M. ESE, THE NIGERIA CONSTITUTIONAL LAW (2006), at 230.
47. J.A. YAKUBU, CONSTITUTIONAL LAW IN NIGERIA (2003), at 383.
48. (2001) 19 WRN at 1.

> the sum total of the rights to privacy and of freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary.[49]

Furthermore, there is no enacted legislation protecting lesbians, gays, bisexuals, and transgender against discrimination or harassment on grounds of sexual orientation or gender identity. There is public hostility to homosexual relations. For instance, in August 2007, the Bauchi State Police Command arrested and charged 18 men in court for dressing like women and addressing themselves as women, which is illegal under the Shariah Penal Code.[50] They were originally charged with sodomy, but the charges were later changed to vagrancy.

In the same vein, on 12 September 2008, four newspapers (Daily Trust, Guardian, The Champion, and Vanguard) published the names, addresses and photographs of 12 members of the House of Rainbow Metropolitan Community Church, a lesbian, gay, bisexual, and transgender church in Lagos. As a result, some of the members were threatened, stoned, and beaten by the members of the public. No action was taken by the police authority against the perpetrators. Gradually, the church and the partner groups cancelled the conferences on sexual rights and health scheduled for Lagos and Abuja in December of that year, because of the concern for the safety of participants;[51] an indication of the public disapproval of same sex marriage.

The United States Department of State summed this position in its Human Rights Report of 2011 thus:

> Because of widespread societal taboos against homosexuality, very few persons openly revealed their orientation. The non-governmental organizations… like the Global Rights and Independent Project provided Lesbian, Gay, Bisexual, and Transgender groups with legal advice and training in advocacy, media responsibility, and HIV-AIDS awareness. Organizations such as the youth's gender together network also provided access to information and services on sexual health and

---

49. *Id.,* at 40.

50. Bureau of Democracy, Human Rights and Labour U. S Department of State, retrieved from <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm>, (accessed 10 March 2013).

51. *Id*.

> rights for Lesbian, Gay, Bisexual, and Transgender persons, sponsored programs to help build skills useful in social outreach, and provided safe havens for Lesbian, Gay, Bisexual, and Transgender individuals. The government and its agents did not impede the work of these groups during the year.[52]

Notable also among the populace is the general belief that HIV/AIDS is the result of immoral behavior and a punishment for same sex sexual activity. Hence the hatred and discrimination against persons living with HIV/AIDS, though authorities and non-governmental organizations sought to reduce the stigma and change these perceptions through education campaigns.

Another negative view expressed against same sex marriage was by the Nigerian Bishop Emmanuel Chukwuma, in an attempt to exercise Richard Kirker, leader of the Lesbian and Gay Christian Movement (LGCM) in the United Kingdom, that homosexuals are going to hell,[53] and he compared the present day activists in the church with the residents of Sodom and Gomorrah, among other descriptions. In many African nations where the Anglican Church is active, prohibiting homosexual activity is accompanied by sanctions and is seen as being irresponsible. The failure to discuss sexuality and human rights among churches amounts to a moral complicity, and there is currently much dispute over the etiology and substantive reality of a homosexual identity in the Christian discussion of human rights.[54]

The churches in Nigeria claimed that homosexuality is inherently immoral; it is therefore evil and should be rejected as a perversion of human dignity. The National Assembly is encouraged to ratify the Bill prohibiting legality of homosexuality since it is incongruent with the teachings of the Bible, the Holy Quran and African traditional values.[55]

The churches claimed further that the concrete legal defenses against the corrosive influences of homosexuality are necessary in taking into consideration the context of human rights laws. For instance, Article 16 of the Universal Declaration of

---

52. Bureau of Democracy, Human Rights and Labour, U.S Department of State, *supra* note 50.

53. Fulcrum Rights, Homosexual, and Communion: Reflections in light of Nigeria, retrieved from <http://www.fulcrum-anglican.org.uk/?167>, (accessed 3 October 2013).

54. Hosea 6:6, Mathew 5:7, 9:13, 12:7, and Leviticus 20:13 of the Holy Bible.

55. Church of Nigeria Standing Committee, retrieved from <http://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167>, (accessed 3 October 2013).

Human Rights[56] provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. Also the African Charter on Human and Peoples' Rights[57] in Article 18 elaborates further that 'the family shall be the natural unit and the basis of society. It shall be protected by the state which shall take care of its physical health and moral basis. And the state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.'

This may also be in line with the Equality Act of the United Kingdom,[58] which was passed into law as a result of growing moral panic about human rights in the United Kingdom. Whilst the act extends marriage to same sex marriage couples in England and Wales, it equally established a form of legal discrimination in marriage based on sexual orientation.[59]

In this light, it is obvious that the concern for the protection of the African traditional family values is formative as a moral repository and one of the most potent motivations among Africans for supporting anti-homosexual civil legislation. However, surprisingly, the Catholic Church seemed to have taken an opposite direction on this position by recognizing homosexuals. For instance, homosexuals do not choose their erotic inclinations; meaning that there is an a priori Christian duty to ensure that homosexuals are granted an environment in which this attitude is neither disregarded nor forcibly assaulted.[60] This stand above requires the creation and support of a context in which the deliberations and choices of homosexual persons are allowed to be made in a way that is honest in line with the realities of their personal resources and privacy.

IV. THE NIGERIA EXPERIENCE AND OBLIGATIONS UNDER INTERNATIONAL LAWS AND TREATIES

It is doubtful whether there is any other country in the world where the idea of same sex marriage is more abhorred publicly than in Nigeria. As discussed earlier on, the Same

---

56. Universal Declaration of Human Rights 1948.

57. African Charter on Human and Peoples' Rights, Cap. A10 Laws of the Federation of Nigeria 2004.

58. Equality Act, 2010 of the United Kingdom.

59. J. Paul, Same Sex Marriage to be Illegal in the Church of England and Wales, retrieved from <http://jurist.org.\/hotline/2012/12/paul-johnson-coe-homosexuallity.php>, (accessed 3 October 2013).

60. Universal Catechism, 2358, retrieved from <http://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167>, (accessed 3 October 2013).

Sex Marriage Prohibition Act 2006 prohibits not only same sex marriages, but also the relationships that arise therefrom. Only recently, there was an attempt by some civil rights groups such as Women's Rights Advocacy to litigate on the subject, but this was called off due to threats that the court might be stormed by angry mobs.[61] Nigeria can therefore be said to be zero tolerant in this respect of same sex marriage. The irony is the fact that there are those that engage in homosexual acts in considerable proportion practicing it under the cover of darkness or for spiritual purposes or for money rituals.[62]

While contributing to a debate on a bill prohibiting same sex marriage, Alaba Obende, a Senator from Edo State Senatorial District, expressed as follows:

> Opening the legal door to same sex marriage in Nigeria will be morally and ideologically unsound when other traditionally shunned intuition as incest remains illegal. The problem with same sex marriage is not slippery slope; the primary assertion is that, just as most Nigerians should maintain that incest is socially unacceptable practice, so too should they disallow same sex marriage.[63]

It should be noted that the idea of morality as the basis of prohibiting same sex marriage is a subjective one, thus what is forbidden in one culture or tradition may be allowed in another. It is a matter of individual perception and civilization.

Also contributing to the bill on prohibiting marriage of same sex individuals, another senator representing Plateau South East opined further that the essence of marriage is for procreation and if we allow same sex marriage to be recognized and legalized, we are not interested in future of our children.[64] The then president, Goodluck Jonathan, signed the Same Sex Marriage (Prohibition) Act[65] into law without announcement, which made it illegal for gay people to even convene a meeting.[66] The Act outlaws homosexuality and imposes a prison term of up to 14 years for people prosecuted under the act.[67] It also criminalizes homosexual clubs, associations and

---

61. "Same-sex marriage around the world", CBS News (Toronto), retrieved from <http://www.cbs.ca./news/world/story/2009/05/06/f-same-sex-timeline.html>, (accessed 13 March 2013).

62. Oyeniyi & Adedapo, *supra* note 18.

63. *Id.*

64. *Id.*

65. Same Sex Marriage (Prohibition) Act, 2013.

66. *Id.,* section 5(2).

67. *Id.,* section 5.

organizations, with penalties of up to 14 years jail term.[68] The Act has drawn international condemnation from countries such as the United States and Britain. For instance, the United States Secretary of State, John Kerry, said the United States is deeply concerned by the country's enactment of a law that restricts freedom of assembly, association, and expression for all Nigerians. Britain also expressed concern over the introduction of a law that promotes discrimination on the ground of sexual orientation.[69] Some gays fled the country because of intolerance of their sexual persuasions, and more are considering leaving, if the new law is enforced.[70] The Act reflects a highly religious and conservative society that considers homosexuality a deviation. Nigeria is one of the 38 African countries that have enacted laws illegalizing same sex unions.[71]

However, there exist circumstances in which a marriage between a woman and a woman is permissible.[72] An instance is the Mbaise community of Imo State in south eastern Nigeria. The culture and the practice in this community is that when a married woman has no son or a child, and the husband dies, it is culturally allowed for her to marry another woman. When this happens, the first woman (the widow) becomes the husband. Almost, in every case, upon the death of her husband, she goes in search of a wife of her choice. On finding one, she pays her dowry and fulfils other traditional rites as it is done under heterosexually contracted marriage.

What is outstanding is that the production of offspring by the newly wedded couple is done upon an agreement of both parties. Both the woman (the widow), who assumes the husband role and the woman (who assumes the role of a wife), will agree to allow a man from either the same village or neighboring one to impregnate the latter. Since the practice is the tradition, nobody questions the paternity of the child born by this couple. In fact, the child born by the latter bears the family name of the former and

---

68. *Id.,* section 5(3).

69. See <http://www.telegraph.co.uk/news/worldnews/africaan>, (accessed 28 January 2014).

70. D. Oyedele, *Anti-Gay Law: Netherlands Confirms Asylum Applications by Nigerians*, THIS DAY LIVE (Nigeria), 4 February 2014. Also available at <http://www.thisdaylive.com/articles/anti-gay-law-netherlands-confirms-asylum-applications-by-nigerians/170491/>, (accessed 13 January 2015). See also, The Telegraph Newspaper, Tuesday 28th January, 2014.

71. *Id.*

72. Leo Igwe, Tradition of Same Gender Marriage in Igboland, retrieved from <Http://web.archive.org/web/201001111010506/http:/www.tribune.com.ng.19062009/opinion.html>, (accessed 14 April 2013).

not that of the man responsible for the pregnancy; a kind of surrogacy.[73]

The emerging argument is the yardstick used to allow one tradition to persist, while disallowing the other brought about by the so-called civilization or a new form of marriage simply because of its name-(gay or lesbian marriage). It is also a recognized fact that this traditional form of marriage among the Mbaise community predates Christianity and the so-called western culture of gay or lesbian marriages which are now being faulted as social vices and moral decadence. This traditional form of marriage in the Mbaise community is still being practiced and is not in any way more imported from the western culture, and it has not in any way undermined the social fabric that unites that community.[74]

Although it may be argued that a man eventually impregnates the 'woman-wife', it should be noted that the essence of such a man traditionally is basically to supply the sperm needed. What is paramount is the sexes that are involved in the union i.e. a woman to another woman (the woman-husband and the woman wife), and the responsibility of any offspring of that union rests on the couple. The offspring grows up knowing both women as his/her 'father' and 'mother'.[75]

V. NIGERIA'S OBLIGATIONS UNDER THE INTERNATIONAL LAW AND TREATIES *VIS-À-VIS* THE EMERGING CONCEPT OF SAME SEX MARRIAGE

In June 1994, the United Nations Human Rights Council (UNHRC) confirmed in the case of *Toonen v. Australia*,[76] that laws criminalizing consensual same sex activity violate both the right to privacy and the right to equality before the law and are contrary to article 17 of the International Covenant on Civil and Political Rights. Those laws interfere with privacy rights regardless of whether they are actively enforced, and run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention by driving marginalized communities underground. The UNHRC has subsequently affirmed this position on many occasions by urging countries to repeal laws that criminalize consensual same sex activity and thereby bring their legislations into conformity with the covenant. Nigeria became a party to the covenant

---

73. *Id.*
74. *Id.*
75. *Id.*
76. Fiftieth Session, CCPR/C/50/D/488/1992. 4 April 1994, retrieved from <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256742005e60d5>, (accessed 10 March 2013).

on 29 January 1993.[77]

The United Nations Working Group on Arbitrary Detention in June 2002 found equally that the arrests for being homosexual or for engaging in consensual homosexual conduct are by definition human rights violations.[78] Any arrest constitutes an arbitrary deprivation of liberty in contravention of article 2, paragraph 1 of the Universal Declaration of Human Rights, and of article 2, paragraphs 1 and 26 of the International Covenant on Civil and Political Rights, 1966. This declaration is part of international law and is, therefore, binding on Nigeria with regard to the provisions of section 12 of the constitution since these treaties and covenants have been domesticated.[79]

This position is also consistent with other regional and national jurisprudence, including the decisions of the European Court of Human Rights in *Dungeon v. United Kingdom*,[80] and United States Supreme Court in *Lawrence v. Texas*.[81] The constitutional court of South Africa said affirmatively too, in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,[82] that the right to privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The court went further to state that the way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing one's sexuality, one acts consensually and without harming another, then invasion of that precinct will be a breach of one's privacy.

Thus the criminalization of sodomy in private between consenting males is a severe limitation of a gay's rights to privacy, dignity and freedom. The harm likely to be caused by infringing on this right to privacy can and often does affect one's ability to achieve self-identification and self-fulfillment which are natural instincts in human beings. This likely harm may also radiate out into the society generally and gives rise

---

77. Status of International Covenant on Civil and political Rights, United Nations Treaty Collection, 30 July 2012, retrieved from <http://www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=&lang=en>, (accessed 10 March 2013).

78. Communication Addressed to the Government on 3 September 2001, United Nations Working Group on Arbitrary Detention, Opinion No. 7/2002 Egypt adopted 21 June 2002, retrieved from <http://www.unw gaddatabase.org/un/Document.aspx?id=2009>, (accessed 4 June 2013).

79. Constitution of the Federal Republic of Nigeria1999 (as amended).

80. (Series A, No. 45, 23 September 1981).

81. (539 U.S. 558 (2003) 26 June 2003.

82. Case CCT 11/98, 9 October 1988.

to a wide range of other human rights discriminations which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.[83]

Furthermore, article 2 of the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (UN CAT) requires each state party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. And Article 1.1 of the UN CAT defines torture to be:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation for or with the consent or acquiescence of a public official or other person acting in an official capacity.[84]

The argument here is that the convention through the Committee Against Torture, officially monitors its implementation by all state parties, by ensuring the protection of minority or marginalized individuals or populations especially those at risk of torture or ill-treatment. This protection covers all persons regardless of gender, sexual orientation or transgender identity. This is the genesis and the argument for the protection and recognition of lesbians, gays, bisexuals, and transgender in Nigeria. Nigeria ratified the UN CAT on 28 June 2001, and by virtue of being a party to this convention, assumes the obligations it mandates.

The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, reported in April 2010 that laws criminalizing sexual conduct between consenting adults impede HIV/AIDS education and prevention efforts and are

---

83. *Id*.

84. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

incompatible with the right to health.[85] Also, the Joint United Nations Programme on HIV/AIDS (UNAIDS) has a similar view.[86]

The international obligations of countries to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were articulated in 2006 in the Yogyakarta Principles[87] on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity 2008.[88] These principles were developed and adopted unanimously by a group of human rights experts. Principle 2 of the Rights to Equality and Non-Discrimination affirms that everyone is entitled to enjoy human rights without discrimination on the basis of sexual orientation or gender identity. It specifically obligates countries to repeal criminal and other legal provisions that prohibit or are in effect employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same sexes and different sexual activities.[89]

Principle 6 of the sexual orientation and gender identity principles affirms the right to privacy of everyone regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms the obligation of countries to repeal all laws that criminalize consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same sex and different sexual activities. The principle also ensures that criminal and other legal provisions of general application are

---

85. Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health submitted to the United Nations Human Rights Council by Anand Grover, 27 April 2010, A/HRC/14/20, paras. 13 and 68, at 7 and 20, retrieved from <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>, (accessed 3 October 2013).

86. Guidance for Applicants to the Global Fund to Fight AIDS, TB and Malaria Round 8 Call for proposal Joint United Nations Programme on HIV/AIDS, 28 February 2008, retrieved from <http://data.unaids.org/pub/BaseDocument/2008/20080228_rd8_sexualminorities_en.pdf>, (accessed 3 October 2013).

87. The Yogyakarta Principle, retrieved from <http://www.yogyakartaprinciple.org/principle_en.htm>, (accessed 3 October 2013).

88. Michael O' Flaherty and John Fisher, *Sexual Orientation, Gender Identity and International Human Rights: Contextualizing the Yogyakarta Principles,* 8 (2) HUMAN RIGHTS LAW REVIEW (2008), at 207-248.

89. Report of the United Nations High Commissioner for Human Rights, submitted to the United Nations Human Rights Council, retrieved from A/HRC/19/41, 17 November 2011, at 5, <http://www.2.ohrc.org/english/bodies/hrcouncil/docs/19sesion/a.hrc.19.41_english.pdf>, (accessed 3 October 2013).

not applied to *de-facto* criminalize consensual sexual activity among other persons of the same sex who are over the age of consent.

In an address delivered before the United Nations in a high level meeting on human rights, the then United Nations High Commissioner for Human Rights, Navanetham Pillay, while advocating for same sex marriage summed up thus:

> The principle of universality admits no exception. Human rights truly are the birthright of all human beings. Sadly… there remain too many countries which continue to criminalize sexual relations between consenting adults of the same sex in defiance of established human rights law. Ironically many of these laws like apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all…it is our task and our challenge to move beyond a debate on whether all human being have rights ; for such questions were long ago laid to rest by the Universal Declaration of Human Rights …and instead to secure the climate of implementation…those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.[90]

VI. CONCLUSION

Different people perceive issues from different perspectives. Depending on one's orientation, perceptions vary. Dealing with different perceptions perhaps is what the political scientists call conflict management. Also, to be appreciated is the fact that all human beings are created equal and are endowed with certain inalienable rights which they must pursue and secure. No doubt the development of legitimizing same sex marriage comes as a radical alteration of the legal framework of marriage ranging from

---

90. Addressing Human Rights Violations Based on Sexual Orientation and Gender Identity at the 10th Session of the Human Rights Council, ARC International, March 2009, at 2, retrieved from <http://arc-international.net/wp-content uploads/2011/09/Advancing-SOGI-issues-HRC10.pdf>, (accessed 3 October 2013).

the definition, requirements for validity, custody and guardianship. Marriage is all about pursuit of happiness and mutual respect for all.

Cultures and value systems are never static; they are constantly undergoing changes and transformations. There is no country in the world whose values have always remained the same. Therefore, it is not expected that the value systems in developing countries including Nigeria will remain static. Just as the value systems in other cultures are changing, Nigerian culture will continue to change; since diversity defines how human beings do things, think, and relate.

Furthermore, just as there are different individuals and groups with different ideas and options of life, so are the different value systems. However, this does not rule out the fact that there are common moral values and decencies shared by all. As new ideas are coming up and new discoveries are made, values are bound to change too, and will keep changing. Without such changes, the individual and the society will stagnate.[91] Changes are undeniable aspects of human life, without which there would be no improvement; neither would there be any progress. Nigeria, for example, is such a diverse country of people with different ideas, beliefs and philosophies. It is also the most populous country in Africa and the seventh in the world. There are conservatives as well as liberals. It is therefore desirable that government should make laws that will take into cognizance the country's plurality as well as dynamism. Such laws should be fair, balanced and inclusive of the rights of lesbian, gay, bisexual, and transgender people as part of the constitutional guaranteed right to privacy.

Submissively, in the face of the progressive value of mankind reflected in the pursuit of equality of all men and the need to provide every human being with the opportunity to express his or her views and be tolerated, a phenomenon as strange to many people as same sex marriage deserves considerable attention; especially at a time when more countries across the globe are permitting, legalizing and legitimizing same sex marriage in an increasing global community.

With increasing modernization and globalization of the world, there is no reason why we cannot accept another form of marriage arrangement. Same sex marriage is neither going to inhibit a society's growth and progress nor stunt its political development. So long as marriage is between two consenting adults, gender should not be an issue, in effect re-echoing the Wolfenden Report of England of 1957 which observed that homosexuality between two consenting adults should not be seen as an

---

91. Oyeniyi & Adedapo, *supra* note 18.

offence so long as it is done in privacy.

The criminalization of same sex marriage is discouraged when one takes into consideration the paranoia of women being forced into marriage against their will/wishes, forced to have sex, forced to have children, forced to be domestic slaves for egoistic men; and forced to endure all manner of abuse and exploitation all in the name of traditional heterosexual marriage, thus depriving many of their fundamental human rights. More so, new scientific evidence has shown that homosexuality is a normal expression of human sexuality that is not chosen; that gay and lesbian people form stable and committed relationships essentially equivalent to heterosexual relationships; that same sex parents are no less psychologically healthy and well adjusted than children of heterosexual parents.[92] This research strongly supports the conclusion that discrimination by the government between married same sex couples and the married opposite sex couples in granting social benefits, stigmatizes same sex couples.

Lastly, pursuant to the above discourse in line with human rights advocacy, it is recommend that since the subject of same sex relationships has more to do with philosophical, political and religious considerations, the law should simply affirm the right of every individual to express his emotions and in particular become married to whatever sex he/she chooses; rather than criminalizing same sex unions. It is better to give same sex marriage the status of civil union it deserves. Just like abortion, the fact that it is expressly prohibited does not in any way in reality limit its practice. It is therefore better to let people be what they want. Criminalizing same sex relationships will only turn Nigerians into asylum seekers.

---

92. T. Elizabeth, Glenn Beck, Gay Marriage Advocate?, THE WASHINGTON POST, August, 12 2010, retrieved from <http://newsweek.washingtonpost.com/onfaith/undergod/2010/08/glennbeckgaymarriageadvocate.html>, (accessed 4 November 2012).

CUSTOMARY LAW, WOMEN'S RIGHTS AND THE TWO FACES OF LAW IN NIGERIA

Israel N.E. Worugji* & Rose O. Ugbe**

ABSTRACT

This article analyses the Nigerian Supreme Court pronouncements in Mojekwu v. Iwuchukwu and Ukeje v. Ukeje. The Supreme Court in these two cases expressed conflicting views on the issue of inheritance rights of women under the customary law in the Igbo communities in Nigeria. In the latter case, it declared the Igbo customary law and practice which disinherits women as unconstitutional. But in the former, the court on the same issue held that the customary law and practice which disinherits women is not repugnant to natural justice, equity and good conscience. These two contradicting rulings, no doubt, have created two faces of law on the same issue. Juxtaposing the two pronouncements, this article examines whether the pronouncement in Ukeje's case could be interpreted to mean that the Supreme Court has by virtue of this, overruled itself in Mojekwu's case in favour of women rights; or has it only introduced some complementarity principle in the judicial role in the protection of women's rights in Nigeria. The resolution of this puzzle is necessary since the court in Ukeje's case never made any reference to Mojekwu's case, as to overrule or distinguish the same. The article argues that this puzzle notwithstanding, the pronouncement in Ukeje's case has cleared the way in favour of women's rights protection and implementation. The article concludes that the part charted by the Court of Appeal and tacitly endorsed by the Supreme Court in Ukeje's case provides a definitive judicial direction in the protection of women's rights in Nigeria that needs to be sustained.

I. INTRODUCTION

In spite of the new legal regimes on women's rights at both the national and international levels, there have remained judicial inconsistencies in the implementation

* Associate Professor of Law, Faculty of Law, University of Calabar, Nigeria. Email: <ineme2003@yahoo.co.uk>.

** Lecturer, Faculty of Law, University of Calabar, Nigeria.

of these women's rights norms in some countries, yielding to some cultural practices against women in some African countries.[1] This has been so notwithstanding the national laws and the international undertaking by states that are signatories to some of these international human rights conventions/laws to guarantee and enforce these laws in their national jurisdictions for the protection of women's rights. Nigeria has remained one of the countries where the implementation and enforcement of women's rights through the intervention of the judiciary has remained minimal. This is particularly so in areas involving non-discrimination and gender equality. Women in some cases are considered inferior to men and discriminated against particularly in cases involving socio-economic relations.[2] This is largely due to cultural practices and religious beliefs prejudicial to the interest of women or what has been referred to as "cultural authoritarian."[3]

One of the areas where judicial protection of women's rights has remained very static and unpredictable is in the property rights of women under the customary law in some communities in Nigeria.[4] Under the customary law, women in some communities

---

1. See, Centre for Reproductive Rights *et al*, Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts, Vol. II (January 2010), retrieved from <www.reproductiverights.org/press-room/african-women-stillnot-getting-justice-in-national-courts-new-report-finds> (accessed on the 18th March, 2015). See also *Magaya v. Magaya* (SC210/98), where the Supreme Court of Zimbabwe refused to invalidate a customary law which accords preference to male inheritance.

2. See Christine Chinkin, *The Commonwealth and Women's Rights*, COMMONWEALTH LAW BULLETIN (1999), at 97. Also see, R. Cook, The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women, ASIL Issue Paper on World Conference No. 5 (Washington, D.C.: The American Society of International Law, 1995). See speech by the UN Women Executive Director, Phumzila Mlambo-Ngecuka, at the UN commemoration of International Women's Day 2014, UN Headquarters, New York, 7 March 2014, retrieved from <http://www.unwomen.org/en/news/stories/2014/3/eds-iwd-speech>. See also Message of the UN Women Executive Director, Phumzile Mlambo-Ngcuka, for International Women's Day 2015, retrieved from <http://www.unwomen.org/en/news/stories/2015/3/executive-director-message-for-iwd-2015>.

3. I.N.E. WORUGJI, WOMEN'S RIGHTS UNDER THE CUSTOMARY LAW IN SOME COMMUNITIES IN NIGERIA (2010). See also, C.E. Ukhum and N.A. Inegbedion, *Cultural Authoritarianism, women and human rights issues among the Esan people of Nigeria*, 1 AHRLJ (2005), 129-147. See also, V.C. Ikpeze, Understanding Affirmative Action as aid to Women's Human Rights in Nigeria, BAR PERSPECTIVE (2002), at 54-58. See also, V.C. Ikpeze, *Legislating Women's Affirmative Action and its Constitutionality in Nigeria*, 2 AFRICAN JOURNAL ONLINE (AJOL) (2011), retrieved from www.ajol.info/index.pho/naujilj/article/download/82399/72553.

4. See Ukhum & Inegbedion *id.,* at 1, where the phrase was specifically used.

cannot own property since they are regarded as part of the properties of either their father's or husband's estate. Whatever they acquire, therefore, belongs to their fathers or husbands as the case may be. The customary law does not also recognize the concept of matrimonial property nor does the woman have the right of inheritance to her husband's property where the husband dies intestate. Women cannot also inherit property in some cases.[5]

Generally, except where there is a will, the extent to which the courts have interfered to eliminate these prejudices against women and to protect the inheritance rights of women has depended largely on the customary law and customs applicable in the area. This has remained so even in the face of some constitutional provisions guaranteeing gender equality and non-discrimination; and that demands transformation of international human rights norms into national laws for effective implementation and enjoyment of human rights as the case may be.

It must be noted that the protection of the right of inheritance is an aspect of protection of property rights. Lack of property rights under the customary law for women is one of the fundamental challenges hindering active participation of women in economic development in some cases. It must also be emphasized that the continued denial of women's rights in this regard has great negative implications for the progress, development, and wellbeing of the nation. The struggle for poverty eradication and decent living cannot be achieved in the face of discrimination against women.[6]

It is within this context that this article reflects on two Supreme Court pronouncements, firstly in *Mojekwu v. Iwuchukwu*[7] and recently in *Ukeje v. Ukeje.*[8] The Nigerian Supreme Court in these cases held somewhat conflicting views on the same issue regarding the repugnancy and the constitutionality or otherwise of

---

5. See Worugji, *supra* note 3. *See also*, V.C. IKPEZE, GENDER DYNAMICS OF INHERITANCE RIGHTS IN NIGERIA: NEED FOR WOMEN EMPOWERMENT (2009). Also see, K.N. NWOYE, PROPERTY RIGHTS OF WOMEN UNDER NIGERIAN LAW (2007); E.W. Uzodike, *Women's Rights in Law and Practice: Property Rights*, in WOMEN IN LAW (A.O. Obidade ed., 1993), at 300-334. See also, Ukhum & Inegbedion *id.*

6. B. Boutros-Ghali, The United Nations and the State of Women: setting the Global Agenda 1995, UN Pamphlet DP1/1672/WON; Speech by the UN Women Executive Director in commemoration of the International Women's Day, 2014, *supra* note 2; see also Message of the UN Women Executive Director in commemoration of the International Women's Day, 2015, *supra* note 2.

7. (2004) 11 NWLR (part 883) 196. This judgment was delivered by the Supreme Court on the 23rd April, 2004.

8. (2014) LPELR-22724 SC. This judgment was delivered by the Supreme Court on the 11th April, 2014. This is incidentally ten years after the Supreme Court pronouncement in *Mojekwu v. Iwuchukwu*.

disinheritance of women in some communities in Nigeria. This article emphasizes the need to reconcile these opposing pronouncements which seem to be creating two faces of law on the same issue—the protection and enforcement of inheritance rights of women under the customary law. This is important because the issue of inheritance rights of women under the customary law has remained central in the protection of women's rights agenda globally. Although the customary law and practices are a major source of law in Nigeria, its patriarchal tradition has, in some cases, remained in conflict with the women's rights protection agenda. This is in spite of the numerous international human rights norms and the constitutional provisions guaranteeing and protecting women's rights in Nigeria.

This article starts by highlighting the legal and policy framework under which the demand for protection of women's rights is hinged; the etiology of the two cases; and the analysis and implications of the Supreme Court's views in these cases on the protection women's rights. It ends with recommendations on the way forward.

II. LEGAL AND POLICY FRAMEWORK

There are several laws and policies at the international and national levels upon which the demand for the dismantling of cultural authoritarianism and omni-prevalent posture of the customary law and practice militating against the protection and enforcement of women's rights in some communities in Nigeria can be supported. At the international level, apart from the United Nations (UN) Charter and the Universal Declaration of Human Rights (UDHR), which in general terms prohibits discrimination, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) laid the foundation for the demands for gender equality and non-discrimination, besides other specific rights in favour of women. This has been complemented by the CEDAW. Besides these, there have been other international moves for the protection of women's rights culminating in the Beijing Declaration and Platform of Action directed at the elimination of all forms of discrimination and violence against women and gender equality and equity.

Further still, African international law through the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa provide further standards upon which protection of women's rights are demanded and evaluated. The Protocol to the African Charter, in particular, is to ensure that the rights of women are not only promoted but protected in order to enable women enjoy their human rights.

At the national level, the Nigerian Constitution, 1999 (as amended) is replete with provisions on gender equality and protection of women's rights. Section 17(1) of the constitution emphasizes that the state social order shall be founded on ideals of social order, freedom, equality and justice. Section 17(2) maintains that in furtherance of social order, every citizen shall have equality of rights, obligations and opportunities before the law. To achieve these objectives, section 17(3) emphasizes that the state shall direct its policies towards ensuring that all citizens, without discriminations on any grounds whatsoever, have the opportunity for securing adequate ways of livelihood. There is no doubt that property acquisition and ownership is one of the means of securing adequate means of livelihood. Bringing women within the ambit of these legal expectations no doubt lays the foundation for gender equality and equity.

Furthermore, section 42 of the constitution, to give effect to the objectives and fundamental principles provided for in the constitution, provides an enforceable legal right to non-discrimination. Denial of the right to inherit property constitutes a deprivation. Similarly, section 43 of the constitution equally guarantees the right to acquire and own property. This applies to all, irrespective of sex or circumstances of birth. Sections 42 and 43 of the constitution are justiciable and enforceable. They provide a legal basis upon which certain violations of human rights could be challenged in the courts of law. Denial of the right of inheritance based merely on reasons or circumstances of birth is one of those violations that can be challenged in the courts of law.

Nigeria, no doubt, is committed to the promotion and protection of women's rights. Besides being a signatory to the international and regional instruments for protection of women's rights, and the provisions in the 1999 constitution (as amended), Nigeria also has a national policy on women and gender generally. The National Policy also recognizes the promotion of gender equality as a developmental strategy which must be pursued. The preamble to the National Policy 2006[9] emphasizes that:

> Promoting gender equality is now globally accepted as a development strategy for reducing poverty level among women and men, improving health and living standards and enhancing efficiency in public investment. The attainment of gender equality is not only seen as an end in itself and human right issue, but as a prerequisite for the

9. NATIONAL POLICY ON WOMEN (2006), FEDERAL MINISTRY OF WOMEN AFFAIRS AND SOCIAL DEVELOPMENT, NIGERIA.

achievement for sustainable development.

Thus, the issue of protection of women's rights is no more that of want of law and policy, but enforcement and implementation of laws and policy.

Even though the customary law is part of Nigeria's legal system, the application of the customary law and practices where they apply is dependent upon their being in consonance with natural justice, equity, good conscience and public policy.[10] The customary law and practice must not also be in conflict with any written law for the time being in force.[11] In effect, customary law and practices are not omnipotent and immutable. They are subservient to any other written law.

It is, however, the application of the customary laws in the communities where they apply that has always been a source of inhibition in the enjoyment of women's rights. There has remained that judicial reluctance to protect the women's rights by denouncing the assumed cultural authoritarianism and omnipotence of customary law and practices that inhibit the enforcement of women's rights. This has remained so in spite of the numerous laws and policies in favour of women which could have provided the legal anchor for easy judicial intervention in the protection of women's rights.

In effect, what is militating against the protection of women's rights in some of these communities is not want of law and policy, but the reluctance of the courts to dismantle the assumed omniprevalent and authoritarianism of the customary law and practices to advance the protection of gender equality and equity. It is within this context and against this background that the Nigerian Supreme Court's pronouncements in the two cases under reference are discussed. The Supreme Court pronouncements in Mojekwu and Ukeje are juxtaposed and analyzed. The contribution here is necessary to chart a new judicial path for the protection of women's rights. The Supreme Court in these cases under reference expressed some conflicting views on the same issue, thus raising the need for a new judicial pathway to make for certainty in the drive for protection of inheritance rights of women in Nigeria.

---

10. See Section 14(3) of the Evidence Act, Cap E 14, Law of Federation of Nigeria, 2004.

11. Sections 1(1) and (3) of the Constitution which make the Constitution supreme over and above every other Law. And any law that is inconsistent or in conflict with the Constitution shall to the extent of that inconsistency be void.

III. EXAMINING THE CASES OF MOJEKWU V. IWUCHUKWU AND UKEJE V UKEJE

A. The Facts and Judgment in Mojekwu v. Iwuchukwu

This case emanated from the High Court, Onitsha. In this case, the appellant sued one Mrs Caroline Mgbafor Mojekwu who, having died, was substituted by the respondent, her daughter. The appellant, Mr. Augustine Mojekwu, relying on the *Oli-Ekpe* custom of Nnewi in South-East Nigeria had instituted action against the respondent, Mrs. Caroline Mojekwu, claiming that he was entitled to inherit her deceased husband's property. The basis for his claim was that the deceased, his paternal uncle, was survived by the respondent and two daughters. Being all women, they were excluded from inheriting property under the *Oli- Ekpe* customary laws applying to the deceased.

The appellant's counsel argued that the *Oli-Ekpe* custom allowed the deceased's closest male relative to inherit if he had no son. The closest male relative would have been the appellant's father, who was also the deceased's brother. However, the appellant's father was dead and the appellant had become his heir. As a result, the appellant claimed ownership of the deceased's house situated in the town of Onitsha, which the deceased had built on the land he had acquired from the Mgbelekeke family of Onitsha. The respondent claimed that her son, Patrick, who had predeceased his father, had fathered an infant son who should inherit the property. Disputing this fact, the appellant claimed that Patrick had died without a son. At the conclusion of the trial, the High Court dismissed the suit. It held that there was no evidence in support of the relief sought by the appellant that under the Onitsha kola tenancy he is entitled to the land in dispute.

Aggrieved by the decision of the trial court, the appellant appealed to the Court of Appeal. The Court of Appeal, while dismissing their appeal,[12] went further and declared that the "oli-ekpe" custom of Nnewi by which a surviving brother of a deceased is by custom allowed to inherit property of the late deceased brother because the surviving wife has no son, was repugnant to natural justice, equity and good conscience. Niki Tobi JCA (as he then was) commenting on the uncivilized nature of the Oli-ekpe custom noted as follows:

---

12. See the Court of Appeal judgment in *Mojekwu v. Mojekwu* (1997) 7 NWLR (part 512) 228.

> Day after day, month after month and year after year, we hear of and read about customs which discriminate against the womenfolk in this country. They are regarded as inferior to the men folk. Why should it be so? Also human beings—male and females—are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. "we need not travel all the way to Beijing to know that some of our customs, including the Nnewi "Oli-ekpe" custom relied upon by the appellant are not consistent with our civilized world in which we all live today. For a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oli-ekpe' custom of Nnewi is repugnant to natural justice, equity and good conscience.[13]

1. The Supreme Court in Mojekwu's Case—The appellant, dissatisfied with the judgment of the Court of Appeal, appealed to the Supreme Court where he contended, among other issues, that the court was wrong in declaring the *'oli-ekpe'* custom of Nnewi repugnant to natural justice, equity and good conscience and therefore not a valid custom to be enforced by the courts. The Supreme Court, however, was in no difficulties in upholding the judgment of the Court of Appeal in favour of the respondent as the woman in the particular case was not excluded from inheritance of the deceased property in the very circumstances. It, however, maintained that the language used by the Court of Appeal in declaring the custom repugnant to natural justice was "so general, far reaching that it seems to cavil at, and it is capable of causing some strong feelings against all customs which failed to recognize a role for women." It also, in disapproving the pronouncement of Court of Appeal, noted its about the discriminatory nature of the custom in issue but felt that the Court of Appeal should have been cautious in its approach in declaring the custom invalid. In the words of Uwaifo JSC:

---

13. *Id.,* at 305 per Niki JCA (as he then was). The court in denouncing the customary law and practice maintained that apart from being unconstitutional, it is antithesis to a society built on the tenets of democracy and also immoral as it is an affront to the Almighty God Himself.

> The learned Justice of Appeal was no doubt concerned about the perceived discriminations directed against women by the said Nnewi '*oli-ekpe*' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and it is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, customs and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing from such a fundamental custom and tradition they practice by the system by which they run their native communities… the underlining crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.[14]

Besides, the Supreme Court also maintained that the underlying crusade in the pronouncement of Niki Tobi JCA is based on "English Law concepts or some principles of individual rights as understood in any other legal system." The court, therefore, concluded with concern that that should not be the basis upon which Nigeria's customary law should be evaluated. Uwaifo JSC emphasized this when he said:

> It must be remembered that a custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with English law concept or some principle of individual right as understood in any other legal system… so the Court must hear the parties and act with solemn deliberation over all the circumstances before declaring or pronouncing a custom repugnant. Admittedly, there may be no difficulty in reaching a decision in some obviously outrageous or needlessly discriminatory customs. In some other cases, it may not be so easy. That is where the repugnancy principle should be dispassionately considered and apply. In the present case, because of the circumstances in which it was done, I cannot see any

14. (2004) 11 NWLR (part 883) 196 at 217.

> justification for the court below to pronounce that the Nnewi native custom of *('oli-ekpe*) was repugnant to natural justice equity and good Conscience.[15]

It is these pronouncements that are juxtaposed on Ukeje's case and discussed. Before going into Ukeje's case, it would be apt to highlight the development in jurisprudence arising from the Court of Appeal pronouncement in *Mojekwu v. Mojekwu* in the protection of women's rights generally.

2. The Aftermath of the Court of Appeal opinion in Mojekwu's case—The underlying crusade, which the Supreme Court incidentally noticed in the pronouncement of Niki Tobi JCA, opened up a new horizon in the jurisprudence of protection of women's rights in Nigeria. It not only acknowledged the fact of the relevance of the emergent standards and aspirations derivable from international human rights law but gave further impetus for the application of the non-discrimination clause in the Nigerian Constitution in the promotion of gender equality and protection of women's rights generally. These became apparent in the judicial pro-actions of the Court of Appeal in *Mojekwu v. Ejikeme, Ukeje v. Ukeje, Uke v. Iro* and *Asika v. Atuanya*, details of which are set out herein.

In *Mojekwu v. Ejikeme,*[16] the issues were (a) whether the *Nrachi* custom of Nnewi which enables a man to keep one of his daughters unmarried perpetually under his roof to raise issues for him is not repugnant to natural justice, equity and good conscience. (b) whether the appellants are entitled to inherit the estate of Reuben Mojekwu who died intestate without any surviving male issue.

At the conclusion of the trial, the trial court found that Reuben's lineage became extinct on the death of his daughter, Comfort, and that the appellants, therefore, are not heirs to Reuben Mojekwu and are not entitled to succeed him and his estate. The court, therefore, dismissed the suit. The appellants appealed to the Court of Appeal. The court while dismissing the appeal, unanimously renounced the *nrachi* custom as inconsistent with public policy and repugnant to natural justice, equity and good conscience and unconstitutional. Fabiyi, J.C.A. without mincing words strongly maintains thus:

---

15. *Id.,* at 216-217.
16. *(2000) 5 NWLR (part 657) 403.*

> I must express the point here by which I will continue to stand that human nature, in its most 'exuberant prime and infinite telepathy' cannot support the idea that a woman can take the place of a man and be procreating for her father via a mundane custom. She stays in the father's house and cannot marry for the rest of her life even if she sees a honest man who loves her. I cannot, and do not believe that the society, as it is presently constituted, will for long acquiesce, in a conclusion so ludicrous, ridiculous, unrealistic and merciless more especially as we march on into the next millennium. The polity, as presently constituted, cannot, in my view, contain what *Nrachi* custom stands for. It is not neat. It is an antithesis to that which is wholesome and forward looking. It cannot, and should not, be allowed to rear its ugly head any longer. It should die a natural death and be buried. It should not be allowed to resurrect. The custom is perfidious and the petrifying odour smells to high heavens. It is an old time custom. And, 'behold, the old order must change and become new'. I strongly feel that *Nrachi* custom is no longer worthy of application with modern day trends… *Nrachi* custom is rendered otiose as it is absurd and fantastic. In the main, it is a farce, a sort of window dressing designed to oppress and cheat the women-folk. I have no hesitation in declaring that *Nrachi* custom is against the dictates of equity. It is no doubt repugnant and contrary to natural justice, equity and good conscience. It is not worthy of application and I declare it as being unenforceable in the judicial realm and no court of record should countenance or take judicial notice of it. In the result, a female child does not need the performance of *Nrachi* ceremony on her to be entitled to inherit her deceased father's estate.[17]

Olagunju, J.C.A. in similar words said:

> The practice is preposterous as compromising the basic tenets of family life that institutionalized marriage as the foundation of that fulfilment. "The contribution of the womenfolk as a procreative

17. *Id.,* at 422-423.

> medium in the annals of human race imposes a duty on the mankind to accord to that special breed of Homo sapiens a dignity and respect for which advanced culture provides a model worth emulating.[18]

His Lordship, however, acknowledged that the custom must have served its purpose in the time past but maintained that:

> … with the passage of time and cross-fertilization of values with other cultures of the world 'Oli-Ekpe custom' for the inequity of which '*Nrachi* ceremony' provides a panacea has become anachronistic and sheer customary relics for the modern times that is yearning desperately for some booster to buy up the low level of chastity that pervades the permissive society which the practice of *Nrachi* compounds. That the twin practice which has all the trimmings of a primordial evolution should survive the 20th century with only a few days to run is one irony of the legacy on the cultural horizon that will be bequeathed to the new millennium. It is retrograde.[19]

But according to his Lordship, the court is therefore:

> To shun the practice as repugnant to natural justice, equity and good conscience and, therefore, unenforceable hoping that sooner than later the authorities that are in a position to do so will hasten the interment of a custom that has outlived its usefulness and has become counter-productive.[20]

Niki Tobi, J.C.A. (as he then was) while also acknowledging the unconstitutionality and repugnancy of this custom extended the invalidating grounds of the custom to its violation of the CEDAW when he states:

> …the *Nrachi* ceremony…is inconsistent with public policy, repugnant to natural justice, equity and good conscience. That is not all. The

---

18. *Id.,* at 438-439.
19. *Id.,* at 438-439.
20. *Id.,* at 438-439.

> *Nrachi* ceremony encourages promiscuity and prostitution, the latter condemned in Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)…[21]

Similarly in *Ukeje v. Ukeje,*[22] the Court of Appeal declared an Igbo native law and custom disentitles a female from sharing in her deceased father's estate as unconstitutional. Galadima JCA restated this when he said:

> I have held the opinion that the Igbo native law and custom which disentitles a female whether born or out of wedlock from sharing in her deceased father's estate is void as it conflicts with section 39 (1)(a) and 39(2) of the Constitution of the Federal Republic of Nigeria.[23]

Still on the need to maintain gender equality and non-discrimination in all spheres of life, the Court of Appeal in *Uke v. Iro*[24] declared unconstitutional a rule of customary law which precludes women from giving evidence in an action for title to land. According to Pat Achelonu JCA (as he then was):

> They argued that by Nneato Nnewi custom, a woman cannot give evidence in relation to title to land. This assertion or argument is oblivious of constitutional provision which guarantees equal rights and protection under the law. The right of sexes are protected under the organic law of the land. I refer to section 39 (1) of the 1979 Nigerian Constitution which states as follows: … this same provision is now repeated in section 41 (1) of the 1999 constitution. Any customary law which flies against decency and is not consonant with notions, beliefs or practices of what is acceptable in a court where the rule of law in the order of the day should not find its way in our jurisprudence and should be disregarded and dismissed as amounting to nothing. Any laws or *custom that seeks to relegate women to the status of a second* class citizen thus depriving them of their invaluable and

21. *Id.,* at 432.
22. *(2001) 27 WRN 142.*
23. *Id.,* at 160.
24. *(2001) 17 WRN 172.*

> constitutionally guaranteed rights are laws and customs fit for the garbage and consigned to history. … A custom which strives to deprive a woman of constitutionally guaranteed right is Otiose and offends the provisions that guarantees equal protection under the law.[25]

There is no doubt that the position of the Court of Appeal since its judgment and pronouncement of Niki Tobi JCA (as he then was) has remained consistent in dealing with repugnant issues and preserving the fundamental rights of women. It declared repugnant any provisions of the customary law which impinge the enjoyment of women's rights as being unjustifiable in a democratic society which Nigeria is consciously trying to establish in its body politic. It in these cases that the courts not only played the role of interpreting the law but kept faith with the role of the judiciary as being the public conscience and common sense. Issues of 'invidious and non-invidious' gender-based discriminations were addressed.

This was the state of the law before the Supreme Court judgement in *Mojekwu v. Iwuchukwu*. Be that as it may, it is of note that the Court of Appeal again in *Asika v. Atuanya,*[26] even after the Supreme Court reservation to the opinion in Mojekwu, declared repugnant and unconstitutional a customary law and practice in Onitsha which disinherits women from inheriting from their father's estate. According to Denton-West JCA who read the lead judgement:

> It is the duty of the court to stand firm and accept the right of ownership of land by women in any part of the country as enshrined in the Constitution. Whatever the Constitution stipulates must be adhered to. The Constitution may be stiff or hard but it takes supremacy over and above any form of social engineering, equity engineering, native law and custom and indeed other enactments.[27]

Denton-West JCA while also noting the caution of the Supreme Court in the Mojekwu case and the reluctance to declare the *Oli-Ekpe* custom repugnant to natural justice maintained thus:

---

25. *Id.,* at 176-177.
26. *(2008) 17 NWLR (part 117) 484.*
27. *Id.,* at 514.

> Nevertheless, the position of the apex court has drastically changed in a host of other cases. Later decisions of the court now dealt precisely with a repugnant issues and preserve the fundamental rights of women in its judicial pronouncement and had consistently upheld as repugnant to the provisions of the our law which limits the exercise of fundamental constitutional rights positions as reasonably justifiable in a democratic society which Nigeria is now consciously trying to establish firmly in its body polity.[28]

The Court of Appeal further emphasized the repugnancy of the customary law and practice on the ground of its unconstitutionality when it maintained that:

> A custom which disentitles women from inheriting their father's property is contrary to the provision of the Constitution of the federal republic of Nigeria 1999 which is the basic law of the land, essentially superior to all other laws. Customary laws and statutory provision cannot in any way render the constitutional provision nugatory. Such custom is also not in conformity with the provisions of the African charter… In the instance case, the respondent contention that the appellants, being women are not entitled to inherit their father's property under the Onitsha custom is contrary to the will of their late father and provisions of the Constitution…and the African charter.[29]

The Court of Appeal again further emphasized not only the need to enforce the fundamental rights provisions of the constitution but also international obligations undertaken by Nigeria in favour of women's rights. According to Denton West JCA:

> …By virtue of Article of the CEDAW, government shall take appropriate measures including legislation to modify or abolish all existing laws, customs or practices which constitute discrimination against women. This Convention has universal jurisdiction and is applicable in Nigeria. Moreover, by Article 16 of the UDHR, men and women are entitled to equal rights in marriage, during marriage and at

---

28. *Id.,* at 517 491.
29. *Id.,* 512-513.

> its dissolution. Also the African Charter is part of Nigerian domestic law.[30]

This is the judicial environment existing before and after the Supreme Court caution in Mojekwu's case, when the Supreme Court again emerged with another opinion in *Ukeje v. Ukeje* on the 11th April, 2014, which is inconsistent with its opinion in Mojekwu case. It is the facts of Ukeje and the opinion of the appellate court that will be next set out.

B. The background and judgement in Ukeje's case

This case originated from the Lagos High Court. The respondent, Gladys Ada Ukeje, is one of the four children of one Lazarus Ukeje who died intestate. When Lazarus Ukeje, an Igbo man, died without a will, Gladys Ada Ukeje, his daughter instituted an action against Lois Chituru Ukeje (the deceased's wife and the plaintiff's step-mother) and Enyinnnaya Lazarus Ukeje (the deceased's son and plaintiff's half-brother) before the Lagos High Court. The plaintiff, in the main, sought to be included among the persons eligible to be entitled and to administer the estate of Lazarus Ukeje, the deceased.

The court upheld the plaintiff's claim and declared the Igbo customary law which excluded female children from inheritance as unconstitutional. Dissatisfied with this judgement, the defendants appealed to the Court of Appeal. The Court of Appeal upheld the decision of the High Court.

In dismissing the appeal, Galadima JSC in declaring the court's view on the constitutionality of the Igbo customary law and practice which disinherits women from inheriting their father's estate maintained thus:

> I have held that Igbo native law and custom which disentitles a female whether born or out of wedlock from sharing in her deceased father's estate is void as it conflicts with section 39(1)(a) and 39(2) of the constitution of the Federal Republic of Nigeria.[31]

It is against this that the defendants/appellants then proceeded to the Supreme Court. The Supreme Court in a unanimous decision confirmed the decisions of the two lower

---

30. *Id.,* at 516.
31. (2001) 27 WRN 142 at 160.

courts which had declared unconstitutional the Igbo customary law of inheritance which excludes female children from eligibility to inherit the property of their father.

The Supreme Court in the words of Rhodes–Vivour, JSC, who read the lead judgement, while acknowledging that what was in issue is the paternity of the respondent, declared thus:

> agreeing with the high court, the court of appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting in her late father's estate is void as it conflicts with section 39 (1) (a) and (2) of the 1999 Constitution as amended. This finding was affirmed by the Court of Appeal. There is no appeal on it. The finding remains inviolate. … No matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father estate is in breach of section 42 (1) and (2) of constitution, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.[32]

Concurring with this finding, Ogunbiyi JSC re-emphasized the unconstitutionality of the custom thus:

> The trial court I hold did rightly to declare unconstitutional the law that disinherit children from their deceased father's estate. It follows, therefore, that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefits of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 as amended.[33]

---

32. (2014) LPELR-22724(SC) at 32-33.
33. *Id.,* at 37.

IV. THE JUXTAPOSITION AND DISCUSSION OF THE TWO SUPREME COURT PRONOUNCEMENTS

The Supreme Court in these cases showed its inconsistencies in matters dealing with discriminations against women under the customary law and practices, in spite of clear constitutional and other legal provisions on the matter. While the court in Mojekwu seems to endorse such discriminative practices, as it did not see anything wrong with the oli-ekpe custom which disinherits women in their father's estate, in Ukeje it denounced the same cultural inhibitions on protection and enjoyment of women's rights. The court in Mojekwu seems to reject the universalization and internationalization of human rights. This explains why it maintained that the Court of Appeal was influenced by the English law concept.

According to the Supreme Court, "a custom cannot be repugnant to natural justice, equity and good conscience just because it is inconsistent with English law concept and some principle of individual rights as understood in any other legal system.[34]" But it closed its mind even to the concept of non-discrimination in the Nigerian constitution and the African Charter on Human and Peoples' Rights which is also part of the Nigerian law. This, it has been argued, is a clear indication of the Supreme Court's refusal to accept changing times, circumstances and environment.[35]

One wonders why the Supreme Court did not recognize and acknowledge that the very customary law and practice which denies women inheritance rights is unconstitutional, if not repugnant to natural justice, before the caution and hasty conclusion. Or even further, why it did not make a clear distinction between what customary practices that could be repugnant to natural justice and those that need to be promoted and protected, for the proper direction in judicial protection of women's rights. It simply admitted that "there may be no difficulty in reaching a decision in some obviously outrageous or needlessly discriminatory customs. In some other cases, it may not be so easy.[36]" This leaves the Supreme Court opinion in Mojekwu very fluid and unguarded for an effective judicial role in the elimination of repugnant customs.

Even though the Supreme Court acknowledged the concern of the Court of

---

34. (2004) 11 NWLR (part 883) 196 at 216.

35. I.N.E. Worugji and R.O. Ugbe, *Judicial Protection of Women's Rights in Nigeria: The Regrettable decision in Mojekwu v. Iwuchukwu* 16 UNIVERSITY OF BOTSWANA LAW JOURNAL (2013), at 70-71.

36. (2004) 11 NWLR (part 883) 196 & 216.

Appeal to denounce the perceived discrimination directed against women in the instant case, it shied away from endorsing that concern on mere personal prejudices against what they perceived was reliance on "English law concept or some principle of individual right as understood in any other legal system."[37]

It is within this context that the Supreme Court opinion in Ukeje is commendable and is said to have set the new trail and concrete judicial pathway for the protection of women's rights in Nigeria. Though it did not make any reference to Mojekwu, it has by implication overruled it. This is evident by the fact that it maintained that the findings of the courts that the customary law which disentitles a female from inheriting in her father's estate is void as in conflict with section 42 of the constitution. According to the Supreme Court, "that finding is inviolate". "No matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her father's estate". And that this is "a fundamental right provision guaranteed to every Nigerian."[38]

It has also by implication provided strong backing to the stance of the Court of Appeal not only in Mojekwu, but in similar other judicial approaches adopted by the Court of Appeal following the reasoning and judicial pro-action in Mojekwu. The Supreme Court made this clear by not only relying on the repugnancy principle in declaring the custom in issue repugnant to natural justice but combined that with the constitutionality principle. This approach is in all fours with the approach adopted by the Court of Appeal in *Asika v. Atuanya* and *Mojekwu v. Ejikeme, Uko v. Iro* and *Ukeje v. Ukeje*. By this approach of combining the repugnancy and constitutionality principle, it has made superfluous of the need to make a clear distinction on what the Supreme Court in Mojekwu regarded as customary law and practices that are repugnant to natural justice and those that need to be safeguarded. It was in this regard that the Supreme Court in Mojekwu said that "the language used by the Court of Appeal made the pronouncement so general and far-reaching that it seem to cavil at, and it is capable of causing strong feeling against, all customs which fail to recognize a role for women." It is, therefore, no more an issue of language used now. The constitutionality principle confirmed by the Supreme Court in Ukeje's case has made the issue of the status of customary laws and practices that disinherit women from inheriting from their father's estate very clear. The Supreme Court in Ukeje case has not only tacitly overruled the Supreme Court in Mojekwu but has on the whole endorsed the path charted by the

37. *Id.,* at 216.
38. (2014) LPELR-22774(SC) at 32-33.

Court of Appeal and provided a new pathway for protection of women's rights in Nigeria.[39]

VI. CONCLUSION

Even though the Supreme Court in Ukeje did not expressly overrule nor disapprove of its earlier pronouncement in Mojekwu, this article concluded that the Supreme Court in Ukeje has created a new pathway for dealing with customary laws and practices which inhibit the enforcement of women's rights in Nigeria. It has taken the approach beyond the application of the "repugnancy test" by applying the "constitutionality test". This, in effect, removes the concern or worry expressed by the Supreme Court in Mojekwu about the "English Law concepts or some principles of individual right as understood in any other legal system" to declare a customary law and practice repugnant. It has also given validity to and provided further judicial anchor for the pro-action of the Court of Appeal in dealing with the issue of customary laws and practices which inhibit effective judicial role in the protection of women rights. It is, however, hoped that the Supreme Court in the near future and at the next available opportunity would consolidate this new pathway and expressly also overrule itself in Mojekwu.[40]

39. I. Nnadi, *A New Tide in the Right of a female child to Inherit Properties in Igboland: A discourse* 2(1) AUSTRALIAN JOURNAL OF EDUCATION AND LEARNING RESEARCH (2015), at 26-30.

40. Worugji & Ugbe, *supra* note 35.

THE IMPLICATIONS OF CUSTOMS AND TRADITIONS ON WOMEN'S REPRODUCTIVE HEALTH AND RIGHTS IN NIGERIA

Olubayo Oluduro*

ABSTRACT

Different groups of people worldwide have great attachments to their customs and traditions. Section 21 of the constitution of the Federal Republic of Nigeria (as amended) provides that the state shall preserve and promote those cultures which enhance human dignity and are consistent with the directive principles. While this section accords recognition to cultures and appears to protect the rights of each and every Nigerian to pursue cultural practices, there is need for a review of some of the age-old practices that are inconsistent with the provisions of the constitution and other human rights principles as enshrined in the regional and international human rights instruments. The article examines how some traditional and cultural practices preserved in the name of custom—such as child marriage, male-child preference, wife inheritance, widowhood rites, violence against women, female genital mutilation, virginity testing, sexual hospitality practices, etc—pose critical and pervasive risks to the reproductive rights of women. It argues that the patriarchal nature of Nigerian society and the lack of empowerment and emotional dependence of women on men has negative consequences on the physical, psychological and mental health of women and reinforces their inferior status. It proffers suggestions on how to bring an end to these practices.

I. INTRODUCTION

As far back as 1995, the United Nations reported that "in no society today do women

*. Associate Professor and Ag. Dean, Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State, Nigeria. Email: <olubayooluduro@yahoo.com>. This is a revised version of the paper presented at the 3rd International Conference of the Transatlantic Research Group in collaboration with the Gender and Sexuality Resource Center and Women and Gender Studies Program, Marquette University on "Sexuality, Human Rights, and Public Policy," held between 23-24 April 2014 at the Marquette University, Milwaukee, USA.

enjoy the same opportunities as men."[1] More than fifteen years after, women continue to suffer discrimination not only in the developing countries, but also in the developed world. Women suffer the worst forms of threats to human security in Africa today. The tragedy of women's insecurity is compounded by the fact that they also are exposed to the worst forms of harmful cultural practices, without any adequate protection offered by the law and institutions in African states, including Nigeria.

In most cultures in Nigeria, there are power imbalances between men and women and there is the belief that women are to be seen and not to be heard. As a result, women are unable to participate in making crucial decisions relating to their sexual and reproductive well-being.[2] Indeed, some of these practices are age-long traditional customs that have been carried out from generation to generation based on the beliefs and values held by members of a particular community. Though some of these practices are harmful, some of the members of the communities where these traditions are being carried out still tenaciously hold on to them, because Africans, as well as Westerners, believe in protecting and promoting their cultural values regardless of their negative impacts on certain individuals in the community.[3] But with modernization and evolution of human rights instruments, some of these traditional practices are being condemned on the basis of their violations of the provisions of the domestic, regional and international human rights instruments.

This article examines the relationship between cultural practices and the realization of the reproductive health and rights of women in Nigeria. It considers some harmful cultural practices that pose serious obstacles to the realization of the reproductive rights of women. It contends that though Nigeria has ratified several human rights instruments protecting women's human rights, some of the traditions and customs that legitimize women's inequality in some parts of Nigeria have had a negative impact on the efforts to respect, protect and fulfill the rights of women[4] to

---

1. UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), HUMAN DEVELOPMENT REPORT 1995: GENDER AND HUMAN DEVELOPMENT (1995), at 29, retrieved from <http://hdr.undp.org/reports/global/1995/en/>.

2. Ebenezer Durojaye, *Substantive Equality and Maternal Mortality in Nigeria*, 65 JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW (2012), 103-132 at 114.

3. Ebenezer Durojaye and Patience Munge Sonne, *A Holistic Approach to Addressing Female Genital Cutting (FGC) in Africa: The Relevance of the Protocol to the African Charter on the Rights of Women*, 1(5) AKUNGBA LAW JOURNAL (2011), at 240.

4. "Women" means persons of female gender, including girls, see Art. 1(k, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

reproductive health.

II. UNIVERSALISTIC AND CULTURAL RELATIVIST APPROACHES AS APPLIED TO CULTURAL PRACTICES

More often, states used the argument of cultural relativism to justify their reluctance to address those cultural practices that are inimical to women and violate their rights. The arguments against the practice of those cultures considered harmful, including female genital mutilation, appear to focus on the promotion of individual autonomy and universal human rights to various freedoms.

On the other hand, those who defend these practices draw support from demands to respect a person's particular cultural identity and to protect the rights of minorities (minority cultures).[5]

Cultural relativism emphasizes that cultures vary in what they regard as right and wrong, standards vary from place to place and over time, there is no universal standard, and accordingly, it is mistaken to criticize the practices of another culture.[6] 'Cultural relativism gives each culture the liberty to practice what is native and relevant to that society without, the imperialist imposition from another culture that holds a different set of beliefs and or norms.'[7] From the point of view of cultural relativists, since human rights principles and standards originate from the West, it is misleading to ascribe 'universalism' to human rights guarantees as they do not necessarily reflect the cultures of developing countries, particularly African countries.[8] The following claims have all been made by cultural relativists:

a) Different societies have different moral codes.
b) The moral code of a society determines what is right within that

---

5. S.K. Hellsten, *Rationalising circumcision: from tradition to fashion, from public health to individual freedom-critical notes on cultural persistence of the practice of genital mutilation*, 30 J MED ETHICS (2004), at 250.

6. Dominic Wilkinson, *Cultural Relativism and Female Genital Mutilation*, PRACTICAL ETHICS, 7 February 2014, retrieved from <http://blog.practicalethics.ox.ac.uk/2014/02/cultural-relativism-and-female-genital-mutilation/>.

7. Sandra Danial, *Cultural Relativism vs. Universalism: Female Genital Mutilation Pragmatic Remedies*, 2(1) THE JOURNAL OF HISTORICAL STUDIES (Spring, 2013), at 2.

8. Ebenezer Durojaye, *'Woman, But not Human': Widowhood Practices and Human Rights Violations in Nigeria*, 27(2) INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY (2013), at 182.

> society.
> c) There is no objective standard that can be used to judge one society's code as better than another's. There are no moral truths that hold for all people at all times.
> d) The moral code of our own society has no special status; it is but one among many.
> e) It is arrogant for us to judge other cultures. We should always be tolerant of them.[9]

In the opinion of the cultural relativist, FGM, child marriage, widowhood rites and other cultural practices are neither right nor wrong. While these may be wrong going by the western standards, they may be permissible according to the values of other societies. For instance, FGM has been condemned as a violation of internationally protected human rights, yet it continues to be an integral part of many African, Asian, and Middle Eastern cultures.

Universalism contends that all people are linked together by a common cause that is human rights, which are universal. All human beings are therefore equal in dignity and in rights and are united against all forms of discrimination and inequality.[10] Also, equality for women is an internationally proclaimed human right contained in many treaties, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which prohibits distinctions made on the basis of gender, yet several cultures continue to deny women equal rights.[11] These issues revolve around the long-standing controversy between the concepts of the universality of human rights and cultural relativism.

As stated by Musalo, while the proponents of universality maintain that the human rights that have been guaranteed in international treaties and conventions are universal, and apply to all countries, and must therefore prevail even when they conflict with cultural or religious practices, advocates of cultural relativism contend that permitting international norms to override the dictates of culture and religion is a

---

9. Ruth Benedict, The Challenge of Cultural Relativism, The Elements of Moral Philosophy, at 16, retrieved from <people.umass.edu/cox/cultural_relativism.pdf>.

10. Sandra Danial, *supra* note 7, at 3.

11. Karen Musalo, When Rights and Cultures Collide: Genital Mutilation, Markkula Center for Applied Ethics, Santa Clara University, retrieved from <https://www.scu.edu/ethics/publications/iie/v8n3/rightsandcultures.html>.

violation of state sovereignty.[12] For instance, cultural relativists assert that those arguing for the eradication of FGM have to acknowledge the risk of alienation faced by women and girls who choose to reject the tradition on account of imperialist imposition, as the need to feel accepted is a basic human need.[13] It would therefore be wrong to displace people from their cultural values and beliefs on the basis of adhering to morally acceptable standards.

Notwithstanding the above opposing views, the cultural norms in a patriarchal society such as Nigeria appear to be a way to maintain gender inequality. The focus of the proponents of universalism is on the overwhelmingly high rates of harmful cultural practices and their attendant complications that include both immediate and long term health concerns. Universalists believe that it is their duty to fight for the rights of women on a global scale, because women's rights are human rights and are universal.[14]

III. INTERNATIONAL AND REGIONAL INSTRUMENTS FOR THE PROTECTION OF WOMEN'S RIGHTS TO REPRODUCTIVE HEALTH

This sub-section examines some of the international and regional human rights instruments relating to equality and non-discrimination, and how they can be transformed to meet the concerns of women, and promote their sexual and reproductive well-being with the view to guaranteeing their right to health.

One of the most important international instruments germane to this discussion is the Universal Declaration of Human Rights, 1948, which among others promotes the concept of equality of all human beings. Article 1 thereof provides that all human beings are born free and equal in dignity and rights. Article 2 further provides that:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.

---

12. *Id.*

13. Sandra Danial, *supra* note 7, at 5.

14. *Id.*, at 6; Mahnaz Afkhami, *Women, Gender, and Human Rights: A Global Perspective*, in GENDER APARTHEID, CULTURAL RELATIVISM, AND WOMEN'S HUMAN RIGHTS IN MUSLIM SOCIETIES (M. Agosin ed., 2001), at 76.

Thus, all human beings, regardless of sex, have equal right from birth, and must be treated equally. Equality of sexes is a norm that cannot be derogated from by customs and practices.[15] Article 5 provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' As will be discussed later, the various mourning rites which most Nigerian widows are being subjected to, such as the shaving of their heads, are contrary to the provisions of this declaration. Article 25 provides for the right to security in event of unemployment, sickness, widowhood or other lack of livelihood. The widows in Africa are often denied this right. They are often neglected and abandoned by the families of their deceased husbands, thus forcing them to prostitution to eke out a living.

There are also two important international covenants which again dwell extensively on these rights. These are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), which came into being in 1966. Article 3 of the two covenants provides that the state parties to the covenant undertake to ensure the equal rights of men and women to the enjoyment of all the rights set out in each of these covenants. The General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the ICCPR noted that states should ensure that 'traditional, historical, religious, or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all covenant rights.'

At the regional level, the African Charter on Human and Peoples' Rights (the Banjul Charter), 1981, also contains some norms against discrimination based on sex. Article 2 provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without discrimination of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

While article 3 provides for equality of all persons, and affords equal protection under the law, article 5 protects the right to the respect of the dignity inherent in a human

---

15. Yemi Akinseye-George, *Changing Perspectives on Human Rights*, in LAW, HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE IN NIGERIA, ESSAYS IN HONOUR OF HON. JUSTICE MUHAMMED LAWAL UWAIS, CJN, (M.T. Ladan ed., 2001) at 199.

being and prohibits all forms of exploitation and degradation particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment. Article 18 (3) further provides that the state must ensure the elimination of every discrimination against women, and also ensure the protection of the rights of the woman and the child as provided in international declarations and conventions. However, article 17(3) goes to provide for the 'promotion and protection of morals and traditional values recognized by the community,'[16] apparently neglecting the fact that some of these traditional values embody practices oppressive to women and impose severe limitations on the rights that women enjoy.[17]

Also important is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 which entered into force on 25 November 2005.[18] The protocol is one of the vital instruments for promoting reproductive and sexual health rights in Nigeria having been ratified by the country, though still awaiting domestication to become part of Nigerian law. Hence, it is only legally binding on Nigeria in terms of respect, observance, promotion and protection of the rights guaranteed therein.[19]

Article 5(e) thereof states that parties to the protocol shall prohibit all traditional and cultural practices that are physically and or morally harmful to women and girls, which are against recognized international norms. The African Women's Protocol imposes an obligation on states parties, as do articles 2(f) and 5(a) of CEDAW,[20] 'to commit themselves to modify the social and cultural patterns of conduct of women and men' so as to eliminate 'harmful cultural and traditional practices and other practices which are based on the idea of the inferiority or superiority of either sexes, or on stereotyped roles for men and women'.[21] States parties are expected to

16. See also Article 18(2) which mandated the State to assist the family which is the custodian of moral and traditional values recognized by the community.

17. Isabella Okagbue, Women's Rights Are Human Rights, Nigerian Institute of Advanced Legal Studies, Lagos, 1996, at 15.

18. It required 15 ratifications to bring it into force. See Art. 29(1). The states that have ratified the Protocol are: Benin, Cape Verde, Comoros, Djibouti, Gambia, Lesotho, Libya, Mali, Malawi, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo.

19. Muhammed Tawfiq Ladan, Review of Existing Reproductive Health Policies and Legislations in Nigeria (Paper presented at a one-day stakeholders' forum on reproductive health in Nigeria, organized by the Independent Policy Group, Abuja, at Tahir Guest Palace Hotel, Kano, Nigeria on 20th April 2006).

20. Art. 5(1).

21. Art. 2(2).

discharge this obligation 'through public education, information, education and communication'.[22]

As observed by Chirwa, the duty to eliminate 'harmful cultural and traditional practices' presupposes that some cultural practices are consistent with women's rights, but which strangely, the African Women's Protocol does not place any obligation on states parties to promote.[23] Article 3 of the protocol also provides that every woman has 'the right to dignity inherent in a human being' and 'to respect as a person and to the free development of her personality'. In addition, article 4 declares that every woman is entitled to 'respect for her life and the integrity of her person'. In view of these provisions, the protocol enjoins states parties to 'adopt and implement appropriate measures to prohibit any exploitation or degradation of women'[24] and to prohibit 'all forms of exploitation, cruel, inhuman or degrading punishment and treatment against women'.[25] The protocol mentioned some of the specific acts and practices, which constitute prohibited and degrading conduct to include violence against women especially sexual and verbal violence,[26] unwanted or forced sex,[27] trafficking in women,[28] and FGM.[29]

Of particular importance is article 5 of the Protocol which obliges states parties to take all ''necessary legislative'' and ''other measures'' to eliminate harmful practices which adversely affect the human rights of women and which are against the recognized international standards.

The African Women's Protocol requires the free and full consent of both parties to marriage,[30] provides the age of 18 as a minimum age of marriage[31] and calls for the registration of marriages "in order to be legally recognized."[32] Thus, any person below the age of 18 is assumed to be incapable of giving free and full consent to marry. This

---

22. Art. 2(2) of the African Women's Protocol.

23. Danwood Mzikenge Chirwa, *Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights*, 53(1) NETHERLANDS INTERNATIONAL LAW REVIEW (2006), at 74.

24. Art. 3(3).

25. Art. 4(1).

26. Art. 3(4).

27. Art. 4(2)(a).

28. Art. 4(2)(g).

29. Art. 5(b); see generally Danwon od Mzikenge Chirwa, *supra* note 23, at 76.

30. Art. 6 (a).

31. Art. 6(b).

32. Art. 6(d).

provision deals with the cultural practices that require the consent of parents or guardian to the intending spouses, without any due regard to the consent of the parties to the marriage especially that of the girl. This provision implies that child marriages, which are common in Africa, are invalid. By article 6(c), states parties have the obligation to promote and protect 'the rights of women in marriage and family including in polygamous marital relationships'.[33]

Article 14 of the African Women's Protocol is very important for the protection of the reproductive rights of women. It provides that women have the right to health including the right to sexual and reproductive rights, the right to control their fertility, the right to decide whether to have children, the number of children and the spacing of children, and the right to choose any method of contraception. The importance of these provisions lies in the fact that 'they seek to reclaim the reproductive rights of women, which are often trumped upon in traditional African societies,'[34] hence the approach adopted by the protocol that recognizes the fact that 'equality between men and women is impossible unless certain traditional and cultural beliefs, attitudes and stereotypes are corrected.'[35]

The African Commission's General Comment on article 14(1)(d) and (e) recognizes "that women in Africa have the right to the highest attainable standard of health which includes sexual and reproductive health and rights."[36] Recognizing the role of culture in limiting the enjoyment by women of their rights, article 17 of the protocol declares that women shall have the right to live in a positive cultural context and to be involved in the determination of cultural policies.[37]

One significant innovation of the African Women Protocol is the provision of article 20 which imposes an obligation on states parties to 'take appropriate legal measures to ensure that widows enjoy all human rights', particularly, to ensure that 'widows are not subjected to inhuman, humiliating or degrading treatment'.[38] In order to overcome the harrowing experiences of women on the death of their husband, the

---

33. Art. 6 (c).

34. Danwood Mzikenge Chirwa, *supra* note 23, at 84.

35. *Id.*, at 89.

36. General Comment on Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Comment on Article 14 (1)(d) and (e) of the Protocol on Women) at para. 5, retrieved from <http://www.achpr.org/news/2012/11/d65/>.

37. Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights comes into Force*, 50(1) JOURNAL OF AFRICAN LAW (2006), at 75.

38. See generally Art. 20(a)-(c).

protocol provides in article 21 that a widow:

> … shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or if she has inherited it.[39]

However, of these international rights instruments dedicated to the protection and promotion of women, the most comprehensive and prominent among them is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1981. This convention was ratified by the Nigerian government in 1985 without reservation and the Optional Protocol to the convention was signed in September 2000.

Article 2 of the convention obliges states parties, in general, to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women.'[40] Articles 5 and 6 of the convention directs states parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The combined reading of article 1 with articles 2(f) and 5(a), 'set the standards by which states are to address the issues around gender roles and stereotypes as well as all forms of discrimination which manifest in culture and tradition.'[41] Also, article 15(1) accords to women equality with men before the law, and article 16 directs specific attention to the need to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular, equality of men and women in marriage, and its dissolution, etc. Notwithstanding the fact that the CEDAW has the second highest ratifications (with 185 state parties) of any human rights treaty after the Convention on the Rights of the Child, it also boasts of being the treaty with the highest

---

39. Art. 21(1).

40. Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women.

41. Dorcas Coker-Appiah, The CEDAW Convention and Harmful Practices Against Women: The Work of the CEDAW Committee, Expert Group Meeting on good practices in legislation to address harmful practices against women, United Nations Conference Centre Addis Ababa, Ethiopia, 25-28 May 2009, EGM/GPLVAW/2009/EP.05, at 4.

number of reservations. It has recorded 73 reservations, 11 of which emanate from the African continent.[42] Some of the articles[43] and reservations concern women's sexuality and their reproductive and sexual rights. For instance, Malawi made a reservation to article 2 on the basis that:

> Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.

As pointed out by Tamale, this reservation and the subsequent withdrawal of the same by the government of Malawi two years later, in October 1991, explains the dynamics that play out between rights, culture and sexuality.[44]

There is also an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. It establishes a Committee on the Elimination of Discrimination Against Women, which came into force in December, 2000. The committee is empowered to receive complaints from individuals and groups of individuals that claim to be victims of the rights provided in the convention. The right to health is central to the recommendations issued by the committee.[45] Since Nigeria became a party to the CEDAW Convention, it has appeared before the committee four times. Its initial report was considered at the ninth session in 1988, the combined second and third reports at the 19th session in 1988, the fourth report at the 30th session in 2004 and the fifth report at the in 41st session in 2008.

At its 41st session in 2008, most of the issues raised by the committee in 2004 remained issues of concern, *viz*: early marriages, persistence of patriarchal attitudes, deep-rooted stereotypes concerning women's roles and responsibilities, entrenched

---

42. These include: Algeria (Arts. 2, 9(2), 15(4), 16 and 29); Egypt (Arts. 9, 16 and 29); Ethiopia (Art. 29); Lesotho (Art. 2); Libya (Arts. 2 and 16b,c); Malawi (Arts. 2 and 29(2)); Mauritania (any article that contradicts Sharia); Mauritius (Art. 29); Morocco (Arts. 2, 9(2), 15(4), 16 and 29); Niger (Arts. 2d,f, 5a, 15(4), 16(1) c, e, g and 29); and Tunisia (Arts. 9(2), 15(4), 16c, d, f, g, h and 29), quoted in Sylvia Tamale, *The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa*, 16 FEM LEG STUD (2008), at 56.

43. See Articles 2 and 16 of CEDAW.

44. Sylvia Tamale, *supra* note 42, at 57.

45. CEDAW, GENERAL RECOMMENDATION, 24 UN GAOR, 1999, DOC NO/A/54/38/REV.1.

harmful traditional and cultural norms and practices, including widowhood rites, as well as the continued high incidence of FGM in some areas of the country.[46] The committee in its concluding comments referred to its comments in 2004 and urged the state party "to continue to take measures, including the enactment of national legislation, to modify or eliminate traditional and cultural practices and stereotypes that discriminate against women in accordance with article 2(f) and 5(a) of the Convention."[47] This clearly shows that practices that are harmful to women are prohibited under the UN human rights system, no matter the justification of such practices by religious or cultural considerations.

Also worthy of note is the Convention on the Rights of the Child (CRC) 1989.[48] Article 24(3) of the convention calls for the abolishment of traditional practices prejudicial to the health of children. It prohibits states parties to give validity to a marriage between persons who have not attained their majority, that is, 18 years. Early marriage is one of the traditional practices prejudicial to health of children.

In addition to the above binding international and regional instruments, there are some non-binding instruments that are also relevant to addressing reproductive health and rights issues in Nigeria. These are: the 1994 International Conference on Population and Development (ICPD) in Cairo and the 1995 Fourth World Conference on Women in Beijing. The ICPD Programme of Action urges governments to "eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection."[49]

It further re-emphasized that "advancing gender equality and the empowerment of women and the elimination of all kinds of violence against women and ensuring women's ability to control their own fertility, are corner-stone of population and development related programmes." This recommendation was also echoed at the

---

46. CONCLUDING OBSERVATIONS OF THE COMMITTEE ON CEDAW: NIGERIA 41ST SESSION 30 JUNE-18 JULY 2008 CEDAW/C/ NGA/CO/6; Dorcas Coker-Appiah, *supra* note 41, at 7.

47. *Id.*

48. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

49. Programme of Action, adopted at the International Conference on Population and Development, Cairo, Sept. 5–13, 1994, New York: Department for Economic and Social Information and Policy Analysis, UN, 1995.

Beijing Declaration.[50]

Taken together, these international human rights instruments offer a wide range of protection to women against harmful cultural practices that violate their sexual and reproductive health and rights. As discussed earlier, Nigeria has ratified some of these international conventions supporting women's rights, but has not been able to fulfill most of the principles set forth in these documents. This shows that the ratification of a treaty by a state does not necessarily mean adherence to its provisions. The principles enunciated in these relevant international and regional treaties are a standard below which any civilized nation should be ashamed to fall.

As noted by the court in *Mmusi & Others v. Ramantele & Others*:

> … by ratifying the above International legal instruments, states parties commit themselves to modify the social and cultural patterns of conduct that adversely affect women through appropriate legislative, institutional and other measures, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.[51]

By ratifying the international conventions, Nigeria adopted the direct, positive duty to enact appropriate legislation and provide administrative, budgetary, and economic measures for the full realization of human rights[52] of women with a view to confronting the traditional practices that impede the realization of their reproductive health and rights. Therefore, Nigeria is duty bound to bring its legislation and policies in line with these international standards. Unfortunately, the majority of these international and regional human rights instruments do not enjoy automatic enforcement in Nigeria as a result of constitutional impediments.

Section 12 of the constitution of the Federal Republic of Nigeria 1999 (as

---

50. Reported in the New York Times (September 11, 1995), at 1 or Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, 4/5 Sept., 1995 (A/CONF. 177/20).

51. *Mmusi & Others v. Ramantele & Others* MAHLB-000836-10 (Botswana High Court), para. 187.

52. Jacqueline Mercier, *Eliminating Child Marriage in India: A Backdoor Approach to Alleviating Human Rights Violations*, 26 BOSTON COLLEGE THIRD WORLD L.J. (2006), at 385.

amended) explicitly requires the domestication of these international conventions by the National Assembly before they can be legally enforced.[53] This remains to be done by the Nigerian Government thereby hindering the enforceability of their provisions. It is only the African Charter on Human and Peoples' Rights that has been domesticated as part of Nigerian law.

IV. NATIONAL EFFORTS AT PROTECTING THE WOMEN'S RIGHTS TO REPRODUCTIVE HEALTH IN NIGERIA

Many constitutions of African countries, including Nigeria's, contain provisions guaranteeing human dignity, equality and prohibition of discrimination on the basis of sex. Suffice it to say that there appears no specific provision on health and reproductive rights under the 1999 constitution of Nigeria. However, there are some sections of the constitution that indirectly allude to the right to health which the citizens could avail themselves of.

Chapter II of the Constitution contains some important principles and objectives towards the protection of children. Section 17 (1) and (2) provides that the state social order is founded on ideals of freedom, equality and justice, and that in furtherance of this social order, every citizen shall have equal opportunity of rights, obligations and opportunities before the law.[54] In other words, the sections recognize the principle of gender equality, and the state must not make any policy or laws that go contrary to this.

Section 17(3) provides that the state shall direct its policy towards ensuring that: 'children and young persons are protected against any form of exploitation whatsoever, and against any moral or material neglect.' Moral and material neglect can be seen as indicators of the violation of the right to health, for example, the moral right to feeding, clothing and shelter.[55]

Section 21 states that the state shall preserve and promote those cultures, which enhance human dignity and are consistent with the fundamental objectives and directive principles of state policy. While this section accords recognition to the value and significant place of custom to the Nigerian people, the courts, in appropriate cases,

---

53. Section 12 of the Federal Republic of Nigeria, 1999 (as amended).

54. Emphasis is mine.

55. Bolaji Owasanoye and Adedeji Adekunle, *Overview of the Rights of the Child in Nigeria*, in THE RIGHT OF THE CHILD IN NIGERIA (I.A. Ayua & I.E. Okagbue eds., 1996), at 55.

could rely on these provisions to strike down cultural practices which discriminate against any citizen and do not enhance human dignity, such as child marriage, that have continued to militate against the rights of women.[56] However, the problem with these provisions lies in its non-justiciability against the state,[57] thereby eroding the advantages which the citizens could have derived from these sections.

The Constitution, however, provides for more effective legal safeguards in its chapter IV, especially sections 34 and 42 of the constitution, which can be used to curb the practice of harmful cultural practices. Section 34 (1)(a) of the 1999 constitution of Nigeria provides that '[E]very individual is entitled to respect for the dignity of his person, and accordingly- no person shall be subjected to torture or to inhuman or degrading treatment. Furthermore, section 42(1) provides that:

> A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person;
>
> a) be subjected to either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject …

This section prohibits discrimination among others on the basis of sex, and so can be used to fight any laws, customary or religious, that tend to discriminate against women. Notwithstanding this anti-discrimination provision, it remains a challenge in Nigeria to make changes to customary law that discriminates against women. By the use of the word "any law in force," it may reasonably be argued that the various harmful

---

56. Yemi Akinseye-George, *supra* note 15, at 207.

57. Section 6(6)(c) of the Constitution provides that: "The Judicial powers vested in accordance with the foregoing provisions of this section- shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution." See *Olubunmi Okogie v. Attorney-General of Lagos State* [1981] 1 NCLR 218. This case constitutes a setback on the realization of the Fundamental Objectives and Directive Principles set out in Chapter II of the Constitution of the Federal Republic of Nigeria.

customary laws and practices offend this constitutional guarantee of freedom from discrimination.

Thus, given that section 1(3) of the 1999 Constitution of Nigeria voids any law that is inconsistent with it to the extent of its inconsistency, discriminatory customs, including harmful traditional practices such as child marriage preserved in the name of custom, that violate constitutionally guaranteed fundamental rights may be struck down by reason of their unconstitutionality.[58] In view of these constitutional provisions and the various human rights instruments mentioned above, the Nigerian government is under obligation to ensure that women are protected from being subjected to acts of degrading and inhuman treatment.[59]

Nigerian courts have not always been consistent in decisions concerning discriminatory rules of customary law. In *Mojekwu v. Mojekwu,*[60] the Oli-ekpe custom of Nnewi Area of Anambra State was constitutionally examined. Under this custom, where a man dies leaving a male child, the latter will inherit his property, but where he dies without a male child, his brother will inherit his property. In this case, a nephew of the deceased went to court to claim that under the Oli-ekpe custom, he is the one entitled to inherit the estate of his uncle who died intestate leaving a widow and two daughters.

Tobi JCA (as he then was) condemned the Oli-ekpe custom which allows the son of the brother of the deceased to inherit his property to the exclusion of his female child as "repugnant to natural justice, equity and good conscience."[61] On appeal, the Supreme Court rejected the above decision in the case of *Mojekwu v. Iwuchukwu*[62] where the court stressed that it is unjustifiable for the Court of Appeal to declare the Nnewi custom of Oli-ekpe repugnant to natural justice, equity and good conscience. The Supreme Court premised its decision on the fact that the "general and far-reaching" pronouncement of the Court of Appeal is capable of causing strong feelings or stirring up a real hornet's nest against all customs that exclude women since issues were not

---

58. Ayo Atsenuwa, *Custom and Customary Law: Nigerian Courts and Promises for Women's Rights*, in CONTEMPORARY ISSUES IN THE ADMINISTRATION OF JUSTICE: ESSAYS IN HONOUR OF JUSTICE ATINUKE IGE (Kenneth Irabor ed., 2001), at 347.

59. Ebenezer Durojaye, *supra* note 8, at 185.

60. *(1997) 7NWLR (Part 512) 288.*

61. *Id.,* at 283. *Alajiofor v. Iro* (2001)17 WRN 172.

62. *(2004) 4 S.C. (Pt. II) 1. There was a change of names of the parties to the case because, Caroline Mojekwu, who was the original party to the case died; and her daughter, Theresa Iwuchukwu, was substituted in her place.*

joined by the parties on it and the parties were not heard upon the issue when raised *suo motu* by the court.

This decision from the apex court of the land no doubt leaves much to be desired as it robs the Nigerian women of the gains so far made in the struggle against gender inequality and unwholesome cultural practices against Nigerian women, and rendered nugatory the gender celebration witnessed by the ruling of Niki Tobi, JCA in *Mojekwu v. Mojekwu*. Even though the Supreme Court confirmed the right of the surviving children of the deceased who are women in this case to inherit the kola tenancy of their deceased father, its decision raises serious doubt as to 'whether the apex court would protect women's human rights by finding that discriminatory inheritance customs violate the constitution's equality provisions.'[63]

Happily, on 14th April 2014, the Nigerian Supreme Court, in a unanimous decision, in *Ukeje v. Ukeje*,[64] found unconstitutional an Igbo customary law of succession that excluded female offspring from eligibility to inherit the property of their fathers. In the case, Lazarus Ogbonna Ukeje, a member of the Igbo ethnic group, died intestate in Lagos in 1981. Cladys Ada Ukeje (his daughter) brought an action against Lois Chituru Ukeje (the deceased's wife and the plaintiff's stepmother) and Enyinnaya Lazarus Ukeje (the deceased's son and the plaintiff's half-brother) before the Lagos High Court, seeking that she be included among the persons eligible to administer the deceased's estate.

Justice Bode Rhodes-Vivour who delivered the lead judgment, held that 'No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo Customary Law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian.'[65] This decision is very significant in that it not only declared an age-old cultural practice illegal, but also provides an effective platform to further challenge similar obnoxious, discriminatory, repressive, unfair and sometimes cruel cultural practices in place in Nigeria that have continued to pose serious danger to the rights and health of women.

Also, there has been a 'sea change' in a number of African countries towards

---

63. Center for Reproductive Rights *et al*, Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts (2010), Volume II, New York, USA, at 35.

64. [2014] All FWLR (Pt. 730) 1323.

65. *Id.*, at 1341.

gender equality, particularly in southern African countries such as Botswana, Namibia and Lesotho as regards the law on customary inheritance. The Botswana High Court in *Mmusi and Others v. Ramantele and Another*,[66] held that the Ngwaketse customary law rule that provides that only the last born son is qualified as intestate heir to the exclusion of his female siblings is *ultra vires* section 3 of the constitution of Botswana, in that it violates the applicants' rights to equal protection of the law.

In this case, Edith Mmusi and her three sisters disputed their nephew's (Molefi Ramantele) claim to the family home. In support of his claim, Ramantele relied on the Ngwaketse custom by contending that their family home had been promised to his father by Mmusi's only brother, being the sole surviving male relative. According to the court, the effect of the Ngwaketse customary law, sought to be impugned, is to "subject women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex," which 'is not only irrational but amounts to an unjustifiable assault on the dignity of the applicants and or women generally... The law is biased against women, with the result that women have limited inheritance rights as compared to men; and the daughters living in their parents' homes are liable to eviction by the heir when the parents die.'[67] This decision which recognized the need for equal rights for women has been applauded as an example of how African countries are striving to maintain a balance between gender equality and traditional practices.[68]

In the South African case of *Bhe v. Magistrate, Khayelitsha, and Others*,[69] the applicant approached the court on behalf of her two minor daughters for an order declaring the rule of primogeniture unconstitutional in order to enable the daughters to inherit. According to section 23 of the Black Administration Act and the regulations,

---

66. MAHLB-000836-10.

67. *Id.*, paras. 196, 200.

68. Aisha Davis, Balancing Customary Law and Gender Equality in Land Rights: Mmusi and Others v. Ramantele and Other, *Landesa*, 21 December, 2012, retrieved from <http://www.landesa.org/balancing-customary-law-gender-equality-land-rights-mmusi-v-ramantele/>; see *Fianko v. Aggrey* (2007-2008) SC. GLR 1135 at 1145 (Ghana); *Re Wachokire* Succession Cause No. 192 of 2000 (Kenya); *Ephraim v. Pastory* AHRLR 236 (TzHC 1990), retrieved from <http://www.chr.up.ac.za/index.php/browse-by-subject/469-tanzania-ephraim-v-pastory-2001-ahrlr-236-tzhc-1990.html (Tanzania)

69. *Bhe and Others v. Magistrate Khayelitsha and Others* CCT 49/03, 2004 (2) SA 544 (C) (2004 (1) BCLR 27, 2005 (1) SA 580; See also the Kenyan case of *In re the Estate of Andrew Manunzyu Musyoka* (2005) eKLR.

in particular regulation 2(e), the two minor children did not qualify to be the heirs of the intestate estate of their deceased father. The court was called to determine whether or not these provisions were consistent with the constitution. The court stated that to the extent that the primogeniture rule prevents all female children from inheriting, it was discriminatory. In the words of Deputy Chief Justice Langa (as he then was):

> The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9 (3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.[70]

We can only hope that African courts will continue to take this reformist approach by delivering more of these kinds of decisions.

There are also several laws that have been enacted at the state level in Nigeria aimed at eliminating all forms of discrimination against women, including all forms of violence and harmful traditional practices against women and the girl-child and protecting the women's sexual and reproductive health. These laws have been found to be consistent with the relevant provisions of the international instruments and regional treaties discussed herein. One of these laws is the Enugu State Prohibition of Infringement of Widow's Fundamental Rights Law, 2001 enacted into law on 8th March, 2001. Section 4(1) states that:

> No person for whatever purpose or reasons shall compel a widow/widower as follows:
>
> to permit the hairs on the head or any part of the body to be shaved;
> to be remarried by a relative of the late husband/ wife;
> to drink the water used in washing the corpse of the husband/wife;
> to vacate the matrimonial home;
> to do any other thing which contravenes the fundamental rights entrenched in the constitution or is degrading the person.

---

70. *Bhe and Others v. Magistrate Khayelitsha and Others, id.,* para. 91.

Subject to the Marriage Act, Wills law, Administration of Estates Law, or indeed any customary law (not repugnant to natural justice, equity and good conscience), a widow/widower shall not be dispossessed upon the death of the husband/wife of any property acquired by the deceased husband/wife (during the deceased husband's/wife life time) without his/her consent."

This law which helps to prohibit the compulsion of a series of widow's mourning rites is a step in a right direction as it will not only help in the promotion and protection of the rights of women, but will further help to remove some cultural practices that make women more vulnerable to HIV/AIDS infections. Others include: the Edo State Female Genital Mutilation (FGM) Prohibition Law 2000; the Zamfara State Sharia Penal Code law of 2000, Vol. 1, No. 4; Anambra State Malpractices against Widows and Widowers (Prohibition) Law, 2004; Ebonyi State Law 010 (2000) on the Abolition of Harmful Traditional Practices against Women and Children; Female Circumcision and Genital Mutilation (Prohibition) Law of Ogun State 2000; and the Cross River State Girl-Child Marriage and Female Circumcision (Prohibition) Law, 2000. There is also the National Policy and Plan of Action on Elimination of Female Genital Mutilations which has as its overall goal to eliminate the practice of FGM in Nigeria in order to improve the health and quality of life of girls and women. Some of its objectives include: increase awareness of the hazards of FGM through information, education and communication; increase the number of decision makers within the families and FGM practitioners with attitudes, beliefs, behaviours and practices against FGM; and promote the enactment of laws for the elimination of FGM.[71]

From the above discussion, it can be seen that some states have taken bold steps at addressing some of the harmful practices that militate against women from enjoying their sexual and reproductive health. Unfortunately, very little efforts have been taken at the federal level towards addressing this issue. The House of Representative in Nigeria passed the Female Genital Mutilation (Prohibition) Bill, on 31st May, 2001. This bill is yet to become law. Also, the policy documents on reproductive health and rights merely serve as administrative guidelines and reflect a lack of serious political commitment to women's health in Nigeria, with the result that the legal framework

71. *See*, REVISED NATIONAL HEALTH POLICY, FEDERAL MINISTRY OF HEALTH, ABUJA, 2004, at 35-36.

remains incoherent and weak.[72]

V. HARMFUL CULTURAL PRACTICES AND CUSTOMS AS AN OBSTACLE TO THE REALIZATION OF WOMEN'S REPRODUCTIVE HEALTH AND RIGHTS IN NIGERIA

There are several international human rights instruments that accord recognition to the right to culture. Article 22 of the Universal Declaration of Human Rights (UDHR) provides that everyone, as a member of society, has the right, among others, to cultural rights indispensable for his dignity and the free development of his personality. Also, article 15 (1) of the ICESCR recognizes the right of everyone to take part in cultural life. Article 1 of the ICCPR also declared that the right to a cultural identity is also part of the right to self-determination. The African Charter on Human and Peoples' Rights also preserves and strengthens positive African values and contributes to the promotion of the moral well-being of society. The positive values include respect for elders, caring for the vulnerable, sharing and solidarity, tolerance, dialogue, consultation, and mediation,[73] all of which must be preserved, promoted and celebrated.

Thus, under international law, peoples have a right to their traditional cultural practices which to them are unique and meaningful, and they have a right to determine how their culture is developed.[74] Little wonder that the United Nations Educational, Scientific and Cultural Organization (UNESCO) posited that, "culture must be understood broadly to mean the shared way of living of a group of people, including their accumulated knowledge and understandings, skills and values, and which is perceived by them to be unique and meaningful."[75]

---

72. Aniekwu Nkolika Ijeoma, *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria*, 13(3) HUMAN RIGHTS BRIEF, CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, WASHINGTON COLLEGE OF LAW, WASHINGTON D.C., U.S.A. (2006), at 38.

73. Art. 29(7); see also, REPORT ON THE PAN-AFRICAN CONFERENCE ON CELEBRATING COURAGE AND OVERCOMING HARMFUL TRADITIONAL PRACTICES IN AFRICA, 5-7 OCTOBER 2011, AU CONFERENCE CENTRE, ADDIS ABABA, ETHIOPIA, at 4.

74. Maleche Allan and Day Emma, Traditional Cultural Practices and HIV: Reconciling Culture and Human Rights, Working Paper for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 7-9 July 2011, at 2.

75. UNESCO (2011), retrieved from <http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights/poverty-eradication/culturalidentity/>.

This right is, however, limited because states have a duty to protect and promote the rights of their citizens. Hence, no individual or society can invoke cultural diversity to infringe upon or limit the scope of human rights guaranteed by international law; and so states have a duty to protect their citizens against traditional and cultural practices that violate the right to the highest attainable standard of health, including reproductive health rights, in addition to a range of other rights.[76] While it is acknowledged that there are several cultures and traditions in Africa that protect some of the women's human rights, the prevalence in Africa, including Nigeria, of certain harmful traditions and cultural practices leads to substantial discrimination against women, thereby preventing them from fully enjoying their reproductive health and rights.[77] Some of them are hereunder discussed.

A. Child Marriage

Child marriage is the practice in which adolescent girls are given out in marriage to men of their parents' choice. It was revealed that the average age of marriage for girls in Kebbi State, Nigeria, is just over 11 years against a national average of 18, while in a separate study carried out in Northern Nigeria, it was shown that 45% of girls marry by the age of 15 and 73% by the age of 18.[78]

One of the contributory factors to the high incidence of child marriage is the absence of a legal minimum age for customary marriage in many parts of Nigeria. The effects of child marriages are devastating. Early marriage directly impacts the girl's education, thus contributing to having lower social status in their husbands' families, less reproductive control, as well as higher rates of the risk for depression, sexually transmitted infections, cervical cancer, maternal mortality, and domestic violence.[79] Indeed, child marriage leads to early pregnancy which increases the risk of complications during pregnancy and childbearing, because such chldren are less mature for childbearing.

In addition, girls who are married young and pressured to have children before

---

76. Maleche Allan & Day Emma, *supra* note 74, at 2.

77. Manisuli Ssenyonjo, *Culture and the Human Rights of Women in Africa: Between Light and Shadow*, 51(1) JOURNAL OF AFRICAN LAW (2007), at 51.

78. Rosemary Ogonna Ibekwe and Perpetus Chudi Ibekwe, *Appraisal of Some Harmful Reproductive Health Practices in Nigeria*, 9(2) TAF PREVENTIVE MEDICINE BULLETIN (2010), at 140.

79. *See,* Erica Field and Attila Ambrus, *Early Marriage, Age of Menarche, and Female Schooling Attainment in Bangladesh*, 116(5) JOURNAL OF POLITICAL ECONOMY (2008), at 881.

their bodies are fully developed are more vulnerable to suffer different forms of obstetric fistulae. According to the World Health Organization (WHO):

> An obstetric fistula is a hole which forms in the vagina wall communicating into the bladder (vesico-vagina fistula- VVF) or the rectum (recto-vaginal fistula- RVF) or both (recto-vesico-vagina fistula RVVF), as a result of prolonged and obstructed labour… The immediate consequences of such damage are urinary incontinence, faecal incontinence if the rectum is affected, and excoriation of the vulva from the constantly leaking urine and faeces. Secondary amenorrhoea is a frequently associated problem. Women who have survived prolonged obstructed labour may also suffer from local nerve damage which results in difficulty in walking, including foot drop.[80]

As a result of their bad smell, the constant release of urine down their legs, and the pool of urine that surrounds them if they venture to stand for too long,[81] they are shunned and rejected by their husbands, family and community thereby forcing some to resort to begging as the only hope for life or to committing suicide. The amorous husband who desired a young and untouched child now throws the remnant into the bin and possibly goes looking for another victim.[82] In Nigeria, the condition is said to affect around 150,000 women, with 80-90 per cent of these child wives divorced by their husbands. The Nigeria Ministry of Health estimates that between 200,000 and 400,000 girls and women are living with fistula, with about 10,000 new cases occurring annually, the majority among teenage girls.[83]

B. Male-Child Preference

Cultural preference for sons over daughters indicates that a son is worth more than a

---

80. WHO, OBSTETRIC FISTULAE: A REVIEW OF AVAILABLE INFORMATION (GENEVA: WHO, 1991), WHO/MCH/MSM/91.5, at 3.

81. Luwam Semere, *Obstetric Fistula: Living with Incontinence and Shame*, 1(4) REVIEWS IN OBSTETRIC AND GYNECOLOGY (2008), at 195.

82. Yemi Akinseye-George, *supra* note 15, at 192; JADESOLA AKANDE, MISCELLANY AT LAW AND GENDER RELATIONS (1999), at 128.

83. Population Council, Child Marriage Briefing: Nigeria, August 2004, accessed at <http://www.popcouncil.org>.

daughter. Mothers in some developing countries, including Nigeria, prefer sons, not daughters, by margins of ten to one. Like virtually all South Asian and East Asian societies, couples in Nigeria, particularly among the Igbos and Yorubas of Southern Nigeria, prefer to give birth to baby boys rather than girls. Improved education standards in Nigeria have not reduced the preference for sons.

In many African countries, including Nigeria, a girl takes her husband's family name, dropping that of her own parents. Descent is traced through the father's line (patrilineal). Female children are often denied the right to inherit from their family as they are considered to belong to their husbands upon marriage; where they are considered, they get less than the male children.

The pressure to have a male child puts the lives of the women in danger and increases the maternal mortality and morbidity. A woman who carries many pregnancies bears the risk of dying at childbirth leading to children without mothers. Also, the high social value placed on having male over female children leads to a high rate of selective destruction of baby girls through abortion. In Nigeria, induced abortion is illegal except to save the life of a pregnant woman. This has led to increased patronage of quack and unprofessional health personnel resulting in increased maternal mortality rate.

C. Wife Inheritance

Wife inheritance involves a situation in which a woman is given out to her deceased husband's relation (a junior brother or another relation of the deceased husband), against her wish, to continue the family name.[84] The practice was largely viewed as a form of social protection for the woman. In the context of HIV, where the widow is HIV-positive and engages in unprotected sexual intercourse with a male relative who is HIV-negative, the practice puts the inheritor at a high risk of contracting HIV, and vice-versa. This is in addition to other psychological problems associated with this practice.[85] This also violates the woman's right to choose freely her sexual partner. Article 16 of the ICCPR has been interpreted by the UN Human Rights Committee to prohibit the treatment of women "as objects to be given together with the property of

84. Rosemary Ogonna Ibekwe & Perpetus Chudi Ibekwe, *supra* note 78, at 142.
85. Maleche Allan & Day Emma, *supra* note 74, at 10.

the deceased's husband to his family",[86] which description tallies with the practice of wife inheritance.

In most cultures in Nigeria, particularly, among the Yorubas, Edos, and Ibos, women are not expected to inherit their fathers' properties since they themselves are seen as 'properties'. A woman is regarded as property that can be inherited, in the sense that she can be transferred from one husband to the other (the husband's brother) in the event of the death of her husband.[87] Protagonists of this custom contend that "its sole motive is the maintenance of the identity of the family."[88] This custom merely exists today to maintain male hegemony. This is because while the heir is obliged to take care of his father's wives and other siblings, no enforceable rights vest in the intended beneficiaries; and where the legal heir is a son from another wife or an otherwise illegitimate child of the deceased,[89] this may spell doom for the widows. Having been dispossessed of her inheritance, the widow is faced with poverty. This may result in the withdrawal of her children from school, inability to afford medical treatment, including ante-natal care, adoption of coping strategies such as hawking, begging for alms, engaging the children in child labour and ultimately, sex work with its attendant health implications. The practice of wife inheritance, however, is on the decline due to civilization and perhaps the influence of Christianity and the increasing level of education of widows and their children.[90]

D. Widowhood Rites

These vary from one society and culture to another and more often done to show respect

---

86. *Cited in* HUMAN RIGHTS WATCH, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA (2003), at 38; See Maleche Allan & Day Emma, *id.*, at 10.

87. A.A. Aderinto, *The Girl-Child Situation in South Western Nigeria: An Assessment*, 3(1-2) J. SOC. SCI. (1999), at 107. In *Ogunkoya v. Ogunkoya* Suit No. CA/L/46/88, at 56 (Unreported), the Court of Appeal sitting at Lagos held that wives are regarded as chattels who are inheritable by other members of the deceased family under certain conditions.

88. R.A.I. Ogbobine, Materials and Cases on Benin Land Law 36 (1978), *cited in* Eweluka Uchechukwu, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24(2) HUMAN RIGHTS QUARTERLY (MAY 2002), at 456.

89. Eweluka Uchechukwu *id.*, at 456.

90. George Akwaya Genyi and George-Genyi, *Widowhood and Nigerian Womanhood: Another Context of Gendered Poverty in Nigeria*, 3(7) RESEARCH ON HUMANITIES AND SOCIAL SCIENCES (2013), at 70.

to the dead and to protect widows from the attack of evil spirits. The practice is prevalent among the different ethnic groups in Nigeria including peoples in the eastern region of Nigeria, as well as the Yoruba, the Igala, Tiv, Idoma, Urhobo, Isan and those in Edo and Delta States. Some of those practices include sleeping on the bare floor beside the corpse (as a symbolic last sexual act with the dead husband), drinking of the deceased's bath water, compulsory wailing, eating from broken plates, shaving of her hairs (prevalent among the Igbos of South-Eastern Nigeria), going without a bath, or staying indoors for one year. A year for mourning is imposed among the Tiv of central Nigeria, while among a community in Delta area of Nigeria, 'after an initial seven-day confinement, a subsequent thirty-day confinement for mourning in a tiny outdoor hut is mandatory for widows'[91] presumably to mortify the body of the widow and test her endurance in time of mourning.

The practice of making the widow drink of the bathing water of her husband's corpse is a ceremony of self-exculpation whereby it is believed the widow will die if she is found to be responsible for her husband's death.[92] The mourning period in these communities only differs in degree. In some tribes, the widow is made to have sexual relations with family members, brothers-in-law, father-in-law to "cleanse" the widow of evil spirits; and the purpose is to sever the links between the living and the dead.[93] These rites are made compulsory and are normally performed by other women on the widow. During these periods of mourning, the widows, depending on the community, are forbidden from public outings and activities.

The practice of banning public outings for widows during mourning periods is based on the false assumptions of the existence of strong family support in Africa which today no longer exists. Since many of the African women affected by these practices are rural women that depend primarily on farming and trading activities for their livelihood, such practice strikes at a woman's basic need for survival.[94] Also, restricting an educated career widow who has to return to her work clearly violates her freedom of movement and association and no longer defensible by the economic demands of modern life. Apart from being dehumanizing, inhumane, barbaric and

---

91. *Id.*

92. Immigration and Refugee Board of Canada, Nigeria: A ritual by the name of "isiku" that a widow is subjected to upon the death of her husband, 4 May 2000, NGA34292.E, retrieved from <http://www.refworld.org/docid/3ae6ad702c.html>, [accessed 6 April 2014].

93. *Id.*

94. Ewelukwa Uchechukwu, *supra* note 88, at 438.

oppressive, these practices also pose some health hazards, permanent incapacitation and sometimes, loss of life.

Suffice it to say that anyone who fails to fulfill the requirements of the rituals may be socially excluded by the society and family or risks personal calamity. Men who lose their wives are not usually treated in the same manner. In some cultures, owing to the fear that the spirit of the dead wife may return at night to share the marital bed with the husband, another woman is found to keep the bereaved husband company.[95]

E. Female Genital Mutilation (FGM)

This is also known as 'female genital cutting' or 'female circumcision'. It refers to "all procedures involving partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons."[96] The World Health Organisation (WHO) estimates that between 100 and 140 million girls and women have been "circumcised" worldwide; and that every year, some three million girls are threatened by FGM/C.[97]

According to WHO, there are three classification of FGM: type I or clitoridectomy, which involves the removal of the tip of the clitoris; type II, which involves the cutting of the clitoris and all or part of the labia minora, and type III or infibulation or pharaonic circumcision, in which the clitoris is cut together with part or the whole of the labia minora and incisions are made on the labia majora.[98]

Of all the known harmful cultural practices which patriarchy has caused in Africa, none incapacitates and prevents the girl-child from achieving a truly fulfilling and rewarding life more than FGM.[99] This practice, which is common in Nigeria, is

---

95. Ibrahim Abdullahi, *Culture as an Impediment to the Realisation of a Human Rights Under the Constitution of the Federal Republic of Nigeria 1999: To Retain or Discard? An Anatomy*, in CONTEMPORARY READINGS IN GOVERNANCE, LAW AND SECURITY: ESSAYS IN HONOUR OF (SIR) MIKE MBAMA OKIRO (J.M. Nasir, *et al*., 2008), at 353.

96. UNICEF, FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL OVERVIEW AND EXPLORATION OF THE DYNAMICS OF CHANGE, (2013), at 6.

97. World Health Organization (WHO), Eliminating female genital mutilation (2008) at 22 (An interagency statement, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO, Geneva, Switzerland).

98. Hellsten, *supra* note 5, at 249.

99. Aderinto, *supra* note 87, at 98.

deeply rooted in the culture of many of the ethnic groups in the country. In communities where it is practiced, FGM is thought of as an ageless ancestral edict that pre-qualifies women for marriage.[100] Non-compliance significantly impairs marital prospects and subjects the woman and her family to shame, ridicule and condemnation. Viewed from a human rights perspective, FGM reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women. And since FGM involves the removal of healthy sexual organs without medical necessity and is usually performed on adolescents and girls who are incapable of giving informed consent, often with harmful physical and psychological consequences, it violates the Convention on the Rights of the Child (CRC).[101] It also violates 'the rights to health, security and physical integrity of the person, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death.'[102]

Some of the explanations for why the practice of female genital cutting continues include sexual control, protection from rape, reduction in the likelihood of pre-marital intercourse, marriageability, fear, money, hygiene, tradition, and religion.[103] It is seen as a "necessary part of raising a girl properly, and a way to prepare her for adulthood and marriage," and it is "associated with cultural ideals of femininity and modesty, which include the notion that girls are clean and beautiful by removing body parts that are considered male or unclean."[104] FGM, which serves no health benefit, continues to thrive on the basis of myths that have been handed down from generation to generation. Such myths include the fact that a child will die if the mother's clitoris touches the infant's head during child birth, or that child rearing will be easier in the

---

100. Obiajulu Nnamuchi, The Right to Health in Nigeria (2007), accessed at <http://www.abdn.ac.uk/law/hhr.shtml>.

101. United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, accessed at <www.unicef.org/magic/media/crc_word_format_english.doc>.

102. WHO, *supra* note 97, at 1; Olaide Gbadamosi, *Female Genital Mutilation: A life-threatening health and human rights issue*, 1 EXCHANGE ON HIV/AIDS, SEXUALITY AND GENDER (2008), at 2.

103. Rachelle Cassman, *Fighting to Make the Cut: Female Genital Cutting Studied Within the Context of Cultural Relativism*, 6(1) NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS (2007), at 134; Hamid Rushwan, *Female genital mutilation: A tragedy for women's reproductive health*, 19 AFRICAN JOURNAL OF UROLOGY (2013), at at 131.

104. WORLD HEALTH ORGANIZATION, FACT SHEET: FEMALE GENITAL MUTILATION, (2013), accessed at <http://www.who.int/mediacentre/factsheets/fs241/en/index.html>.

future; and these are just two of many myths told in African communities to delude young women and girls to believe that the practice is useful and healthy.[105]

One of the major health concerns is that those who perform the FGM often are not qualified health practitioners. Many of them use unsterilized blades and tools to sew the vaginal lips together leaving a tiny hole for urine and menstrual flow, which disrupts the natural genital state, thereby resulting in health complications.[106] The prevalence rate is high, nearly 60%, among women of Yoruba ethnic group, compared to less than 1% for Hausa and Fulani women.[107] Taking a look at regional differences in Nigeria, the rate is highest in the South West (57%) and the South East (41%) compared to the North East (1.3%) or the North West (0.4%).[108]

The good news is that FGM has been outlawed in more than 25 states in Nigeria, including Cross River, Delta, Edo, Osun, Rivers, Bayelsa, and Ogun, while some states have enacted sexual and reproductive health related bills that aim at protecting women's sexual and reproductive health. All these are positive steps towards implementing the provisions of international treaties protecting the reproductive and health rights of women in Nigeria. The UN General Assembly Sixty-Seventh session on advancement of women reaffirmed that female genital mutilation is a harmful practice. It constitutes a serious threat to the health of women and girls, including their psychological, sexual and reproductive health, which can increase their vulnerability to HIV and may have adverse obstetric and prenatal outcomes as well as fatal consequences for the mother and the newborn.[109]

The European Parliament has also given particular attention to protection from harmful practices. In its resolutions on FGM adopted in June 2012, the parliament specifically condemns this practice, stressing that "any form of female genital mutilation is a harmful traditional practice that cannot be considered part of a religion, but is an act of violence against women and girls which constitutes a violation of their fundamental rights, particularly the right to personal security and integrity and physical

---

105. Sandra Danial, *supra* note 7, at 7; Blake M. Guy, *Female Genital Excision and the Implications of Federal Prohibition,* 2 WM. & MARY. J. WOMEN & L. 125, 149 (1995).

106. Sandra Danial *id.*, at 3.

107. Obiajulu Nnamuchi, *supra* note 100; UNICEF, Nigeria FGM/C Country Profile, accessed at <http://www.childinfo.org/areas/fgmc/profiles/Nigeria%20FGM%20profile.pdf>.

108. Obiajulu Nnamuchi *id.*

109. UN General Assembly Sixty-seventh session Third Committee Agenda item 28 (a), Advancement of women, on 'Intensifying global efforts for the elimination of female genital mutilations,' A/C.3/67/L.21/Rev.1, 16 November 2012.

and mental health, and of their sexual and reproductive health, while also constituting child abuse in the case of girls who are minors; whereas such violations can under no circumstances be justified on grounds of respect for cultural traditions of various kinds or for initiation ceremonies."[110]

There is a huge body of literature that has documented the adverse health consequences of FGM/C over both the short and long term. While immediate consequences include bleeding, delayed or incomplete healing and infections, long-term implications include damage to adjacent organs, sterility, recurring urinary tract infections, the formation of dermoid cysts, chronic pain, decreased sexual enjoyment, and psychological consequences, such as post-traumatic stress disorder, and even death.[111] It has been estimated that an additional one to two babies per 100 deliveries die as a result of FGM.[112]

F. Nutritional Taboos

In many societies, certain foods are forbidden for women to eat generally, or are not supposed to be eaten by women when pregnant based on some erroneous obstetric and nutritional beliefs. As noted by Baobab, a non-governmental organization, cultural practices, including nutritional taboos such as denial of red meat, egg yolk, fish, roasted corn, crab, unripe bananas, etc deprive pregnant women and the foetus of important nutrients.[113] This leads to deficiency in iron and proteins needed for the health of the foetus.

In some African societies, milk and green vegetables are forbidden during pregnancy on the belief, among others, that the foetus is located in the stomach. The practices where women receive fewer than the additional calories required during pregnancy contribute to mothers' poor health and to the vulnerability of infants to

---

110. European Parliament resolution of 14 June 2012 on ending female genital mutilation, accessed at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-261>.

111. UNICEF, *supra* note 96, at 43; see also, World Health Organization *et al*, *supra* note 101, at 11; See Hamid Rushwan, *supra* note 102, at 130–133.

112. *Id.*

113. BAOBAB for Women's Human Rights, *Reproductive Health and Rights*, 5 LEGAL LITERACY SERIES (2007), 2007, at 7.

disease and death.[114] Pregnant women in southern Nigeria are not encouraged to eat snails, which are rich in calcium, to avoid their babies drooling.[115] Other traditional practices after labour include "more dietary restrictions, massive sodium intake, daily scalding hot baths, insertion of unclean caustic substances into the vagina to restore it to 'virginal' condition and other harmful 'purification' techniques, all of which may contribute to maternal death."[116]

G. Violence Against Women (VAW)

This is another harmful cultural practice that is prevalent in developing countries and poses serious public health issues to the reproductive rights of women. Unfortunately, this issue has not been given serious attention in Nigeria despite the fact that the country is a signatory to several international human rights instruments on the elimination of violence against women. Women in large numbers are daily subjected to gender-based violence in the form of systematic rape, forced abortion, sexual slavery, etc.

In most Nigerian cultures, beating is widely sanctioned as a form of discipline. Wives are regarded as the 'property' of men and like minors, are prone to indiscipline and excesses which must be curbed.[117] Other abuses range from humiliation to physical brutality. The physical abuse ranges from shoving and slapping to acid bath, kicking and stabbing, all of which can result in severe injuries, permanent disability or disfigurement, and sometimes even death.[118]

These incidents which are prejudicial to health are rarely reported for fear of further violence from both the husband and wider family, and even where they are reported to the police or referred to the justice system, they rarely take action (in the form of investigation or pressing of charges or prosecution). This failure to act is

---

114. Zoë Oxaal and Sally Baden, Challenges to women's reproductive health: maternal mortality, Report prepared for the Department of Social Development, Department for Overseas Development (DFID), UK, Report No. 38, September 1996, at 33.

115. Comfort Chukuezi, *Socio-Cultural Factors Associated with Maternal Mortality in Nigeria*, 1(5) RESEARCH JOURNAL OF SOCIAL SCIENCES (2010), at 24.

116. Zoë Oxaal & Sally Baden, *supra* note 114, at 33.

117. Elijah Adewale Taiwo, *Women Rights and Gender Discrimination in Nigeria: Socio-Cultural and Legal Perspectives*, 1(1) NIGERIAN JOURNAL OF PUBLIC LAW (2008), at 249.

118. AMNESTY INTERNATIONAL, NIGERIA: UNHEARD VOICES- VIOLENCE AGAINST WOMEN IN THE FAMILY (2005), AI INDEX: AFR 44/004/2005, at 4.

presumably on the ground that they are family matters which must not be reported to 'outsiders' or be subjected to public scrutiny. The fear of violence (actual or perceived) subdues women and girls and makes it very difficult for women to exercise their free will or seek sexual and reproductive health services.[119] This is coupled with the fact that wife battering is culturally acceptable and must be tolerated and endured. To make matters worse, section 55 (1) of the Nigerian Penal Code provides:

> Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done … (d) by a husband for the purpose of correcting his wife such husband and wife being subject to any native law or custom in which such correction is recognized as lawful.

This section of the law explicitly condones and legalizes the beating of wives by husbands as long as it does not reach the threshold of severity amounting to 'grievous hurt'. The provision of this law is not only barbaric but runs contrary to international human rights instruments such as the Universal Declaration of Human Rights, to which Nigeria is a signatory and therefore should be abrogated.

Also, the provisions of the Criminal Code and the Penal Code as applicable in southern and northern Nigeria respectively explicitly excludes marital rape from the definition of rape; thus, not making it a crime at the State level. Where he uses force or coercion, his action can only amount to assault or grievous bodily harm. Failure to criminalize domestic rape amounts to institutionalizing discrimination against women on the basis of marital status and makes the wife a commodity of the husband.[120] Some of the effects of violence against women—rape, forced prostitution and refusal to use condoms—'interfere with women's abilities to control their sexual and reproductive lives and puts them at risk of contracting HIV/AIDS and unwanted pregnancy. Women, for fear of violence, are unable to refuse sex or negotiate safer sexual practices.'[121]

H. Polygamy

Polygamy, also known as plural marriage, can be described as the practice of having

---

119 Ebenezer Durojaye, *supra* note 2, at110.
120 Amnesty International, *supra* note 118, at 24.
121 *Id*.

more than one spouse. It allows men to have additional wives without allowing women to have more than one husband. Polygamy is allowed in Nigeria under customary law (as opposed to the civil law), which means that the practice is largely tolerant.

In Nigeria, approximately 42.6% of all married women are in polygamous unions and 56.7% are in monogamous unions.[122] The fact that a man can bring a new spouse into the family home any time he likes, where he feels that his existing wife is not fulfilling her marital responsibilities, 'places pressure on the first wife to perform and perpetuates sex-stereotyping' and so can be considered a form of patriarchy.[123] Although a polygamous marriage has its advantages, for instance, if the union saves a woman from poverty or if the co-wife relationship is collaborative,[124] its negative effects outweigh its potential advantages. According to the Human Rights Committee (HRC), polygamy discriminates against women and violates their dignity:

> It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.[125]

Similarly, a scholar observed that the institution of polygamy discriminates against women and strikes at the root of equality of sexes and non-discrimination. During the drafting of the African Women Protocol, there were arguments made by the NGOs for the abolition of polygamy[126] but which was stoutly resisted by government experts who met in 2001.[127] The grounds for refusal include the fact that the Shari'a and many

---

122 THE CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN'S REPRODUCTIVE RIGHTS IN NIGERIA: A SHADOW REPORT (1998), at 11.

123 Ruth Gaffney-Rhys, *Polygamy and the Rights of Women*, 1 WOMEN IN SOCIETY (2011).

124 *Id.*

125 *HRC General Comment No. 28, Equality of Rights Between Men and Women (Article 3), UN Doc CCPR/C/21/Rev1/Add 10 (2000) at para 24; see also, HRC Concluding Observations: Nigeria UN Doc CCPR/C/79/Add 65 (1996) at para 25.*

126 The practice of having several wives at the same time.

127 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Government Experts in Addis Ababa on 16 November, 2001) 22 November, 2001, CAB/LEG/66/6/Rev.1.

customary personal law systems recognized the rights of men to marry more than one wife; and that a legal abolition of polygamy would result in hardship to women already in polygamous unions.[128]

The final protocol is the result of a compromise by state parties that: "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family including in polygamous marital relationships are promoted and protected."[129] This compromise measure clearly reflects the cultural acceptance of polygamous union in Africa and the difficulties involved in arriving at a consensus on matters of women's human rights at the regional and international levels.

Apart from the social and economic implication of this practice, it also has serious health implications. The threat or the actual taking of additional wives can cause psychological trauma and mental stress to the first wife owing to the loss of exclusive possession of her husband. It can also affect the physical health and well-being of the woman. Nigeria, like Uganda, Kenya and other African countries, has a high prevalence of HIV/AIDS and there is the high risk of the same being spread in a polygamous marriage. For instance, where the man or one of the wives (out of not been given proper attention at home by her husband) engages in extra-marital affairs outside, the man or the wife, as the case may be, will transfer it to the other partner, who will then spread it to other wives.[130] This also increases the number of children born with the HIV/AIDS.

VI. CHALLENGES TO OUTLAWING HARMFUL CULTURAL PRACTICES FOR NIGERIAN WOMEN

A. Poor Access to Justice

Harmful traditional practices are rarely reported and where they are so reported, the relevant authorities do not take the necessary measures towards bringing the culprits to book. Some of the factors that account for not filing of actions in court include the length and cost of lawsuits, absence of family and society support, fear and superstition by the victims, and ignorance, among others. Customary law, like any other law, is

128 Fareda Banda, *supra* note 37, at 77.
129 Art. 6 (c).
130 Ruth Gaffney-Rhys, *supra* note 123.

dynamic and always changing to reflect how people are living today. To promote gender justice, there is the need to improve access of women to courts so that they can bring claims on discriminatory practices thereby giving opportunities to the courts to reform the law.[131] There is the need for the establishment of courts within the rural areas to exclusively handle family law related issues pertaining to women and children.

B. Lack of Political Will

The lack of strong political will on the part of the Nigerian government towards addressing harmful traditional practices contributes to the deepening and entrenchment of these practices. Meager resources have been committed by the government to programmes that could lead to the reduction and or elimination of these practices. Government must develop the political will and commit resources to programmes that will help to bring an end to these harmful traditional practices. Also, government has the duty to implement gender equality obligations, which derive from international law and constitutional principle, even where the patriarchal practices to be eliminated are based on claims of culture.[132]

C. Poor Enforcement of Laws

There is poor awareness and poor implementation of laws that protect women against harmful traditional practices. While Nigeria can boast of a number of policy documents on sexual and reproductive health and rights in the last few years, these do not constitute legally enforceable standards as they merely serve as administrative guidelines that promise much but need a lot of commitment from the government to translate into positive outcomes for women's reproductive health and rights in Nigeria.[133] In addition, the state agencies that have the mandate to enforce the laws dealing with harmful traditional practices also lack the capacity to implement these laws.

---

131. Ndulo Muna, *African Customary Law, Customs, and Women's Rights*, 18(1) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES (2011) at 92, 118.

132. Frances Raday, *Culture, Religion and Gender*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2003), at 710.

133. Benjamin Chukwuma Ozumba, Improving Maternal Health in Developing Countries: The Nigerian Experience, (An Inaugural Lecture delivered at the University of Nigeria, Nsukka, on 16 July, 2008), at 41-42.

D. Ignorance

There is a lack of universal recognition by community members of the negative physiological and psychological consequences of FGM and other entrenched customs such as polygamy, wife-inheritance, early marriage, domestic violence, etc.[134] For instance, many of the affected women still believe that FGM helps to protect against promiscuity and enhance sexual pleasure, while many are inclined to believe that the clitoris is injurious to the child during delivery. Also, many of the victims and even the policy actors are not aware of these laws. This explains why these practices are predominant in the rural communities where the levels of illiteracy are high.

VII. RECOMMENDATIONS TO ADDRESS OBSTACLES TO THE REALIZATION OF REPRODUCTIVE HEALTH RIGHTS

A. Improvement of Healthcare Facilities

An improvement of the health care facilities of the state for women will go a long way in ameliorating the plight of victims of harmful traditional practices. The African Women Protocol calls on states to provide the "necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counseling as well as vocational training to make them self-supporting."

B. Economic Empowerment of Women

There is the need for the empowerment of women. For example, the fact that those who perform FGM earn a good income out of it, thus providing a means of livelihood for many, contributes to its continuation. This may account for why women themselves, while being victims of the practice of FGM, are often its strongest proponents. A possible solution is to provide sources of additional income, new jobs, or government funding to those who financially benefit from FGC and other cultural practices.[135] Women empowerment programmes could change their perception of self-worth and

134. Federal Democratic Republic of Ethiopia Ministry of Health, *National Reproductive Health Strategy 2006-2015*, March 2006, at 9.

135. Rachelle Cassman, *supra* note 103, at 148.

well-being. It could reduce gender inequalities in prestige, increase their control over resources, decrease their dependence on men, and increase their ability to make decisions regarding their health, sexuality and the exercise of their basic rights.[136]

C. Enforcement of Laws

There are state laws, including international conventions and treaties, to curb harmful traditional practices in Nigeria. But the lack of political will to implement these laws enables these practices to continue with impunity. "Mere legal rules, without affirmative and meaningful support, can be undermined by power, culture, or both."[137] International law, on its own, will not bring about the eradication of the perceived harmful traditional practices until individual countries enforce the law and implement their own laws that support such international prohibition.[138] Where the domestic law overlaps with international laws, and where the individual nations apply international law to their own individual legislation, there is a much greater likelihood that harmful cultural practices can be stopped.[139] It is not enough to bring local legislation into conformity with international standards. It is equally important to take the necessary step towards ensuring that mechanisms are put in place to ensure the implementation and enforcement of these laws to save the Nigerian women from the devastating consequences that these harmful traditional practices cause.

D. Judicial Activism

Indeed, the Nigerian courts are obliged to develop and apply the various laws against harmful traditional practices in a manner consistent with the constitution and human rights instruments that Nigeria is a party to.

In *Mojekwu v. Ejikeme*,[140] the Court of Appeal invoked international law (CEDAW, Art. 2 on discrimination) in arriving at the decision on the legitimacy of a custom which subordinated women. It is important to stress that following the decision

---

136. Agatha N .T. Eguavoen, *et al.*, *The Status of Women, Sex Preference, Decision-Making and Fertility Control in Ekpoma Community of Nigeria*, 15(1) J. SOC. SCI., (2007), at 47.

137. Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. (2003), 785, 786.

138. Rachelle Cassman, *supra* note 103, at 146.

139. *Id.*

140. *Id.*

in *Bhe and others v. Magistrate, Khayelitsha and others*,[141] the *Reform of Customary Law of Succession and the Regulation of Related Matters Act* of 2009[142] was enacted. It prohibits such practice and stipulates that all spouses have the right to inherit the property of the deceased. This Act abolished the customary rule of primogeniture in so far as it applied to the law of succession in order to bring it in line with the Bill of Rights as set out in *Bhe's* case.

The Nigerian courts must be alert to their responsibilities of interpreting both the constitutional provisions and international conventions that impose obligations on states to eradicate customs and traditions that dehumanizes and undermine the physical and mental well-being of women. The courts must exercise their responsibility in a way that shows that they are sensitive to the objectives of the norms contained in these documents.

E. Education of Women

Education enables the women to have more autonomy to choose their partner, decide on marriages generally and on issues that border on their sexual and reproductive health. It equips them with knowledge of the law so that they could use it to protect themselves. Abolition of traditions, customs and practices can only succeed where mores and sensibilities of the people concerned are repulsive to such traditions, customs and culture. Otherwise any legislative intervention may amount to an effort in futility.[143] Thus, community education is necessary to increase public awareness on the human rights implications and other negative consequences of this practice, or to uproot or transform deeply-rooted customs and to stimulate behavioral change regarding the value of women.

Education is necessary for the establishment of a culture where human rights are understood, respected and promoted.[144] The educational programmes which must target people in rural communities should, among others, emphasize the psychological and physical impact of harmful cultural practices on women and girls; promote human

---

141. *Id.*

142. REFORM OF CUSTOMARY LAW OF SUCCESSION AND THE REGULATION OF RELATED MATTERS ACT, 2009, accessed at <http://www.info.gov.za>.

143. Dele Peters, *Feminism and the Institution of Polygamy: A Forward-Looking Approach*, in NIGERIAN CURRENT LEGAL PROBLEMS (I.A. Ayua ed., 2000), at 24.

144. Manisuli Ssenyonjo, *supra* note 77, at 65.

rights and demonstrate the manner in which these rights are affected by harmful cultural practices; and focus on the needs of women and girls while involving the entire community.[145] This information and education should address all taboos and misconceptions relating to sexual and reproductive health issues, deconstruct men and women's roles in society, and challenge conventional notions of masculinity and femininity which perpetuate stereotypes harmful to women's health and well-being.[146] Involving the local people from the beginning in all efforts at eradicating harmful traditional practices will be much more rewarding and result-oriented than isolating them.

F. Litigation and Advocacy

The NGOs and the local civil society groups may consider the court as a means of putting an end to harmful cultural practices against women for several reasons. Courts may be used by lawyers to attract publicity to the continued practice of harmful traditional practices, to obtain compensation for an individual who has undergone the practice, to enforce a law intended to prevent harmful cultural practices, or to challenge an existing law that is detrimental to the struggle against harmful cultural practices.[147] NGOs need to mix their advocacy programmes with other definite efforts aimed at curbing the harmful traditional practices. They could help to support and empower the women to fight these practices. The NGOs may also adopt other forms of advocacy, including the alternative dispute mechanisms that may advance their efforts to stop harmful cultural practices.

G. Elimination of Harmful Traditional Practices and Promotion of Good African Cultural Practices

There is an urgent need for the National Assembly to abolish all cultural practices that are inconsistent with the domestic laws and other regional and international treaties so

---

145. CENTER FOR REPRODUCTIVE RIGHTS, FEMALE GENITAL MUTILATION A MATTER OF HUMAN RIGHTS: AN ADVOCATE'S GUIDE TO ACTION, (2006), at 27.

146. African Commission on Human and Peoples' Rights, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, accessed at <http://www.achpr.org/news/2012/11/d65>.

147. CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 144, at 36.

that the right to equality ceases to be an illusion. The Nigerian government must take steps to promote the traditional values and practices that may be beneficial to reproductive health, particularly, maternal and child health as well as family planning. These vary according to societies. In some societies, "social norms prescribe that only physiologically mature girls can marry, so early marriage is discouraged, and traditions such as the 'fattening house' are part of customs to nurture brides-to-be into good physical condition on marriage.

Norms against a woman having a baby after she becomes a grandmother diminish the amount of pregnancies to older women who are more at risk of maternal death. Breast feeding suppresses ovulation and therefore helps increase birth spacing, ultimately reducing the number of children a woman has. Traditions of post-partum sexual abstinence would have a similar effect."[148] Where the National Assembly is slow to effect the promise of the constitution, the court, being the fountain of justice and the guardian of the constitution, should not hesitate to perform its constitutional duty of interpreting the constitution liberally and progressively for the purpose of rendering justice to all, without being inhibited by those aspects of culture that are no longer relevant.[149]

H. Ensure Constitutional Protection of the Rights of Women

The Nigerian Government should ensure that the constitution contains provisions that guarantee the rights of women. The constitution as it were does not guarantee the right to health, not the least, women's rights. It is therefore imperative for the Nigerian government to affirm a constitutional right to health by placing it under the justiciable part of the constitution as has been done under the South African constitution. There are countries which have gone ahead of Nigeria to specifically provide in their constitutions sections to tackle problems of customary and traditional practices that dehumanize women. For instance, the Zimbabwean constitution that was approved in a referendum on 16 March 2013 reinforces the values and principles of gender equality as it provides in section 80(3) that "All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement".

Also, section 26(2) of the Ghanaian constitution of 1992 states that: "All

148. Zoë Oxaal & Sally Baden, *supra* note 114, at 33.
149. See *Mmusi & Others v. Ramantele*, *supra* note 51, paras. 211, 218.

customary practices which dehumanizes or are injurious to the physical and mental well-being of a person are prohibited." This provision helped the Ghanaian government to jettison negative customary practices such as FGM, forced marriage, enslavement of young girls (Trokosi) and harmful widowhood rites.[150] The constitution should be amended to promote gender equality and specifically address customs and practices harmful to women's health.

I. Domestication of International Treaties on Women's Rights

Ratification of treaties by government is 'merely a first step toward social change. Subsequent national-level action must be taken to ensure that all existing domestic legislation is compatible with the ratified treaty. Future legislation must also be reviewed to determine its compatibility with the treaty.'[151] Suffice it to say that ratification and adoption of international treaties and instruments on human rights and gender issues by the state is indicative of its willingness to comply with international obligations on sexual and reproductive rights.[152] Urgent action must be taken to domesticate the provisions of CEDAW through the passing into law by the National Assembly of the 'Abolition of all forms of Discrimination Against Women in Nigeria and Other Related Matters Bill, 2006' (CEDAW Bill) and the African Union Protocol on Women's Rights, among others. This will go a long way in eliminating gender inequality in Nigeria. There is also the need to incorporate some of these conference declarations (International Conference on Population and Development in 1994 and the Fourth World Conference on Women in 1995) into national legislation(s) on reproductive health and rights.

VIII. CONCLUSION

This article has dealt with some of the many harmful cultural practices that negatively impact the reproductive health and rights of women in Nigeria. There is no single

---

150. Sheila Minka-Premo, *A Comparative Analysis of the Rights of Women Under the African Charter on Human and People's Rights and the 1992 Ghanaian Constitution's Bill of Rights* 1 ASICL PROC. (1999) at 259, *quoted* in Yemi Akinseye-George, *supra* note 15, at 206.

151. CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 145, at 22.

152. Aniekwu Nkolika Ijeoma, [En] gendering Sexuality: Human Rights Issues in Reproductive and Sexual Health, (Paper presented at the ARSRC Sexuality Leadership Development Fellowship (SLDF), July 2006).

approach that can eliminate harmful cultural practices. Laws alone may not change people's behavior. In the same vein, educational efforts, while often effective, cannot entirely eliminate support for harmful traditional practices,[153] hence, the need for the adoption of a multi-strategy approach. An improvement in the reproductive health and rights of women will go a long way in helping to achieve the targets of the Millennium Development Goals (MDGs). The right to culture, although expressly provided in the non-justiciable portion of the Nigerian constitution, is an inalienable right of every person in Nigeria. But suffice it to say that culture changes with time, and so must yield to the provisions of the constitution and other international and regional treaties that promote the reproductive health and rights of women and their rights to human dignity. In the event of a conflict with these laws, such a custom must yield. Nigerian courts must therefore strive to continue to affirm the human rights of women, particularly as it affects their reproductive health and rights.

153. CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 145, at 41.

RIGHTS AND CHALLENGES OF WOMEN'S PARTICIPATION IN POLITICS IN NIGERIA: ISLAMIC LAW PERSPECTIVE

Hanafi A. Hammed*

ABSTRACT

There has been ubiquitous and pervasive misconception among the general public that women should not participate in politics. Politics is said to be the science of governance. It deals with distribution of resources and wealth in a given society. Those who decide how wealth and other resources are distributed among the masses enjoy certain prestige, authority and power. For unjustifiable reasons, people believe that men have special skills that politics requires while women are often excluded from politics and public life in general because of a myopic notion that they lack skills to participate in politics. They are expected to operate solely within the family and home arena as wives, mothers and home makers. Politics is said to be too rough a game for women. The thrust of this article is therefore to review the Nigerian women's participation in politics in the pre-colonial and post-colonial eras. The article also examines the position of women in Islam, the role of women in politics from an Islamic perspective and factors affecting women's participation in politics in Nigeria. The article finally recommends some measures on how to ensure effective Muslim women's participation in Nigerian politics.

I. INTRODUCTION

The impact of women in the development of Nigeria is not reflected in their representation in politics. Women represent about 60% of the Nigerian population[1] but very few are participating in the Federal and State legislature. There has never been a woman on the Supreme Military Council (SMC) or the Armed Forces Ruling Council (AFRC) as the case may be. This may, however, be due to the fact that there are few

* Faculty of Law, Kogi State University, Anyigba, Nigeria. Email: <lawhammed@yahoo.com>.

1. B.E. Madinagu and F. Okoye, Women, Law and Transition to Democracy (Kola Ahmed, ed., 1993).

women in that profession. Major policy decisions are taken without women participation, even if the decisions and policies affected women directly. Although it has been stated that women have found their ways in the Federal Cabinet during civilian regimes, their participation in decision making bodies are still negligible.[2]

Democracy has become the pillar upon which every nation builds hope of attaining sustainable development, but the definition of democracy remains elitist. Politics as an integral part of democracy remains male-dominated and excludes women. It needs to be stated here that the right of women in politics remains an integral part of human rights and women's rights generally are a necessary aspect of any democratic framework.

If the definition of democracy allows for diversity of opinions and participation of different groups, then it cannot flourish by exclusion of women, who effectively constitute half of the Nigerian population. The fact that the constitution is supposed to promote the evolution of the notion of the democratic process is not in doubt. What seems contentious is whether a democratic process can grow in the current dispensation where the constitutional guarantees for women participation in politics are limited.[3]

Despite the significant roles of Nigerian women before and after independence in the development of corresponding economic, social and political power, they are not given fair representation in politics. Nigeria was under military dictatorship for years and this helped to institutionalize violation of human rights that resulted in severe political, social and economic crises. These anomalies have impacted negatively on the development of women's rights, even though many international norms and institutions have been designed to advance the cause of women.[4]

The challenge of women's participation in the political process in Nigeria has gained additional significance since the return of democracy. The 2011 general election saw women taking over the male-dominated model of politics altogether or rejecting the male -dominated style of politics. Women's aspiration to participate in governance is premised on the following grounds: it is the believed that women constitute half of the population and hence should be allowed a fair share in decision making. Secondly,

---

2. *Id.*

3. U.A. Yusrah, Women in Politics: A Review of Common Law and Islamic Law Provision (Essay Submitted to the Faculty of Law, University of Ilorin, Ilorin, Nigeria in Partial Fulfillment of the Requirement for the Award of the Degree of Bachelor of Law (LL.B Combined Hons) in Common Law and Islamic Law, May, 2011), at 5.

4. *Id.*, at 6.

that all human beings are equal and women possess the same rights as men to participate in governance is an entitlement conferred upon all citizens by law.[5] The Nigerian Constitution provides that:

> Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interest: Provided that the provisions of this section shall not derogate from the power conferred by this constitution on the Independent National Electoral Commission with respect to political parties to which that commission does not accord recognition.[6]

The constitution further states that: "A citizen of Nigeria, or of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subject to any form of discrimination."[7]

It is apparent from the above that there is nothing in the constitution which excludes women from participating in Nigerian politics. But when it comes to practice, there is great discrimination against woman.

On the other hand, The Noble Qur'an allows a woman the right to vote, to participate in politics and express her opinion in public discourse. It is on record that in the days of Prophet Muhammad (SAW), women were consulted before Islamic communities chose their leaders. Women asked questions on different topics and expressed their opinions as well as participated in public life. Muslim women accompanied Muslim armies to battle to take care of the wounded people.

II. REVIEW OF NIGERIAN WOMEN'S PARTICIPATION IN POLITICS

Apart from their roles as mothers, wives and taking charge of the domestic sector, women contributed substantially to the production and distribution of goods and services. In the agricultural sector, women farmed alongside their husbands and children. In South Eastern Nigeria, women took part in the production of palm oil and palm kernel. They also participated in local meetings, trading and they were fully

---

5. *Id.*
6. *Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (amended).*
7. Section 42 (1), *id.*

involved in the procurement and sale of various food items and related commodities.[8] In Northern Nigeria, women were involved in food processing and trading with the assistance of intermediaries like their husbands and their children. Most often, these women supplied the means of sustenance for their entire households.

Under the customary laws in most Nigerian societies, women were considered inferior to adults. At the same time, they were subordinate to male authority. Since land was usually owned communally, whoever worked or tilled the land, whether male or female, derived benefits from it. Nevertheless, women in many societies could not inherit land. Education in pre-colonial time was functional. It enabled women to obtain a skill in order to earn a living. Ogunsheye observes that a woman who lacked craft or trading skill or was totally dependent on her husband was not only rare but was regarded with contempt.[9]

As regards participation in politics during the pre-colonial period in Nigeria, women were an integral part of the political set-up of their communities. Most often, they carried out separate functions from the men. These functions were fully complementary.

In Bomu, for instance, women played active parts in the administration of the state. They held very important offices in the royal family, including the offices of the *Magira* (the Queen mother) and the *Gumsu* (the first wife of the *Mai* of the king). Women also played a very significant role in the political history of ancient Zaria. The modern city of Zaria was founded in the first half of the 16th century by a woman called Queen Bakwa Tuniku. She had a daughter, called Amina, who later succeeded her as a Queen. Queen Amina was a great and powerful warrior. She built a high wall around Zaria in order to protect the city from invasion and extended the boundaries of her territory to the present Bauchi and Kano states. The people of Kaduna and Katsina paid tributes to her. She turned Zaria into a very prominent commercial center.[10]

The story was not different in ancient Yoruba land. The Oba ruled with the assistance of a number of women referred to as the ladies of the palace. The ladies of the palace consisted of eight titled women of highest rank. The significant role played by prominent women such as Moremi of Ile-Ife, Emotan of Benin and Omu Okwel of Ossoman in pre-colonial Nigeria cannot be ignored. Moremi and Emotan were great

---

8. Yusrah, *supra* note 3, at 8.

9. AISHA LEMU, MUSLIM WOMEN AND MARRIAGE UNDER SHARIAH: RIGHTS AND PROBLEMS FACED. FEDERAL MINISTRY OF JUSTICE LAGOS (1989).

10. *Id.*, at 9.

amazons whose tremendous bravery and strength in the politics of Ife and Benin respectively cannot be overemphasized, while Omu Okwei dominated the commercial scene of Ossomani in present day Delta state.[11]

III. WOMEN IN POLITICS DURING THE POST-COLONIAL ERA

During the post-colonial period, Nigerian women began to play very active roles in various aspects of the nation's development and assumed a more critical role in traditional agriculture. Particularly, as a result of the flight of many able-bodied men to wage labour, Nigerian women took over an increasing portion of the burden of food production, and contributed between 50 to 70 per cent of Nigeria's food requirements. While the situation in the public sector remained unsatisfactory, it was markedly different from what obtained during the pre-colonial and colonial times. Five years after independence, only 6.9 per cent of the salaried workforce was women. By 1970, 8.7 per cent of the total numbers of established staff in the Federal Civil Service were women. In 1980, the percentage of women had risen to 12.6.

In 1979, women constituted 4.9 per cent of agricultural manpower in Nigeria, 1.4 per cent of artisan craftsmen and 1.6 per cent of the professional/sub-professional group. Unfortunately, there was no remarkable improvement on women education in the medical sector in post-colonial Nigeria. According to the Population Reference Bureau, in 1981, only 6 per cent of adult Nigerian women were literate. By 1979, 72.9 per cent of urban girls and 80.8 per cent of rural girls were not attending school.

University admission figures also reflected a low percentage of female entries in the new era. Successive post-colonial governments have encouraged female education and expanded educational facilities for girls. In spite of these efforts, however, the impact of women in politics and education are still low. Some of the factors that militate against women's education in the country include the perception that women are only to be good house wives. The economic recession since the mid 1980s was also affecting women's education in Nigeria. As a result of the increasing cost of education, most parents, especially in the rural areas, withdrew their girls from school. To curtail this surge, some State governments have passed edicts granting free education to girls up to certain levels. In other states, children were allowed to attend school and it is considered an offence to withdraw a female child from school before

11. Yusrah, *supra* note 3, at 24.

a stipulated age. Many states and women's organizations frown upon early marriages of girls. The Women's Education Unit was established at the Federal Ministry of Education to encourage women education. Subsequently, all State Ministries of Education did the same.

The legal system inherited from the colonial era placed many obstacles in the way of women's self-advancements and participation in national development. For instance, married women had to obtain their husbands' written permission to obtain international passports. Until recently, women were not allowed to stand as surety to grant bail for a suspect. The role of women in Nigeria's post 1960 politics has not been reflected sufficiently, for example, in appointments to policy making posts. In spite of massive support given to various political parties by women, women organizations, market women movements, etc., until recently very few women benefited from political patronage.

There was further progress during the Second Republic (1979-1983). A few Nigerian women won election to the House of Representatives at the national level. Some of these women were Mrs. J. C. Eze of the Nigerian People's Party (NPP) who represented Uzo Uwani constituency in former Anambra State, Mrs. V.O. Nnaji, also of NPP who represented Isu and Mrs. Abilol Babatope of the Unity Party of Nigeria (UPN) who represented Mushin Central II of Lagos State. On the whole, very few women won elections into the State Houses of Assembly during the Second Republic.

During the same period, only two women were appointed as Federal Ministers. They were Chief (Mrs.) Janet Akinrinde who was Minister for Internal Affairs and Mrs. Adenike Ebun Oyagbola, Minister for National Planning. Mrs. Francesca Yetunde Emmanuel was the only female Permanent Secretary (first in the Federal Ministry of Establishment and later Federal Ministry of Health). A number of women were appointed commissioners in the states. In 1983, Mrs. Franca Afegbua became the only woman to be elected to the Senate. Also, very few women contested and won elections into the Local Government Councils during this time.

With the return of military rule in December 1983, the first formal quota system was introduced by the Federal Military Government as regards the appointment of women into governance. The Buhari administration directed that, at least, one female must be appointed as a member of the Executive Council in every state. All the states of the federation complied with this directive. Some states even had two or three female members. In the early 1990s, two women were appointed as Deputy Governors. These were Mrs. Alhaja Latifat Okunu of Lagos state and Mrs. Pamela Sadauki of Kaduna state. Chief (Mrs.) D.B.A. Kuforiji Olubi served as chairperson of a bank, i.e.

the United Bank of Africa PLC. Later on, Dr. Simi Johnson and Eniola Fadayomi served as chairpersons of Afribank International Nigeria Plc, respectively. There was, however, no female minister. There was also no female as member of the defunct Supreme Military Council or later the Armed Forces Ruling Council.

In the 1990 election into local governments that heralded the third Republic, very few women emerged as councilors and only one woman, chief (Mrs.) Titilayo Ajanamu, emerged as chairperson of a Local Government Council in the West. During the gubernatorial election, no female governor emerged in any of the states. Only two female deputy governors emerged, namely: Mrs. Alhaja Sinatu Ojikutu of Lagos state and Mrs. Cecilia Ekpenyong of River state. In the senatorial election held in 1992, Mrs. Kofo Bucknior Akerele was the only woman who won a seat in the Senate. Very few women won election in the House of Representatives. One of these few was chief (Mrs.) Florence Ita Giwa, who won the Calabar constituency under the banner of the National Republican Convention (NRC).

Amongst the members of the Transitional Council appointed by President Babangida in January 1993, there were only two were women, namely, Mrs. Emily Aiklmhokuede and Mrs. Laraba Dagash. In the Interim National Government of Chief Ernest Shonekan, two female ministers were appointed into the cabinet. General Sani Abacha had female ministers at various times in his cabinet, including chief (Mrs) Onikepo Akande and Ambassador Judith Attah.

In the fourth Republic which started on May 29, 1999, the Nigerian political terrain witnessed an increase in the number of women political appointees, even though women did not perform well at the elections. In the election held before May 29, 1999, few women emerged as chairpersons of Local Government Councils. A number of women won elections as councilors. There was no female governor in any state of the federation, except Lagos State that produced a female deputy governor, Senator Bucknor Akerele.

In the National Assembly, there were only three women in the senate, namely: Chief (Mrs.) Florence Ita Giwa, representing Cross River State South Senatorial district, Mrs. Stella Omu, from Delta State and Hajiya Khairat Abdul-Razaq (now Hajiya Gwadabe), representing the Federal Capital Territory (FCT). There were only 12 women in the House of Representatives and these were: Barrister Iquo Minimah, Mrs. Patience Ogodo, Lola Edewor, Patricia O. Etteh, Dorcas Odujinrin, J. F, Adeyemi, Binta Garba Koji, Gbemisola Saraki, Florence Aya, Linda Ikpeazu, Temi Harouboab and Mercy Almona Isei.

In the State House of Assembly, very few women emerged as members. States

like Cross River, Akwa Ibom, River, Lagos and many others do not have female members in their state legislature. In some states, only one or two women emerged in the National Assembly. Women have been appointed as commissioners and therefore members of the Executive Councils in all the states. While some states have one female, others have two in the Executive Councils. President Olusegun Obasanjo appointed a number of women into the Federal Executive Council. They were Dr. (Mrs) Kemi Chikwe (Minister of Transport), Mrs. Dupe Adelaja (Minister of Defence), Dr. (Mrs.) Bekky Ketebuigwe (Minister of State, Ministry of Solid Minerals), Dr. (Mrs.) Amina Ndalolo (Minister of State, Federal Ministry of Helath), Mrs. Pauline Tallen (Minister of State, Federal Ministry of Science and Technology) and Hajia Aihatuy Ismaila (Minister of Women Affairs). Others were: Arch. Tayo Alao, Minister for Environment, Chief (Mrs.) Titilayo Ajanku was the Special Advisor to the president on Women Affairs. President Yar'adua continued in the same vein.

It is obvious that there have been remarkable improvements in the female representation in the present National Assembly and among ministers, state houses of assemblies, and deputy governors, although there are no female governors, council chairpersons and councilors. For the first time in the history of Nigeria, women were appointed as the Chief justice of Nigeria and President of the Court of Appeal.

From the foregoing, it is evident that only very few Nigerian women have participated and emerged in Nigeria's political landscape in spite of the pioneering efforts of women like Funmilayo Ransome Kiti and Margate Ekpo since the 1950s. Today, the numbers of women in top jobs are still insignificant.

IV. POSITION OF WOMEN IN ISLAM

The Muslim woman has come a long way from the *Jahiliyya* period to the height of uplifted, protected and honoured with a noble position enjoyed by no other creature. Woman in ancient civilization from Europe, Asia, Africa and the world over have no value and they are merely regarded as chattels.[12]

During the pre-Islamic era, Muslim daughters were buried alive because they were considered not relevant in terms of war. The emergence of Islam through divine revelation to Prophet Mohammed (SAW) brought a new dawn to mankind. He brought

12. A. Yahaya, Muslim Women and Political Participation in Nigeria (Nigerian Muslim & Democracy Conference Abuja, 2012) at 1, retrieved from <http://www.nmdc-ng.org/papers/WOMAN-AND POLITICS pdf>, (accessed on 7th December, 2012).

to the world a universal message which was fresh, noble and ultimate from the Almighty Allah.[13]

A woman is equal to a man in the sight of Allah as regards to her rights, responsibilities and actions. This was emphasized by Almighty Allah in the Holy Qur'an when He stated that: "Every soul will be held in pledge for its deeds."[14]

Almighty Allah further reiterated this when He said: "…so their Lord accepted their prayers. (Saying): I will not waste the work of any of you whether male or female. You are members, one of another."[15]

Furthermore, it is provided in the Holy Qur'an as follows: "Whoever works righteousness, man or woman, and has faith verily to him We will give a new life that is good and pure, and WE will bestow on such their reward according to the best of their actions."[16]

It is obvious that the world before Islam dishonoured women.[17] It is in the midst of this darkness that engulfed the world that the divine message for the entire universe came to the Holy Prophet Mohammed (SAW). The message reverberates to the desert Arabia and the whole world that men and women are the same because they were created from the same soul.[18] It was provided in the Holy Qur'an as follows: "O mankind, keep your duty to your Lord who created you from a single soul and from it created its mates (of same kind) and from them twain has spread a multitude of men and women."[19]

In another chapter of the Holy Qur'an, the Almighty Allah said: "He (Almighty Allah) it is He who did create you from a single soul and did create his mate, that he might dwell with her (in love)."[20] The Holy Qur'an forbade female infanticide as well as custom in some Arabia tribes and considered it as culpable homicide punishable with death. It states: "And when the female (infant) buried alive (as the pagan Arabs used to do) shall be questioned: For what sin she was killed?"[21]

---

13. *Id*.
14. Q.74:38.
15. Q.3:195.
16. Q.16:97.
17. N.M. SHAIKH, WOMEN IN MUSLIM STATE (KITAB BHVAN PUB., NEW DELHI, 1991), at 17.
18. A.B. Jamal, The Status of Woman in Islam, at 50 and 14, retrieved from <www.islamfortoday.com htm>, (accessed on 12th October, 2012).
19. Q. 4:1.
20. Q.7:189.
21. Q. 81:8-9.

Almighty Allah frowns against the attitude of parents who showed dissatisfaction at the birth of female children. He said in the Holy Qur'an that:

> And when the news of (the birth of) a female (child) is brought to any of them, his face becomes dark, and he is filled with inward grief. He hides himself from the people because of the evil of that whereof he has been informed. Shall he keep her with dishonor or bury her in the earth? Certainly, evil is their decision.[22]

In furtherance of the right of females to life in Islam, it also gives her rights so that she does not suffer discrimination, injustice and inequality; rather, it advocates kindness and just treatment for her. "Whoever has a daughter and he does not bury her alive, does not insult her, and does not favour his son over her, God will enter him into paradise."[23]

Whenever a Muslim woman reaches the age of marriage, she enjoys the rights for the choice of her spouse, emotional well-being, spiritual harmony with a marriage based on love and mercy. The Holy Qur'an provides thus: "And among His signs is this: That He created mates for you wives from among yourselves, that you may find repose, peace of mind in them, and He ordained between you, affection and mercy. Verily, herein indeed are signs for people who reflect."[24]

Men and women have equal rights and claims on another except for leadership. Here, the role is given to the husband based on his physical strength to provide for and protect his family and not in terms of despotism; while the role of a woman is to protect the property of her husband and to take proper care of children and the entire members of the family.[25] Islam places great emphasis on the importance of counseling and mutual agreement in family decisions. There is a plethora of authorities in the Glorious Qur'an concerning weaning of children which has to do with the mutual agreement between the husband and wife. For instance, it provides thus:

> The mother shall give suck to their children for two whole years, (that is) for those (parents) who desire to complete the term of suckling, but

---

22. Q. 16: 58-59.
23. Ibn Hambali, No. 1957.
24. Q.30:21.
25. M.A. AMBALI, THE PRACTICE OF THE MUSLIM FAMILY LAW IN NIGERIA (2003), at 256-257.

> the father of the child shall bear the cost of the mother's food and clothing on reasonable basis. No father shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child. And on the (father's) her is incumbent the like of that (which was incumbent on father). If they both decide on weaning, by mutual consent, and after due consultation, there is no sin on them. And if you decide on a foster suckling-mother for your children, there is no sin on you, provided you pay (the mother) what you agreed (to give her) on reasonable basis. And fear Allah and know that Allah is All-seer of what you do.[26]

The Holy Prophet has equally reported to have said: "the best of you is the best to his family and I am the best among your family. The most perfect believers are the best in conduct and best of you are these who are best to their wives."[27]

It is apparent from the foregoing verses of Holy Qur'an and the traditions of Prophet Mohammed (SAW) that Islam advanced the status of a woman from an ordinary chattel or slave and enhanced her status to compete favourably with her male counterpart. Islam recognised the rights of a woman and guarantees that both male and female enjoy equal rights in all aspects of human endeavours.[28] Although there is a particular belief by some early nomadic Arabs that the matriarchal system dominated the Arabic peninsula, they agreed that the ruling system was patriarchal.[29] It is clear that before the advent of Islam, the Arabian Peninsula did not recognize human rights and an independent identity for women. Therefore, one of the major objectives of the mission of the prophet (SAW) between the periods of 610-623 A.D. was to establish a social order that gives women respect, identity and dignity. At the same time, it abolished and replaced gender discrimination with equal and equitable organization so that they would be recognized in the same way as their male colleagues and no longer

---

26. Q.2:233.

27. Ibn Ambali, NO. 73.

28. M.A. Nimah, Women Governance in Nigeria: Religion and Politics as Challenges, retrieved from <http://ebookbrowse.com/women-governance-in-Nigeriareligionandpolitics-as-challenges-pdf-pdf-d51823007>, (accessed on 7th December, 2012).

29. P. Maryam, Women, Islam and Equality (1995), at 6, retrieved from <www.islamfortoday.com.htm>, (accessed on 12th October, 2012).

be treated as slaves, chattel or man's property.[30]

V. THE ROLE OF WOMEN IN POLITICS: ISLAMIC PERSPECTIVE

The role of women in politics has generally been downplayed throughout history. In 350 BCE, Aristotle in his treatise on politics excludes women along with children and slaves from his definition of a citizen. This prevented women from having a say in government and ruling. Later generations came to defend the decision to exclude women on grounds that they were not suited to the task because of the differences between the male and female intellect, women's physical strengthen and inability to maintain their attention.[31]

After a century of oppression and struggle to gain the same respect, dignity and basic rights which had come all too easily for men, the tide for the women seems to have turned. In the 20th century Western World, the historical value of male chauvinism has been challenged. Sometimes, women have been considered politically equal to men and in some exceptional cases, a few women have even surpassed the level of achievement of their male counterparts. But despite such changes, in recent thinking, the idea of women engaging in politics continues to be a matter that raises many debates in the West and particularly, in the Muslim World which often bears the brunt of criticism in its inequitable regard towards women.[32]

Indeed, the political status of women in Islam in many quarters is still perceived to be at par with the "Dark ages" of European history. Muslim women are assumed to be strictly in the background of political milieu, having little to say and even less to offer. Whilst the West purports to have completed the process of integration of women into politics by championing democracy and the advancement of women's causes, it attacks the Islamic World for its oppression of women. In reaction to this, many Muslim women inspired by the apparent progress made by her western counterparts, are becoming increasingly vociferous in their call to participate in the political process. But what needs to be scrutinized is the legitimacy of the West's achievement.[33]

---

30. *Id.*

31. Nazia Jalali, The Role of Women in Politics (Khulafah Magazine, August, 2003 edn), retrieved from <http://www.oocities.org/zq83_uk archives/women in politics. htm>, (accessed on 8thDecember, 2012).

32. *Id.*

33. See <http://www.oocities.org/zq83Ukarchives/women in politics. htm>, (accessed on 8th December, 2012).

After the birth of Islam, women were engaged in politics as ever before. It was then that their duty to carry the call of the *Da'wah*, to enjoin the *ma'ruf* (good) and forbid *munkar* (evil) within society. So, it began with some companions of the Prophet (SAW) who found themselves inpositions where even the messenger of Allah (SAW) sought advice from them on political matters.[34]

Umm Salamah, one of the wives of the Prophet (SAW), was consulted by him at the time of the Treaty of *Hudabiyah.* She advised him on the way to defuse the tensions that had arisen amongst the companions who were disappointed as they thought of engaging in peace with people who had oppressed them so bitterly in the past. This was a demonstration of her great political insight and wisdom.

The political rights of women in Islam included the authority to give treaty to a non-combatant from a non-Muslim attacking force. When Prophet Muhammed (SAW) came to Makkah, Umm Hani bint Abi Talib afforded protection to certain relatives of hers. She went to the Prophet complaining that, despite her promise of protection, her brother, Ali bin Abi Talib, wanted to execute two of these men because they were known for harming the Muslims and fighting against them. The Prophet said to her: *We offer refuge to whoever you offered and we guarantee the safety to whom you guaranteed safety."* Thus, we observe that Umm Hani bint Abi Talib performed a significant political action by granting asylum to these men.[35]

Islam advanced as a political system which for the first time in the history of man commanded the involvement of not just men but also women to the action of commanding the *ma'ruf* (good) and forbidding the *munka*r (evil). This is one of the utmost political actions. Women were thus, permitted indeed, and obliged to advise the ruler, call for the implementation of Shari'ah and work to establish the deen of Allah on earth by way of intellectual and political struggle. Like any man, she has to concern herself with the idea of *Ummah*. Allah says:

> The believers, men and women, are protecting friends (Auliya) of one another; thy enjoin the *ma'ruf* (that which Allah commands) and forbid people from *munkar* (that which Allah prohibits; they perform salat, and give zakat, and obey Allah and His messenger. ALLAH

---

34. Muslim Women of the Past in Islamic Politics, retrieved from <http://www.google.com.ng/search?q=Muslim-women-in-the -past-in-islamic-politics>, (accessed on 12th December, 2012).

35. *Id*.

will have mercy on them. Surely, Allah is Al-mighty, All wise.[36]

Islam came with *Shari'ah*'s commandments which it obliged on man and woman. When it clarified the Shari'ah rules (*Ahkam Shari'ah*), which treat the action of each of them, it did not give the issue of equality any attention nor did it give it the slightest consideration. Rather, it viewed that, there was a specific problem which required a solution. So, it treated it in its capacity as a specific problem regardless of whether it was a problem pertaining to a man or a woman. Thus, the solution was for the action of a human, for the problem-incident and not for the man or woman.

Hence, equality between man and woman is not the issue for discussion nor is it an issue which forms a subject in the Islamic social system. The woman is equal to the man, or the man is equal to the woman is not a significant matter which has influence over the societal life and it is not a problem which is likely to occur in the Islamic life. It is a phrase which is only found in the West. None from amongst Muslims holds this view except those imitating the West which has violated woman's natural rights in her capacity as a human being. Hence, she called for restitution of these rights.[37]

Islam commanded the Muslim woman as it commanded the man to be concerned with the affairs of the *Ummah*. She is permitted and encouraged to partake in the political life as long as this does not compromise her primary role as a wife and mother. In Islam, it is an obligation for a woman to carry the *Da'wah* and account to the ruler. However, the contribution of a woman is not exactly the same with that of a man.

In the spheres of politics, a woman is not permitted to hold a position of ruling such as *Khalifah*, his *Ma'awin* (assistant), *wal*i (governor), *Amil* (Major) or any other activities categorized as ruling. This is in view of a hadith narrated by Abubakar that when the news reached the messenger of Allah (SAW) that the people of Persia had appointed the daughter of Chosroes as queen over them, the prophet (SAW) said: "People who appoint a woman to run their affairs shall never succeed." It should not be assumed that a woman is prevented from leadership because she is in some way inferior or incapable of carrying out this role. Rather, Islam specifically prohibits this function for her and Allah knows best.

Although women have not been permitted to take on a role of leadership, we

36. Q.9: 71.
37. *Id.*

still saw women in the past active within the state in other permitted areas. It has been reported from Umar bin al-Khattab that he appointed al-Shifah, a woman from his folk as a market judge who was empowered to pass judgment on violation of public rights.

Ensuring the state's adherence to Shari'ah and accounting for any deviation is an important responsibility for women just as much as men. A famous example of this was when a woman accounted the Khalifah Umar Ibn al-Khattab after her sermon in the mosque when he suggested a limit on the amount that could be asked for *dwory*. Once the *khutba*h ended, a woman stood up and asked, "Who are you to place limit on what Allah and His messenger (SAW) have not placed a limit upon?" Umar realized his mistake and replied, "The woman is right and Umar is wrong." This shows how the women of that time understood Shari'ah and were not afraid to raise matters directly with the Khalifah in public.[38]

Unlike in the West where women were in direct competition with men in a male-dominated environment, in Islam, both their roles are complementary to one another so that they can work in unison for the pursuit of the pleasure of their creator, Allah. He says:

> And wish not for the thing in which Allah had made some of you to excel others. For men, there is reward for what they have earned and (likewise) or for women there is a reward for what they have earned, and ask Allah of His Bounty. Surely, Allah is Ever All-Knower of everything.[39]

VI. FACTORS AFFECTING WOMEN'S PARTICIPATION IN NIGERIAN POLITICS

A. Women's Conception of Politics

There is a belief that Nigeria politics is based on high political virility: those who have all it takes to compete in the turbulent environment; those who possess the wherewithal to take it by force when force is required; and those that can march violence with violence. It is believed that men possess the superior strength, competitiveness, and self-reliance and are prepared to tussle in political endeavour, whereas women are

38. *Id*.
39. *Q. 4.32.*

considered too passive to engage in politics and governance. This belief is also constructed by societal norms and values which, through socialization, have defined different gender roles according to biological differences. Women's perception of politics as a dirty game and continued fright at the thought of violence have further alienated them from mainstream politics.[40]

In Nigeria, there seems to be no critical understanding of the difference between "a visible agenda for women and an impacting agenda for women." While severally, emphasis is laid on women's numerical strength, translating such into the attainment of power has been difficult as women are perceived as a "supporters club, team of cheerers and clappers" in contrast to their male counterparts. Women politicians seek offices on the premise of being different; most believe they must do what men are doing to succeed. The meekness of women is not to their advantage in political tussle.

B. Cultural and Religious Impediments

There are several cultural and religious biases used to frighten Muslim women from political participation. This is especially due to the fact that men are the major decision makers and dominate the religious liberty as well. Therefore, they permeate cultural values into religious ones to dishearten and frighten female contestants. The labeling and stereotyping of women politicians has not helped the situation. It is more common for Muslim women to declare interest and later negotiate for political appointments.[41]

Some religious doctrines militate against the active participation of women in politics and positions of authority. Islamic doctrines strictly bar women from some political endeavours like public speaking and ruling that can facilitate their political ambitions.

C. Family and Priorities

Muslim women consider their family as their primary constituency. A young wife and

---

40. Damilola T. Agbalajobi, *Women's Participation and Political Process in Nigeria: Problems and Prospects*, 4(2) AFRICAN JOURNAL OF POLITICAL SCIENCE AND INTERNATIONAL RELATIONS (2010), at 75-82, retrieved from <http://www.academicjournals.org/ajpsir/pdf2010/February/Agbalajobi.pdf>, (accessed on 8th December, 2012).

41. Yahaya, *supra* note 12, at 1.

mother with young children will be doing a great disfavour to herself and the Muslim *Ummah* by abandoning her home to fix the problems of the world. It is best for her to spend her time raising good Muslim children who will be of immense blessing to the Muslim *Ummah* and the wider world rather than ruining her family to save the society. She may end up paying a high price for her political ambition. Women not tied to family responsibilities may be in the best position to pursue this interest since their children may all have left the house. She could still be married or widowed and have the time desired for this representation. However, a Muslim woman no matter her status will ideally have a brother, father, son or husband as a *Muharram* to consult on issues to protect her interest.

D. Gender roles – Patriarchy

The family is the main institution of patriarchy which is an important concept in explaining gender inequality. Literarily, it means "the rule of the father." More broadly, it refers to a society ruled and dominated by men over women. This is inherent in most African families. Giving men a higher social status over females has crept into public life, which reflects in state activities. The family plays an important role in maintaining this patriarchal order across generations. The socialization of children to expect and accept different roles in life has created a social mechanism for the development of values that engender the several forms of discrimination against the female sex.

The greatest psychological weapon available to man is the length of time they have enjoyed dominance over women, who have taken it for granted especially in the area of politics that often continues to stereotype women and justify their subordination.

E. Political Atmosphere

The Nigerian political scene is not female friendly and above all not very favourable to Muslim women. Despite the fact that we have come a long way from the era of the first, second, and third republics when women were used to chant, sing, dance and entertain crowds at allies, more needs to be done. The political arena is often perceived as a dirty profession for crude and uncivilized people who bend rules and subvert due process. The media is full of stories of nasty and manipulative actions of members of the political class who are in essence corrupt. The political process is time-consuming with caucus meetings, campaigns, fund-raising, primaries, etc. Nocturnal meetings are

a norm rather than an exception.

Historically, the political scene is associated with women of loose morals who are deemed irresponsible. A great percentage of Muslim women are uncomfortable with such issues as hugging, handshakes, being raised shoulder high by youth who are high on drugs, and use of foul language. As a result, Muslim women hardly will compromise their values for the sake of political participation and contribution to nation building.

F. Lack of Economic Incentives (Financial Backing)

Politics is expensive worldwide but more so in Nigeria. The election process requires tons of money from the purchase of nomination forms which are very expensive despite discounts given to women. Contestants must have big bank accounts to actualize their ambition. Alternatively, an aspirant has to have a godfather who foots the bill in exchange for unlimited favour when the seat is eventually secured. This is the major hurdle in the participation of Muslim women in politics.

Women's historical experience of discrimination puts them at a disadvantage economically. Political campaigns are expensive and require solid financial backing for resources. Over the years, sexual division of labour and job opportunities offered on sexual basis have given men productive gender roles, enabling them to possess more power over their female counterparts. As an implication, the Nigerian labour market has about 75% of labour being supplied by men. This economic disparity favours men to the disadvantage of women. Only few women that are affluent possess the economic power to bankroll political campaigns.

Societal values assume that political activities are masculine and this makes it worse as financiers and sponsors of politicians prefer male candidates over female ones, since they believe they stand a better chance. Most success achieved by women in politics has been through women movements that sponsor women's political aspirations financially and otherwise. Women dependence on men financially, made manifest through the dependence of wives on their husbands in families, reveals the extent of financial incapacitation of women in Nigerian politics. As a result, women's political aspirations have been grossly hampered by lack of financial support.[42]

---

42. Damilola, *supra* note 40.

G. Violence and Drugs

The Muslim woman is respected in her position as a mother, wife, sister and daughter. She is full of compassion and is averse to violence and destruction. The political scenery is full of threats, blackmail, brandishing and use of weapons with little or no intimidation at all. It is general knowledge that funds given for mobilization are used for the purchase of drugs and weapons for political thugs to intimidate or kill opponents. There is absolutely very little control the contestants can exercise over their supporters even if they abhor such actions. The do or die nature of politics in Nigeria is a fact, threats to opponents and politically motivated killings are rife. Senator Gbemisola Saraki from Kwara State barely escaped assassination in 2011 and another Muslim woman contestant, Aminu Tijjani of the Action Congress Party, was seriously assaulted both in Kaduna and Abuja due to her intention to contest for a senatorial seat in Kaduna. These are just a few examples of how crude the situation is.[43]

H. Discriminatory Customs and Laws

The customary practices of many contemporary societies are biased by subjugating women to men and undermining their self-esteem. The overall impact of gender bias, cultural norms and practices has entrenched a feeling of inferiority in women and placed them at a disadvantage vis-à-vis their male counterparts in the socio-political scene even in urban centers. These socially constructed norms and stereotype roles make women overplay their 'feminist' side by accepting that they are 'weaker sexes.' For example, most customs often prefer sending the male child to school over the female who is expected to nurture siblings and to be married off. This marginally increases the illiterate women and stifles their competition with their male counterparts in politics.

I. Lack of Affirmative Action Quota

Affirmative action is usually a measure intended to supplement non-discrimination. It is a broad term encompassing a host of policies that seek to support weak groups in society. They include policies where deliberate action is used to stop discrimination.

---

43. Yahaya, *supra* note 12, at 1.

A policy process of this kind allows for rules that have the objective of enhancing equal opportunity for individuals and the improvement in the situation of marginalized groups. In 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This convention has variously been described as the "Bible of women empowerment" and "Women's International Bill of Rights." Since its adoption, it has become a reference point for the women's movement in the demand for gender equality.

The Convention "reflects the depth of the exclusion and restriction practiced against women solely on the basis of their sex by calling for equal rights for women, regardless of their marital status in all fields—political, economic, social, cultural and civil. It calls for national legislation to ban discrimination and recommends temporary special measures to speed equality between men and women."[44] The Convention provides that: Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered as discrimination as defined in the present Convention, but shall, in no way entail as a consequence of the maintenance of unequal or separate standards. These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[45]

The 1999 Constitution of Nigeria made provision for somewhat similar affirmative action to supplement non-discrimination of contending parties. The constitution provides that:

> The composition of the government of the federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also command loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or any of its agencies.[46]

It is not the use of affirmative action that seems to be the problem but the practical effects and its linkage to fundamental ideas of fairness and justice. By the same token,

---

44. Article IV, Convention on the Elimination of All Forms of Discrimination against Women,
45. *Id.*
46. Section (3), Constitution of the Federal Republic of Nigeria (1999).

there can hardly be a strong argument for gender-based affirmative action than equal representation in a country where women who constitute about half of the population have been continuously sidelined in public life, to the extent that they have never held more than 15 per cent of both appointive and elective offices. However, the constitution was not explicit in ensuring equal representation on sexual grounds. Unlike the constitutions of some African countries, notably South Africa and Uganda, the constitution of the Federal Republic of Nigeria takes no cognizance of the disadvantaged position of women and has no provision for gender equality. Apart from the general reference to non-discrimination on the basis of sex etc,[47] there is nothing in the constitution that is aimed at redressing the disparities that exist along gender lines in Nigeria.

On the other hand, the Federal Character Principle which is meant to ensure equitable representation of states and ethnic groups in national appointments actually places women at additional disadvantage by implying that they can only represent their states of origin. Where culture does not permit a woman to represent her place of birth, she loses a golden opportunity. There have been many cases where a woman's state of origin disallows her appointment and the husband's state also refuses to endorse her. In many of these instances, the government plays safe by appointing a man instead and this has continued to consolidate women's under-representation in national politics.

J. Low Level of Political Consciousness

Most Muslim women have low level of political awareness because they believe that they are not meant to participate in politics but they are only meant to take care of their family members, their husbands, children and homes. They tend to believe that this gives them more reward from Allah (SWT) as the Prophet is reported to have said: "*of you move a pin from the floor to the table you (wife) will be rewarded.*[48] Muslim women tend to strive for this reward than to participate in politics. On the other hand, contemporary women are exposed but they have been stigmatized by men. Men are not giving them a chance to participate. They make it tough for them to be part of politics and they made it a dirty game for them to survive.[49]

In recent times, however, there have been signs of commitment towards change

47 Section 42 (2), *id.*
48 Transmitted by Bukhari and Muslim on the authority of Anas.
49 Yusrah, *supra* note 3, at 56.

in the social status of women in public life. Through a series of women enlightenment and emancipation, women subordination in politics has been reduced to an extent. Women through several of these platforms have played influential roles and this has further spurred more women into politics.

K. Sexual Harassment

Women have come under severe nervous tension leading to a complete relegation, if not total absence, from political spheres in Nigeria as a result of sexual demands by the political big wigs before a woman can be allowed to contest in an election. A good example was in the run-up to the 2007 elections, when a former minister, Iyabo Anishulowo, had to defect from the ruling party, the People's Democratic Party (PDP), to the opposition party, the All Nigeria People's Party (ANPP) in Ogun State, after accusing leaders of the party at the State and National levels of seeking sexual relations with her before being allowed to stand for election on the platform of the party.[50]

VII. HOW TO ENSURE MUSLIM WOMEN'S PARTICIPATION IN NIGERIAN POLITICS

A. Political Information

This is one of the important needs of women politicians. Information is life. It gives awareness of one's environment so as to know how to handle situations generally. It comes in various ways. It may be through conversations from print or non-print media. Nigeria has gone some miles in the use of information technologies for effective management of its information. As a heterogeneous society with the greatest number of languages, some States in Nigeria still have over 60% of women who can neither read nor write, yet they form the highest percentage of voters. This means that it will take a long time to have 100 per cent usage of computers in information management. These states, particularly in northern Nigeria where Muslims are predominant, have to work very hard to get political information across to their women politicians and in the

50 *Id.*, at 41.

languages they can understand.[51]

B. Political Counseling

Muslim women need political counseling to meet their political needs, resolve their differences whether personal, social, psychological or political. It can also assists people to develop healthy habits in their political lives, encourage them towards effective decision-making and get them adjusted to political situations.

For effective political counseling, the counsellor must be conversant with politics and its
activities, both the negative and positive forces surrounding it. He must have understanding and listening skills, respect the worth, dignity and quality of the person being counseled. Also, he must be a good supporter of the human rights doctrine. Above all, he must have the skill for human relations. Everybody involved in politics, whether male or female, educated or non-educated, married or single, needs counseling so as to be adjusted in the political environment that has varied cultures, beliefs, customs and educational backgrounds.[52]

Married women politicians need to be counseled to be prepared before joining politics. They need to dialogue with their husbands for their approval. Studies have shown that most families reject their spouses' involvement in politics, particularly women. They maintain that women who want to join politics must show responsibility, commitment and sincerity of purpose and be God-fearing. This should be seen over the years not only during politics. A sudden change in a woman's behaviour might be regarded as fake and without root.

The faith, confidence and trust a husband has for his wife will show the extent of his support for her political career. A faithful woman does not only play politics successfully but would also help to downplay the existing political ills found among women and counsel those with questionable characters to uplift the dignity of womanhood and the society at large. It is generally believed that women are great gossips and rumour-mongers. The study reveals that men are more dangerous these days in these crimes. There is need to control the most dangerous weapons of

---

51. L. Tashi, The Potentials of Women in Political Development: The Case of Plateau State, at 7, retrieved from <http://dspace.unijos.edu.ngbitstream/10485/1772/2/the potentials of women political development000i.pdf> (accessed on 12th December, 2012).

52. *Id*.

destruction—tongue-lying and character assassination are some of the characteristics of politicians. Women must be very observant and careful in making their choice of candidates. Many a time, things said about an aspirant might not turn out to be true. A good candidate may be rejected in ignorance. All women politicians feel they should be involved or fully absorbed in government after success. They do not know that government works need some education for efficient and effective performance. Women should know that even contracts are awarded according to one's capability and financial position to be able to execute it to the satisfaction of the authority. They should also be counseled against focusing on wealth acquisition in politics. Too much love of money can lead to dubious behaviour. It is safer and better to choose the right candidate who is not self-centred but has the common man at heart irrespective of his financial stand.[53]

C. Quota System

There is need for advocacy for introduction of a quota system from relevant bodies, like the Independent National Election Commission and political parties. This could be guaranteed if the quota system, particularly in favour of women, is incorporated in the constitutions of various political parties.

D. Lobby and Pressure Groups

The focus of these groups is to advocate for laws and follow up on the passage of bills for the improvement of the political terrain for the provision of an enabling environment free of political harassment to allow for women to contribute to decision making processes.

Lastly, mobilising, networking and building coalition groups, that is, NGOs including, among others, the Federation of Muslim Women Organisations of Nigeria (FOMWAN), the Muslim Sisters Organisation of Nigeria (MSO) and Muslim in Da'awah (MID) should coordinate and identify potential women aspirants. [54]

53. *Id.*, at 8.
54. Yahaya, *supra* note 12, at 9-10.

VIII. CONCLUSION

Muslim women's participation in Nigerian politics is an issue of great importance. They have been kept at the background of politics for years. This has engendered a consciousness of women under-representation in public life. However, the intention of most women to participate in politics is basically to support their female folk. This is their substantive responsibility and it is even on this platform that most women emerged as public office holders successfully. They use the platform of women movements such as FOMWAN as a veritable platform to seize political power and consolidate the power on this same platform. Be as it may, there is an increase in women participation on these bases and women movements are promising in achieving gender equality and equity.

The exclusion of Muslim women in politics has no religious backing. Women have visibly contributed to the development of Muslim *Ummah* in the times of the Prophet (SAW). If Muslim women are given a conducive environment, they can contribute positively to nation building. Therefore, the identified challenges against Muslim women's participation in politics should be removed.

NON-STATE ACTORS AND LEGAL ACCOUNTABILITY

Thorbjørn Waal Lundsgaard*

ABSTRACT

As a branch of public international law, human rights law has historically been state-centric, with governments and public authorities traditionally understood as its exclusive subjects. However, in recent decades, stemming from various developments, there has increasingly been pressure on human rights law towards the possible relaxation or extension of this norm to include also certain non-state actors (NSA). NSAs include non-governmental organizations (NGOs), paramilitary groups, terrorists, national liberation movements, intergovernmental organizations and private actors generally, including business entities. Taking the latter, and particularly the case of multinational corporations (MNCs), as its focus, this article will first present evidence of the trend of increasing application to MNCs of human rights law norms and standards. From this basis, it will then argue that while this trend entails a degree of reconceptualization, given the historical restriction of human rights law to states as mentioned above, it is still incomplete with significant gaps, which means that MNCs as non-state actors are not yet fully accountable to human rights standards. On the other hand, in conclusion, it will argue that expectations that MNCs should or will be held accountable by identical mechanisms and to an identical standard as are state actors are probably misplaced. Human rights law and advocates should rather accept more diversity in these areas in future, with the onset of its application to non-state actors than was the case before.

I. INTRODUCTION

As a branch of public international law, human rights law has historically been state-centric, with governments and public authorities traditionally understood as its exclusive subjects. However, in recent decades, stemming from various developments, there has increasingly been pressure on human rights law towards the possible relaxation or extension of this norm to include also certain non-state actors (NSA).

* University of Agder, Kristiansand, Norway, and Oxford Brookes University, Oxford, United Kingdom. Email: < thorbjwl@gmail.com>.

NSAs include non-governmental organizations (NGOs), paramilitary groups, terrorists, national liberation movements, intergovernmental organizations and private actors generally, including business entities.[1] Taking the latter, and particularly the case of multinational corporations (MNCs), as its focus, this article will first present evidence of trend of increasing application to MNCs of human rights law norms and standards. From this basis, it will then argue that while this trend entails a degree of reconceptualization, given the historical restriction of human rights law to states as mentioned above, it is still incomplete with significant gaps. This means that MNCs as non-state actors are not yet fully accountable to human rights standards.

On the other hand, in conclusion, it will argue that expectations that MNCs should or will be held accountable by identical mechanisms and to an identical standard as are state actors are probably misplaced. Human rights law and advocates should rather accept more diversity in these areas in future, with the onset of its application to non-state actors, than was the case before.

II. INCREASING APPLICATION OF HUMAN RIGHTS NORMS TO NON-STATES ACTORS: THE CASE OF MNCS

During the 1990s, many NGOs campaigned against negative impacts on individuals and communities resulting from the activities of MNCs as well as from business activities sponsored by development actors such as international financial institutions, and presented such impacts as human rights violations or abuses.[2] MNCs were boycotted by consumers for non-compliance with labour standards in production facilities in developing countries.[3] International organizations were also subjected to pressure: the World Bank withdrew lending for a liquefied gas project in Nigeria when Ken Saro Wiwa was executed, in which Shell was implicated.[4]

Gradually this perspective was also integrated into expert opinion and academic

---

1. L. OETTE AND I. BANTEKAZ, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (1 EDN, CAMBRIDGE UNIVERSITY PRESS 2013), 657.

2. See for example, AMNESTY INTERNATIONAL, HUMAN RIGHTS PRINCIPLES FOR COMPANIES, AI INDEX: ACT 70/01/98; see also, A. Clapham, *Non-State Actors*, in INTERNATIONAL HUMAN RIGHTS LAW, (D. Moeckli et al., ed, 2010), 574.

3. R. HIGGINS, PROBLEMS AND PROCESS INTERNATIONAL LAW AND HOW WE USE IT (1995), 37.

4. C. Gunduz, Human Rights and Development: The World Bank's Need for a Consistent Approach, (Development Studies Institute, London School of Economics and Political Science, 2004), 18.

contributions.[5] For example, according to a 2008 report by the International Commission of Jurists, an MNC should be held legally accountable for gross human rights abuses if it: i) enables specific abuses to occur; ii) exacerbates specific abuses; or iii) facilitates specific abuses.[6]

International organizations and their human rights mechanisms also responded to this development. In 2000, the United Nations (UN) Global Compact was established, including amongst its ten principles that "1. Businesses should support and respect the protection of internationally proclaimed human rights" and "2. Businesses should make sure they are not complicit with human rights abuses."[7]

The Universal Declaration on Human Rights (UDHR), in its preamble proclaims the human rights it contains "…as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*...shall strive... to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[8] With point of departure in this text and the UN Charter,[9] in 2003, the United Nations Sub-Commission for the Promotion and Protection of Human Rights adopted a set of *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the Draft Norms).

The Draft Norms stated that, "…transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights."[10] They thus imposed on business entities the same human rights "obligations under international law as those addressed to states, namely to promote, respect and fulfill human rights."[11]

---

5. See for example, M.K. ADDO HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (1999).

6. REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, 'CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, VOL 1: FACING THE FACTS AND CHARTING A LEGAL PATH', (2008), 9, 27.

7. UNITED NATIONS GLOBAL COMPACT, THE TEN PRINCIPLES (2011).

8. Universal Declaration of Human Rights, adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Preamble (emphasis added).

9. Arts. 1, 2, 55, 56.

10. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, A (1).

11. OETTE & BANTEKAZ, *supra* note 1, at 666.

The Draft Norms were not adopted by the then UN Human Rights Commission.[12] However, soon afterwards, a new mandate of the Special Representative of the UN Secretary General on Business and Human Rights was established. The work of the mandate holder, Prof. John Ruggie, led in 2011 to the endorsement by the UN Human Rights Council of a set of *Guiding Principles on Business and Human Rights.* Arguably, these Guiding Principles give effect to the same basic principle behind the Draft Norms, i.e. that human rights norms should apply as conduct standards for MNCs and other businesses, even if the Guiding Principles take a different approach than did the UN Draft Norms in the way this principle was formulated.[13]

The UN Guiding Principles (GPs) are based on a "three-pillar" framework. This comprises firstly, the state duty to protect against business-related human rights abuses: the UNGPs detail how states should take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication;[14] it clearly sets out expectations that MNCs respect human rights[15] and ensure that laws regulating businesses "enable business respect for human rights."[16]

Under the second pillar, the corporate responsibility to respect human rights, MNCs must "…avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved;"[17] and in relation to weak states i.e. situations where domestic law does not live up to fundamental human rights, MNCs should "…honor the principles of internationally recognized human rights when faced with conflicting requirements."[18]

The third pillar emphasizes that effective remedies should be accessible to victims for business-related human rights abuses, through state-based judicial and non-

---

12. P. Alston, *The 'Not-a-Cat' Syndrome*, in NON-STATE ACTORS AND HUMAN RIGHTS, (P. Alston, 2005), 33.

13. *See,* REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, JOHN RUGGIE, (21 March 2011).
UN Doc. A/HRC/17/31.

14. J.G. RUGGIE, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK' (16 JUNE 2011), GUIDING PRINCIPLE 1.

15. *Id.,* Guiding Principle 2.

16. *Id.,* Guiding Principle 3.

17. *Id.,* Guiding Principle 11.

18. *Id.,* Guiding Principle 23 (b).

judicial mechanisms, and non-state based mechanisms.[19] Since 2011, other international organizations have integrated the UNGPs into their own standards addressed to companies, for example, the Organisation for Economic Co-operation and Development (OECD)'s Guidelines for Multinational Enterprises,[20] while international financial institutions such as the International Finance Corporation have claimed to do the same. In Europe, both the European Union and Council of Europe have adopted formal statements of support for the UNGPs.

Since 2011, UN treaty monitoring bodies, especially the UN Committee on the Rights of the Child and the UN Economic and Social Rights Committee, encouraged by the UNGPs, have increasingly addressed businesses and their responsibilities for human rights.[21] There are also indications that treaty bodies are giving effect to this principle extraterritorially: for example, the UN Committee on Economic, Social and Cultural Rights recently recommended to Norway that it must ensure its investments in foreign companies in third countries are "…subject to a comprehensive human rights impact assessment" and take "…measures to prevent human rights contraventions abroad by corporations which have their main offices under the jurisdiction of the State Party."[22]

III. GAPS IN ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES BY MNCS

Against the above normative developments, there are still numerous gaps in accountability of MNCs for human rights abuses in practice. According to Bantekas, in this regard there are three outstanding issues: i) international treaties fail to impose obligations on MNCs; ii) independent subsidiaries are not governed by the corporate and other laws of the home state of the MNC; and iii) terms of contracts between host

19. *Id.,* Guiding Principle 22.

20. OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, 3.

21. Committee on the Rights of the Child, UN. Doc. CRC/C/GC/16, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights', (17 April 2013); Committee on Economic, Social and Cultural Rights, UN. Doc. E/C.12/2011/1, (12 July 2011), 'Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights'.

22. Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Norway', (Advance unedited version), (29 November 2013), E/C.12/NOR/CO/5, para. 6.

states and MNCs can be written in ways that have negative impacts on human rights.[23]

To this can be added t the International Criminal Court (ICC). Article 25 (1) of the Rome Statute limits the Court's jurisdiction to natural persons, excluding corporate liability for crimes within its jurisdiction, despite the case for crimes of corporate complicity advanced by the ICJ and others, as noted above. In practice, this is often true also at national level with regard to domestic international criminal statutes which cover grave breaches,[24] despite the fact that 'complicity' (i.e. aiding and abetting the criminal acts of another) is a crime in the laws of most countries throughout the world.[25] This contrasts clearly with the legal position and increasing practice towards individual liability of natural persons, for example under Article 3 of the Geneva Conventions, which apply during armed conflict, as evident in the case of *Doe & Kadic v. Karadzic* in the United States Court of Appeals, where the court held that "*Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity.*"[26]

Exceptionally, MNCs have been held legally accountable for human rights abuses. Originally enacted to protect trade ships from pirates,[27] the United States Alien Tort Claims Act had been relied on in recent years to allow foreigners to file a civil claim in a U.S. district court for a tort committed in violation of either international law or a U.S. treaty.[28] Successful cases under ACTA included *Doe v. UNOCAL Corp*., where it was found that "*Unocal could be held liable on the basis of aiding and abetting under the ATCA for abuses that it knew about and substantially assisted through practical encouragement or support.*"[29]

Many authors had highlighted the US Alien Tort Claims Act as a shining

---

23. OETTE & BANTEKAZ, *supra* note 1, at 663.

24. R.C. THOMPSON AND A. RAMASASTRY, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW', A SURVEY OF SIXTEEN COUNTRIES, EXECUTIVE SUMMARY, FAFO, (2006), 16.

25. *Id.,* at 17.

26. Kadic v. Karadzic: Opinion of 2nd Circuit re: Subject Matter Jurisdiction, United States Court of Appeals, Second Circuit, Opinion by: Jon O. Newman, Chief Judge, para. 2.

27. J. Bray, *Attracting reputable Companies to Risky environments: Petroleum and Mining Companies*, in NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS (P. Collier & I. Bannon ed), 306.

28. Alien Tort Claims Act (ATCA) of 1789, 28 U.S. Code § 1350.

29. R. Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses* 13(1) Human Rights Brief (2005), Castan Centre for Human Rights Law, Monash University [Australia], at 15.

example of possibilities for improved accountability through law of complicity.[30] Even the Special Representative had asserted in 2006 that "under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and some crimes against humanity."[31] However, on 17 April 2013, in the case of *Kiobel v. Shell* relating to executions of environmental activists by the Nigerian authorities while helping Shell secure its operations in the Niger Delta, the US Supreme Court, effectively extinguishing ACTA as a route to accountability, ruled in a 9-0 judgment that victims of human rights abuses in which corporate actors were allegedly complicit could not seek justice in US courts under the Alien Tort Claims Act of 1789 (ATCA; Kiobel v. Royal Dutch Petroleum. 2013).

Such issues appear to be systemic and not restricted to individual jurisdictions. Based on 40 cases of alleged corporate involvement in gross human rights abuses from different geographical regions, a new study published by the UN Office of the High Commissioner for Human Rights has also found that "present arrangements for preventing, detecting and remedying cases of business involvement in gross human rights abuses are not working well: victims in many cases fail to get effective redress, States face un-even patterns of use of remedial mechanisms, and companies have to operate in an environment of great legal uncertainty and lack a level playing field."[32]

IV. CONCLUSION

Based on the above evidence, can it be said that international human rights law has been re-conceptualized to enable MNCs, as non-state actors, to be held accountable for human rights violations?

Firstly, it should be acknowledged that most of the positive developments identified are at the level of "soft law." However, the UN Guiding Principles, which as highlighted above address the responsibility to respect human rights to business

30. Clapham, *supra* note 2, at 575.

31. J.G. Ruggie, COMMISSION ON HUMAN RIGHTS, 'PROMOTION AND PROTECTION OF HUMAN RIGHTS, INTERIM REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, E/CN.4/2006/97 (22 February 2006), 15-16.

32. OHCHR, STUDY ON DOMESTIC LAW REMEDIES (2014).

entities, have been repeatedly reaffirmed by the UN Human Rights Council resolutions since 2011, and recently by a Declaration of the Council of Europe Council of Ministers.[33] Adoption of National Action Plans on business and human rights based on the Guiding Principles also provides emerging evidence of state practice.[34]

Moreover, it can be said that the UNGPs' articulation of a "*corporate responsibility to respect*" human rights is in itself an important reconceptualization. The Draft Norms as noted expressed an obligation on businesses "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights"[35] which would have put companies "in the shoes" of the state in terms of the scope of obligation. Even if MNCs, in specific locations, carry out state-like functions, such as providing transport and health infrastructure,[36] as NSAs they are "entities that do not exercise governmental functions or whose conduct cannot be described as possessing a public nature."[37] Recognizing this, the Guiding Principles appear to have innovated a new level or form of obligation, formulated as "responsibility," which entails only the parts of states' "obligations" under human rights laws appropriate to corporations' restricted legal mandate and social functions, i.e. refraining from abuses and avoiding complicity.

On the other hand, regarding Pillar I of the UN Framework, it might be said this reaffirms states as the principal subjects of international law, with "Violations of the obligation to protect follow[ing] from the failure of States…"[38] But here too, pressure for reconceptualization and extension is in evidence. For example, it has been claimed that: "The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights,"[39] even extra-territorially, and that "States must cooperate to ensure that non-State actors

---

33. COUNCIL OF EUROPE, 'DECLARATION OF THE COMMITTEE OF MINISTERS ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS', (ADOPTED 16 APRIL 2014).

34. OHCHR, STATE NATIONAL ACTION PLANS (2014).

35. NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, PREAMBLE.

36. A. GATTO, MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS: OBLIGATIONS UNDER EU LAW AND INTERNATIONAL LAW (2011) 4.

37. OETTE & BANTEKAZ, *supra* note 1, at 657.

38. *CESCR, UN Doc. E/C.12/GC/18, General comment No. 18, 'The Right to Work', Adopted on 24 November 2005, para. 35.*

39. THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1998, para. 18.

do not impair the enjoyment of the economic, social and cultural rights of any persons."[40]

Does accountability require that these new human rights norms are expressed in a human rights and business treaty, setting direct obligations on transnational businesses? This view has been voiced, but John Ruggie, the former UN Special Representative on Business and Human Rights, has argued that it "takes time for any major new initiative to take root,"[41] and that "complex clusters of different bodies of national and international law,"[42] render it unlikely that such a treaty could be transformed into "meaningful legal action."[43] Such challenges are also noticed by Zerk who says that it is unclear whether a "close convergence of legal standards and procedures is a desirable, let alone feasible, project."[44] While this debate continues, it seems reasonable to expect, with these authors, that just as NSAs are not identical to states, neither will accountability for their abuses of human rights look identical to models developed historically for states.

---

40. MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (29 FEBRUARY 2012), para. 9.

41. J.G. Ruggie, *A UN Business and Human Rights Treaty?,* ISSUE BRIEF, 28 January 2014, at 2.

42. *Id.,* 3.

43. *Id.,* 3.

44. J. ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES (2014), REPORT PREPARED FOR THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, 10.