

**AFRICAN CUSTOMARY LAW AND GENDER
JUSTICE IN A PROGRESSIVE DEMOCRACY**

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ABSTRACT

The constant clash of African culture and traditions with human rights continue to militate against the adequate protection of women's rights. Thus, African women constantly face challenges resulting from restrictions under customary laws of succession and inheritance, witchcraft violence, degrading treatment to widows, domestic violence; women killed by their partners, rape of women and children under all kinds of circumstances.

This thesis was prompted by the issues raised in the *Bhe* case of the Constitutional Court of South Africa. In this landmark judgment, Ngcobo J dealt with the development of customary law, and how it must be approached by the courts in a manner that would have due regard to the rights of women on one hand and, on the other, would also accord customary law of its proper place, purpose and values within the African context. Against this background, the thesis focused on South Africa, Nigeria and Lesotho as excellent models of the broader challenges for women as well as governments; despite certain legislative measures put in place by the latter, the battle continues unabated for the balance of traditions and culture with women's rights issues. Although South Africa is more progressive in terms of

Constitution and practice than Nigeria and Lesotho, a lot still needs to be done particularly in the area of harmonization of laws. Regrettably, in Nigeria and Lesotho respect for the Constitution is superficial and lacks substantive policies that would promote women's rights. To this extent, the balance of democratic values and promotion of women's rights issues within the continent lie in women being partners in development rather than unduly suffering under intense burden of culture, tradition and societal stereotypes.

*"All across the nations, all around the world,
women are longing to be free, no longer in
the shadows forced to stay behind but side
by side in true equality. So sing a song
for women everywhere, let it ring around
the world and never cease, sing a song
for women everywhere; equality,
development and peace."*

(1995 World YWCA theme song)

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DEDICATION

This thesis is dedicated to the two people who mean the world to me: My mother, Ezinne Gladys Agwu for raising in me the consciousness of women's rights issues at a very young age; and my husband, Kenneth whose native name, Ikechukwu, means more than a name to me.

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CHAPTER ONE

General Overview

1.1 Introduction

African customary law as a legal system has been in existence from time immemorial and finds expression in the day-to-day cultural practices, rituals and traditions of a people.¹ In the colonial era, customary law existed side by side with the received systems of law in the context of legal pluralism.² The importance and continued relevance

¹ TW Bennett *Human Rights and African Customary Law Under the South African Constitution* (1995) 63, where the author makes the observation that customary law rules were grouped in the same manner as common law in concepts such as marriage, succession and property. The Constitutional Court in the *Bhe & Others v Magistrate Khayelitsha & Others; Shibi v Sithole; South African Human Rights Commission v President Republic of South Africa* 2005 (1) BCLR 1 (CC) and *Alexcor ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) disapproved the previous approach whereby customary law was seen through the eyes of the common law. The Court saw this as a failure to interpret customary law in its own setting thereby precluding it from developing in its own right and to adapt to changing circumstances. In this work, the terms African Customary Law and Indigenous Law will be used interchangeably. It should be noted also that the idea of indigenous law might comprise laws relating to African customs and traditions, Hindu and Muslim laws.

² GJ Van Niekerk "Legal Pluralism" in JC Bekker, JMT Labuschagne and LP Vorster (eds) *Introduction to Legal Pluralism Part 1 Customary Law* (2002) 3-18. The author comments on the different interpretations of the types of laws that co-exist in the country, which could be applied by the state in conformity with the values of the people. How these different legal systems co-exist and are applied within the country is the province of the notion of legal pluralism. See also W Ncube "Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture" in W Ncube (ed) *Law, Culture, Tradition and*

of these indigenous laws of the people in society points to the existence of legal dualism in most African countries. This study will, however, focus on the rights of women in a democracy and how such rights have been undermined by customs, traditions, religion and patriarchal principles still prevalent in some parts of the African continent.

1.2 Context

Although customary practices play a very important role in the lives of the African people as mentioned above, some of the rules can no longer withstand constitutional scrutiny.³ In the *Bhe* case per Langa DCJ (as he was then called) "The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9 (3) of the Constitution ... The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property". The reasons for loss of constitutional base are that some of the customary practices place women in a position of dependency in relation to their male counter-parts and as such are

Children's Rights in Eastern and Southern Africa (1998) 1 where the author, in dealing with international norms, points out that legal pluralism affect the implementation of the legal norms of different countries in Africa.

³ *Bhe case*, paras 91-93, 97. The Constitutional Court held that the customary rule of primogeniture discriminates against women on the basis that they are women. It further held that fundamental rights must be protected and equality of sex is a right that should be respected. The Court reiterated that as equality forms a core value of the new democratic South Africa, there is, therefore, an urgent need to do away with legacies of apartheid as it is manifested in section 23 of the Black Administration Act 38 of 1927.

subjected to a place of subordination to men.⁴ The achievement of equal access to resources and opportunities between men and women has been a very thorny issue globally.⁵ It is common knowledge that most African societies are still male dominated and this is reflected in the sphere of family law and succession.⁶ The group that exerts more power than the other determines not only the rules of governance but also how society would be governed. The unequal position of a woman married under customary law in countries such as Nigeria (particularly the Igbo tribe); Zambia, Ghana and Zimbabwe is amply demonstrated in the minority judgment of Ngcobo J in the *Bhe* case.⁷

This study was prompted by the approach of the minority judgment of the aforementioned case, to the extent that it critically evaluated the African jurisprudence and gave further insight on the gains that would be made if customary law were developed to be consistent in certain areas with fundamental human

⁴ W Ncube "Under Privilege and Inequality: The Matrimonial Property Rights of Women in Zimbabwe" in Alice Armstrong (ed) *Women And Law in Southern Africa* (1987) 4. See also F Kaganas and C Murray "Law and Women's Rights in South Africa: An Overview" (1994) *Acta Juridica* 16-18 where the authors gave details of the position of women under customary law and how the basic rights and equality with men were pushed back into the private realm.

⁵ M Molyneux and S Razavi "Introduction" in M Molyneux and S Razavi (eds) *Gender Justice, Development And Rights* (2003) 3.

⁶ See generally Lesotho Law Commission 2nd Annual Report (2000) cited in T Matoane and KK Mohau (eds) *The Lesotho Law Reports and Legal Bulletin* (1999-2000) 477.

⁷ See *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 (1) BCLR 1 (CC) paras 189 - 196.

rights.⁸ The *Bhe* case would be a benchmark for the other two countries: Lesotho and Nigeria.⁹

When South Africa became a constitutional democracy in 1994, it enshrined in its Constitution the notion of equality both as a right and a value.¹⁰ This comes out

⁸ "The defect in the rule of primogeniture is that it excludes women from being considered for succession to the deceased family head. In this regard it deviates from section 9(3) of the Constitution. It needs to be developed so as to bring it in line with our Bill of Rights. This can be achieved by removing the reference to a male so as to allow an eldest daughter to succeed to the deceased estate". Ngcobo J in his judgment envisaged that customary law can only be developed if it is appropriately harmonised with the Constitution. Moreover, as customary practice of primogeniture defines the very essence of the community structure of the African life, such important aspect of the life of the people should be made to be line with modern developments. Such form of development can be achieved through the process of development of customary law of succession. In his opinion, these developments must be line with other such progresses made in terms of gender equality on the continent and the world. For example, the roles women play in our society have changed tremendously and so the exclusion of women from succeeding to family head can no longer be justifiable.

⁹ The Court quoted extensively the Privy Council decision of *Amodu Tijani v Secretary, Southern Nigeria* 1921 (2) AC 399 (PC), and it also referred to the Zimbabwe High Court decision in *Chilowa v Mangwede* 1987 (1) ZLR 228 (SC). The court made use of African jurisprudence from Ghana, Nigeria and Zimbabwe. The relevance of this to the study is the lessons that the countries in the continent could learn from each other to improve the human rights records of their respective countries.

¹⁰ The preamble to the Constitution envisages a country where everyone would be treated equally and section 9 of the Constitution of South Africa Act 108 of 1996 sets out the provisions of non-discrimination, which invariably supports the idea of equality. The notion of equality has a deep meaning to it for South Africa due to the past history of racial discrimination, so equality is a value that recognises those substantial rights and privileges, duties and

eminently in the Constitutional Court judgment in *Fraser v Children's Court, Pretoria North and Others*¹¹ where Mohammed DP said: "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."

Against this background, recent debates on human rights of equality versus culture bring into question the development of customary law to be consistent with democratic principles.¹² Under customary law for example, succession and inheritance for black African people in South Africa is according to the unwritten rule of primogeniture in which estates of deceased black men will devolve upon their male descendants to the exclusion of women and girls.¹³ In the light of the foregoing, it has

immunities are the same for all. In other words, men and women should have equal rights and access to resources.

¹¹ 1997 (2) SA 261 (CC) para 20 at 272A.

¹² F Kaganas "The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution" (1994) 21 *Journal of Law and Society* 409 at 411; M Pieterse "Killing It Softly: Customary Law in the New Constitutional Order" (2000) *De Jure* 35 at 39 and the authorities cited therein and C Himonga and C Bosch "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 *SALJ* 306, all these authors dealt with the issue of the development of customary law as well as the clashes between human rights and culture, V Bronstein "Reconceptualising the Customary Law Debate in South Africa" 1998 *SAJHR* 40 in which, the author also dealt with the whole question of culture v equality clash.

¹³ TW Bennett (1995): 126. See also T Venter and J Nel "African Customary Law of Intestate Succession and Gender Inequality" (2005) *TSAR* 86 and AM Janse Van Rensburg "The True Capacity of Women Under Customary Rule to Acquire Land: An Exposé on the Law, Land and the Rules of Succession" (2003) *Stellenbosch Law Review* 294. These two authors argued that there are discrepancies in the rights of women

become imperative to measure democratic values of equality against customary practices to ensure that such practices are transformed so as to conform to the objectives of s 39 (2) of the Constitution.¹⁴ One of the primary objectives of the South African Constitution is to achieve human dignity. In *Dawood and Another v Minister of Home Affairs and Others*¹⁵ the Constitutional Court stated: "The Value of dignity in our constitutional framework cannot be therefore doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied..."

South Africa is a very good example of a country that has been able to move progressively in the direction of gender justice or interchangeably gender equality. It is a notion that refers to equal employment, equal access to resources, equal opportunities and equal power to influence decisions made within the society. Gender justice does not mean that men and women are the same, but that opportunities and life chances should not depend on sex or gender or both,¹⁶ unlike Nigeria¹⁷ and Lesotho.¹⁸

under customary law; acquiring land through intestacy is still a problem for women. It was also discussed that in the modern society today, the rule of primogeniture constitutes unfair discrimination.

¹⁴ S 39 (2) of the South African Constitution enjoins courts to "promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation or when developing common law or customary law". The provisions of s 39 in the Bill of Rights are innovative towards incorporating international law. See Samuel-Jacques Priso-Essawe "The Protection of International Legal System" (2001) 34 *De Jure* 549.

¹⁵ 2000 (3) SA 936 (CC).

¹⁶ *Daniels v Campbell NO and others* 2004 (5) SA 331 (CC) dealt with inheritance in a Muslim marriage. The court recognized that a woman cannot be precluded from inheriting in a marriage concluded according to the beliefs of the people simply because such marriages are not legally recognized in South Africa. This progressive move could be

Although women's issues in South Africa have since 1994 received maximum attention at political,¹⁹ judicial²⁰

seen further in ss 2 (1), 2 (3) (a-c) of the Traditional Leadership and Governance Framework Act 41 of 2003 which recognizes the importance of gender equality because of the inclusion of headwomen in traditional leadership positions. Also the Act requires that traditional institutions should transform and adapt customary law to be in line with the rights contained in the Bill of Rights. Section 22 (3) of the Communal Land Rights Act 11 of 2004 provides that in the composition of land committee should include a prescribed percentage of women.

¹⁷ VC Uchendu *The Igbo of South East Nigeria* (1965) 23. In contrast to the position in South Africa, women are not included in any land ownership matters and marriage negotiations. The latter position is reflected in the reformist judgment of *Mabena v Lestalo* 1998 (2) SA 1068 (T).

¹⁸ ML Lehohla "The Role of Customary Law in Developing Africa: The Lesotho Position" (2004) 8-10, a paper delivered in Washington DC by the Chief Justice of Lesotho, outlining the problem areas of law in that country.

¹⁹ C Murray and L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 21. This study shows that in 1998, South African Parliament established a joint committee of the two Houses of the National Parliament to monitor progress with regard to the improvement in the quality of life and status of women in South Africa, with specific reference to the government's commitment to the Beijing Platform of Action and with regard to the implementation of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). "The Committee has decided to focus on broad policy issues such as domestic violence and equality legislation...In addition, women politicians themselves have established 'women caucuses' and as caucuses they intended to lobby as a women's group, these groups are potentially policy committees concerned with the status of women..." the authors point out that in a number of Provincial Legislatures, the gender or status of women committee is to monitor both Provincial and National legislations.

²⁰ RB Mqeke "African Family Law and Statutory Developments Affecting the Legal Rights of Women in the New South Africa" (2004) *Speculum*

and policy making²¹ levels generally, the full realization

Juris 26. In this article, the author made references to the cases such as that of *Mabuza v Mbatha* 2003 (7) BCLR 743 (C), in which the court rejected expert opinion that the custom of integration of the bride into the bridegroom's family (*ukomezeka*) does not change.

²¹ Murray and Nijzink (2002): 3-7 describe the mandate the policy makers have and how they act within the authority bestowed on them. The White Paper on Local Government, further seeks to create a developmental local government through eradicating poverty through socio-economic development and community empowerment with a focus on women who are poor and need to be empowered. In Para 1.3 of the White Paper, it is stated that Municipalities have roles to play in removing division and marginalization but must work towards equal and effective participation of women. For more information, see White Paper on Local Government 423 Government Gazette 18739 March 1998. The African National Congress Reconstruction Development Policy (1990) also made the point that there would be no political democracy if the majority of its people remain in poverty and without land. Examples of the exasperation of the poor and landless people could be seen from the "Riots in Khutsong" SABC News February 2006 on the several riots that took place in Khutsong, South Africa before the Local Government elections held on 1 March 2006. The same situation has been the bane of the oil companies operating in the Niger-Delta area of Nigeria, where youth militia constantly demand developmental, social and employment considerations from the oil companies whose workers have been held hostage many times by the militiamen. Niger-Delta produces over 90 percent of crude oil exploration in Nigeria yet the people face environmental pollution, lack of access to clean water, shelter and basic needs. See Legborsi Saro Pyagbara "The Ogoni of Nigeria: Oil and Exploitation" at <http://minorityrights.org/admin/Download/pdf/NigeriaMicro.pdf> (accessed on 12 April 2005) for more on the oil exploration issues in the Niger-Delta. The same sentiments have been echoed by other authors such as M Robertson "Land and Post-Apartheid Reconstruction in South Africa" in S Bright and J Dewar (eds) *Land Law, Themes and Perspectives* (1998) 311 in which land reform according to the government Green Paper espouses social justice to deal with the legacies of the past, overcoming poverty, gender equality, so that women could have opportunity in access in land, the need for

of the government's efforts on the ground is undermined by various factors such as the African belief systems (the mythical belief in witchcraft) and some outdated rituals, customs, traditions, associated patriarchal practices and the high incidence of crimes of violence such as murder, rape and assault on women. The extent of the impact of the African belief systems on women's rights has been widely commented upon in the media²² and in particular, the Ralushai Commission of Inquiry appointed by the Limpopo Provincial Government about 11 years ago.²³

democratic process involving participation and accountability at all levels of government. The same views have been expressed in C Miller and A Pope *Land Title in South Africa* (2000) 308.

²² "There are no Witches" *Daily Dispatch* 10 January 2006 editorial opinion carried the following comment: "Two more elderly women have been murdered in our province after being accused of being witches and at least one more has fled her home... Every month we hear of more attacks on elderly women in rural villages, particularly in Transkei. These women are not rich; they are not being systematically robbed. They are being attacked because they are accused of being witches". "Bewitched to Death" *Daily Sun* 9 December 2005 carried a gruesome story of a cold blood murder on mere suspicion of a woman being a witch. Recently, the *Daily Dispatch* carried a story of eight youths called (*abakhwetha*) that is young men who recently graduated from a circumcision school who gang raped a 27 year old woman in her house in Zwelitsha, King Williamstown, supposedly acting in accordance with an outdated customary practice that allowed circumcised youth to sleep with a woman with a view to removing the "ochre" from the young men.

²³ NV Ralushai "Summary of the Ralushai Commission" in J Hund (ed) *Witchcraft Violence and the Law in South Africa* (2003) 124. The Executive Council of the Limpopo Province appointed this Commission in March 1995 to look into the causes of the escalation of witchcraft violence in that province. One of the terms of reference of the Commission was to recommend possible legislative measures that could be put in place to prevent such incidents of violence. See also P Mashagoane "The Gender Implications of Witchcraft Violence and

Some of the gruesome incidents of violence occurred during December 2005 when the country observed the annual "16 Days of Activism Against Women and Children",²⁴ unfortunately in most parts of South Africa both urban and rural, the incidence of crimes of violence against women has increased at an alarming rate.²⁵

Strategies to Combat it" (2001) *De Jure* 488 where the author said that witchcraft violence has social implications for gender equality and empowerment of women. It was argued here that witchcraft is gendered because women are strong mortals, knowing the sacred meaning of tradition; African women are seen as the pillars of the society.

²⁴ "Bust-Up over Beer" *Daily Sun* 5 December 2005 carried a story of a woman who was severely beaten up by her boyfriend in Duncan Village, East London. "Rape Crisis Centre Involved in 16 Days of Activism" *Grocott's Mail* 9 December 2005 reported that thirteen women and children received counselling at the in-house rape crisis centre of the Police Station in Grahamstown. In "Beaten Up for Love" *Daily Sun Newspaper* 10 January 2006, a woman's boyfriend repeatedly assaulted her and she lost an eye. In the same newspaper, a priest allegedly raped one of his converts and other women in the Church. The woman who laid a complaint with the police has a two-year-old child from the priest. Similar kinds of abuse are experienced by domestic workers who accuse their boss of raping them while at work. Also reported "Six Girls Raped in the Last Week" *Daily Sun* 9 December 2005, is a story of the rape of six girls between the ages of two and sixteen who were raped in separate incidents in the Transkei and two of whom had been killed. A woman was raped in the bushes and later stabbed to death in Limpopo as reported in "Woman Raped in Bushes" *Daily Sun* 9 December 2005. Another woman was left in the pool of her own blood after a heavy drinking by her boyfriend. Regrettably, the national program of the 16 Days of Activism Against Women and Children seem to have little or no effect.

²⁵ The latest incident is the gang raping of the domestic worker of the son-in-law of the Judge President of the Transvaal and the murder of his four year old grand-daughter by unknown assailants as televised on the SABC News on Wednesday 8 March 2006. The rape trial of the former Deputy President ended in Johannesburg on Monday 8 May 2006. He was found not guilty, but the case brought out several

This study will therefore highlight and comment on the factors contributing to the apparent disrespect of women's human rights in the three countries chosen for this study. The legal position in South Africa will be juxtaposed with that in Lesotho and Nigeria. All these countries have emerged from major conflicts of different kinds.²⁶

It has been 60 years since the adoption of the Universal Declaration of Human Rights (UDHR), which act as the foremost instrument in the protection of human rights. The three countries under review subscribe to the provisions stated in the Declaration. Unlike South Africa, the other two countries have not yet formulated policies, which seek to improve women's legal rights in a meaningful way. It is a matter of regrets that, despite the Beijing Programme of Action, many African governments still have reservations regarding certain provisions of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).²⁷ It is noted with

issues such as the HIV/AIDS and problems faced by women who had been raped. It also widely believed by some men in South Africa that raping a virgin would help cure them of their HIV/AIDS disease.

²⁶ South Africa from the 1950s up to 1994 suffered from a repressive government where women were under perpetual tutelage to a human rights regime currently characterized by incidence of violence of different kinds on women; Lesotho is a constitutional monarchy which is rooted in traditions and customary practices also emerged from a military rule, and Nigeria, the most populous African country suffered major religious problems (Sharia), and ethnic violence also emerged from a long period of military junta.

²⁷ Algeria, Egypt, Ethiopia, Morocco, Libya and Lesotho to name just a few, all have reservations to certain provisions of CEDAW, especially the provisions that would bring about gender equality or justice. See also in this regard C Heyns (ed) *Human Rights Law In Africa* (2004) 1 54-56.

interest that despite the above reservations on the provisions of CEDAW, at the United Nations Conference in Beijing,²⁸ women's issues captured the attention of the world community.

Governments in the African continent have done very little in adhering to the provisions of the Conventions to which they are signatories, notable among them are CEDAW, African Charter on Human and Peoples' Rights, African Charter on the Rights of the Child and the African Union. There are, however, positive changes, which need to be accelerated and acted upon consistently by all governments in the African continent especially members of the African Union.²⁹ It is believed that where men and women are equal partners in development, human rights would thrive on the continent.³⁰

²⁸ The United Nations convened this world congress in 1995 in China. The Conference highlighted the need to address issues of women's rights as part of the human rights content in which respect of their dignity and equal treatment as human beings would be guaranteed. Although member states representatives have agreed upon the Plan of Action, the implementation of the said plans is slow and incoherent. There has been evaluation on the gains made in the follow up of Beijing + 5 and Beijing + 10 meetings. Information related to these meetings are posted on the website of the United Nations Division for the Advancement of Women (DAW) at <http://www.un.org/womenwatch/daw/> (accessed on 24 March 2006).

²⁹ The 53 members of the African Organization Unity (OAU) except Morocco, signed the Constitutive Act establishing the African Union (AU) as an Organisation that would accelerate economic growth, improve democracy in the African Continent. This is discussed in chapter six below.

³⁰ One of the giant leaps towards this form of partnership could be seen with the appointment of a female Vice-President in South Africa in 2005. The speaker of the South African Parliament is a woman. Similarly, the first African female State President was elected in Liberia. Although Liberia is one of the oldest democracies in the

1.3 Purpose of the Study

The greatest concern the world over in this century characterized by war of all kinds, poverty and HIV/AIDS is the maintenance of democratic principles and human rights protection, which lay the basis for security, development and peace.

In this study, the writer seeks to demonstrate the ripple effects of the co-existence of customary law and the received law on women's rights particularly in countries, which do not have the tradition of respect for such rights. It will be argued with reference to the position in South Africa that there is a correlation between democracy and respect for women's legal rights. In African countries, problems arise in the context of legal duality and the fact that some customary law practices despite their apparent repressive nature, underpin the very essence of the lives of the people thereby making it difficult for the governments to abolish them.

On the other hand, the presence of the Bill of Rights with equality clauses as shown in the *Bhe* case regarding the unwritten rule of primogeniture, poses a huge challenge on the judiciary either to strike these practices down or to develop them to be consistent with the provisions of the Bill of Rights.³¹ This study will

continent it has been dogged by years of civil unrest and war. It all came to an end with the inauguration of Dr Ellen Johnson-Sirleaf in Monrovia, Liberia on 16 January 2006 which is seen by the global community as well as women activists as a triumph and due recognition of the capabilities of women in governance and development; Lesotho and Nigeria, present a sharp contrast as women parliamentarians in both countries are still in the minority.

³¹ Ngcobo J expressed the same kind of sentiments in his minority judgment in the above-mentioned case. Also in South African

also show the disparity in the legal positions of these countries regarding women's access to land, intestate succession and rights in marriage.

The case of South Africa is significant in view of its history of racial discrimination and the manner in which the Constitutional Court has established equality jurisprudence.³²

Constitution, section 9 prohibits unfair discrimination; s 9 (3) has listed number of prohibited grounds of which sex and gender are listed. Section 42 (1) of the 1999 Constitution of the Federal Republic of Nigeria prohibits discrimination on grounds *inter alia* of sex; the same prohibition is to be found in s 18 of the Lesotho Constitution. The South African Constitution has both sex and gender as prohibited grounds of discrimination while those of Nigeria and Lesotho prohibit discrimination based on sex only. Sometimes the term 'sex' is used interchangeably with gender, but in this study they are two separate terms. Sex refers to the biological difference between male and female (See generally BA Garner (ed) *Black's Law Dictionary* 8 ed (1999) 1406) as opposed to gender, which refers to the expectations, attributes, and ideas that are attached to being male or female (See K Fekade in L Muthoni (ed) *Women and Land in Africa: Culture, Religion and Realizing Women's Rights* (2003) 352). See also M Pieterse "Killing It Softly: Customary Law in the New Constitutional Order" (2000) *De Jure* 35 where the author argued that it would do more harm than good if customary laws were abolished indiscriminately without taking into account their true significance. See also in this regard; E Knoetze "Customary Law of Succession in a Dualistic System" (2005) 1 *TSAR* 137, L Mbatha "Reforming the Customary Law of Succession" 2002 *SAHJR* 18 259, C Rautenbauch "Some Comments on the Status of Customary Law in Relation to the Bill of Rights" (2003) 1 *Stellenbosch Law Review* 107 and the case of *Zondi v President of RSA* 2000 (2) SA 49 (N).

³² See *inter alia* *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), *Harksen v Lane NO and others* 1998 (1) SA 300 (CC). This was done on the basis of both the Interim and Final Constitution. Chapter Two of the 1996 Constitution contains the Bill of Rights stating the fundamental rights, most of which are fashioned in a manner that would address the injustices of the past. Chapter IV of

In Nigeria, political instability manifested in military dictatorships which spanned 25 years, and this had a countervailing effect of putting women's issues on the national agenda largely through the different programs initiated by the Office of the First Lady of the Federal Republic of Nigeria.³³ The Nigerian government also created the Ministry of Women Affairs, which became responsible for creating awareness relating to economic, political and social inequalities and the need to incorporate them into the national mainstream.³⁴

Nigerian Constitution contains similar provisions. Likewise Chapter Two of the 1993 Lesotho Constitution provides for the protection of fundamental human rights and freedom.

³³ During the Babangida regime 1985-1993, the "Better Life for Rural Women" Program initiated by Maryam Babangida brought to the fore the plights of the local women. Another First Lady, Maryam Abacha followed suit by establishing the "Family Support Program" (FSP) from 1995-1998. It is generally believed by Nigerians that both programmes failed to address the legal rights of women and only focused on economic empowerment, which also lacked any real impact on the poverty levels of the average rural woman for whom these programmes were supposedly created to help. The few legislations specific to women in Nigeria are: Family Support Trust Fund Act 10 of 1995 established to deal with the improvement of family healthcare delivery and promotion of family economic advancement, Maintenance Order Act 8 of 1921 is aimed at facilitating the enforcement in Nigeria of maintenance orders made in Ireland or England. This latter legislation could have been as a result of the Nigerian colonial relationship and the fact that Nigerians born in Lagos Island only at that time were accorded British citizens.

³⁴ The Ministry has a vision to build a Nigerian society devoid of gender discrimination, that would guarantee equal access to political, social and economic wealth, creating opportunities, and also develops a culture that would place premium on the child. It would also focus attention on the public and private sector and bring them on board on issues that promote full participation of women and children in the national development process. The Minister set out

Lesotho seems to differ remarkably as it is the only country amongst the three under review that is a constitutional monarchy. One of the reasons for the continued existence of the monarchy is the high degree of respect for tradition, customs and rituals.³⁵ The ripple effect of the observance of cultural practices is the slow process of transformation. For example, the principle of primogeniture recently discarded in South Africa in the *Bhe* case is still in force in Lesotho.³⁶ This position seems to be in direct conflict with the provisions of the country's 1993 Constitution.³⁷

Comparison of these countries is insightful for the following reasons:

this vision during a press briefing on the theme of 'Enhancing Gender Equality and Child Development' on 20 December 2005 in Abuja, Nigeria. However, the level of women participation in the political life is still low with only 24 women in the National Assembly, whilst there are only 7 ministers out of 29. Clearly these are lower than the 30percent representation expected by International standards. See Text of a press briefing by The Honourable Minister of Women Affairs, Mrs. Inna Maryam Ciroma, Held On Tuesday, December 20, 2005 At The Jakaranda Hall, Sheraton Hotel & Towers, Abuja. The theme was: "Enhancing Gender Equality and Child Development" at <http://www.nigeria.gov.ng/women%20affairs%20press%20briefing.doc> (accessed on 8 March 2006).

³⁵ See M Mamashela *Family Law through the Cases* (1991) 1-3.

³⁶ WCM Maqutu *Contemporary Family Law in Lesotho* (1992) 165-187.

³⁷ Section 18 (3) of 1993 Constitution provides "that the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..." The implication of this provision creates avenue for discriminatory practices without setting any limits on whether the discrimination is justifiable in an open and democratic country.

- (1) Nigeria and South Africa are both regional powers within the continent of Africa, whilst Lesotho is a monarchical country with strong traditionalist element.
- (2) Secondly, the three countries are members of the African Union and as such have pledged their support to develop the continent as a model of African culture, heritage and development.
- (3) Thirdly, all three countries have dual legal systems of law, which include the received law and the indigenous law.
- (4) Fourthly, all three countries now enjoy constitutional democracy having emerged from major social conflicts. They had the experience of colonialism.³⁸
- (5) Nigeria and South Africa have diverse people and cultures, for example, South Africa has 11 official languages and different tribes; Nigeria, on the other hand has about 256 local dialects and a multi-ethnic demography.
- (6) African governments have come up with a new blueprint on how to accelerate development on the continent, and they have forged a new initiative known as the New Partnership for African Development

³⁸ Lesotho has a history of colonial rule and also rule by a powerful king; Nigeria also has a history of colonial rule as well as military dictatorship while South African experience is both colonial rule and a complicated social segregation. All three countries are experiencing new forms of governance. Democracy was truly attained in Nigeria in 1999 after several years of military incursion into the political arena; the South African Constitution has been hailed as a world class Constitution. How these forms of governance have impacted on the rights of its citizens especially women is an important reason for comparison.

(NEPAD). Nigeria and South Africa both have disproportionate distribution of wealth owing to their different histories of military dictatorship and apartheid respectively.

(7) The countries are signatories to the various international human rights instruments.

(8) In terms of government structures and history, cultures, customary laws and practices, these three countries may well be regarded as good representatives of African nations.

1.4 Methodology

To bring about relevant insight into the dynamics of human rights and African cultures and traditions, this research will utilize the following resources:

Primary Sources:

This study will consider *inter alia*, pieces of legislation and the relevant Constitutions of the various countries as well as case law covering women's rights issues.

Secondary Sources:

These include literature on customary law such as books and articles published in the various law journals.

World Wide Web:

The Internet is a huge repository of information especially on trends obtainable globally. The comparative nature of the research study demands that such an avenue for resource material cannot be ignored.

1.5 Literature Review

As indicated in note 19 above relating to the various support systems at Provincial and National legislative organ of government, South Africa has championed the cause of women's rights at different levels.

Parliament and the Judiciary are in the forefront of this battle as can be seen from the various pieces of legislation³⁹ noted below as well as landmark judgments handed down by the various divisions of the High Court and the Constitutional Court.⁴⁰ It is pertinent to expatiate on how these various pieces of legislation protected women's rights. For example, Traditional Leadership and Governance Framework Act,⁴¹ the Communal Land Rights Act⁴²

³⁹ In the last 11 years of the attainment of democracy in South Africa, the Parliament has enacted the following legislations, which have directly impacted the lives of women, notable are: Communal Land Rights Act 11 of 2004, Traditional Leadership and Governance Framework Act 41 of 2003, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Domestic Violence Act 116 of 1998, Recognition of Customary Marriages Act 120 of 1998; Prevention of Family Violence Act 133 of 1993, Films and Publications Act 65 of 1996, Maintenance Act 99 of 1998 and Employment Equity Act 55 of 1998.

⁴⁰ See note 32 above.

⁴¹ Section 2(3) provides that " A traditional community must transform and adopt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by: (a) preventing unfair discrimination; (b) promoting equality; and (c) seeking to progressively advance gender representation in the succession to traditional leadership positions". The content of this provision is at the heart of this study.

⁴² Act 11 of 2004, promulgated on 20 July 2004. The commencement date of the Act is yet to be announced. See also G Pienaar " The Meaning

provides for the access to land by women, to benefit in land and other rights thereto in the same manner as men without discrimination. This provision is in line with the equality provision in the Bill of Rights and the mandate on the state to create mechanisms within its resources to address the issue of land ownership, housing and shelter;⁴³ however, the practicalities of ensuring this lofty ideal are yet to fully materialize.

The Recognition of Customary Law Marriages Act gave a new lease of life to women by stipulating the modalities that govern marriages under this system to be at par with common law provisions.⁴⁴

of the Concept Community in South Africa Land Tenure Legislation" (2005) 16 *Stellenbosch Law Review* 63 - 68 where the author commented on the overlapping provisions of the Act with that of the Communal Property Association Act 28 of 1996. The author also mentions the social and cultural constraints that might thwart the equality idea. See also A Claassens "Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act (2005) *Acta Juridica* 42 where the author criticized s 4 (2) of the Act and its impact on women. Also mentioned were continued clashes between equality and custom because the civil society opposed the Act while traditional leaders welcomed it as a triumph of tradition and African custom.

⁴³ Section 25 (5) of the Constitution provides that "state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

⁴⁴ In terms of section 6 of the Act, a customary law wife has equal status and capacity to that of a wife in a civil marriage, including the capacity to acquire property and to enter into contract. The inclusion of the Matrimonial Property Act of 1984 into the Recognition of Customary Law Marriages Act is an indication of the political will of the government to ensure gender justice in a customary law marriage that hitherto did not provide for equal share in the family property. Spouses to a customary marriage in terms of the Act can inherit from the deceased's estates whether they are in monogamous or polygynous unions. Langa DCJ whilst expressing the same

The Prevention of Family Violence Act gives victims of violence the capacity to approach the court for preventative interdicts and it also criminalizes the rape of a woman by her husband.

As a means of further securing gender equality, women of the ruling African National Congress (ANC) and other opposition parties made a strong lobby for an Act that would severely deal with pornography, particularly child pornography in the Films and Publications Act.⁴⁵ South Africa has been favoured to make tremendous progress in terms of legislation to ensure equality of rights between the sexes. Equality is an important value to which the ruling party; African National Congress (ANC) alluded to at the inception of constitutional democracy in South Africa.

opinion in the *Bhe* case held that it is appropriate that spouses in these kinds of unions should be able to inherit from the deceased's estate because polygny is an aspect of African customary law. Also from the application of the accrual system in terms of s 2 of the Matrimonial Property Act, and s 14 for marriages in community of property, women would no longer be disadvantaged when the marriage is dissolved as they can now share in the family estates. Mediation in Certain Divorce Matters Act which is also incorporated into the Recognition of Marriages Act provides for the appointment of a family advocate to ensure that the interests of dependent and minor children are well protected. See also JC Bekker and LN Van Schalkwyk "All African women May at Last Own Property: Particularly Land" (2005) *De Jure* 395. The authors in this article evaluated the status of South African women in line with the Acts promulgated that seek to ensure their equal status with men especially with regards to ownership of land. They came to the conclusion that the time for women's right to land ownership is indeed here.

⁴⁵ The role of women within the reconstruction and development programme of the party was mentioned as well as the importance of mechanisms to address gender inequalities. See generally *The Reconstruction and Development Programme: A Policy Framework of the African National Congress* (1994) 17, 120.

The government recognized the untenable position of women in a highly male-dominated environment and therefore introduced measures to combat discrimination on grounds of sex and gender. To this end, the Prevention of Unfair Discrimination Act 4 of 2000 was promulgated. The Act prohibits traditional, customary and religious practices that undermine the dignity of women and equality. This is considered to be a progressive step in furtherance of equality provisions in the Bill of Rights. The Act also seeks to promote social, economic and political equality between men and women.⁴⁶ To protect women in abusive relationships, the government enacted the Domestic Violence Act.⁴⁷ The need for this particular legislation arose as a result of the high statistics of sexual violence in the country where more than fifty thousand

⁴⁶ However, certain criticisms have been levelled against this Act by some writers such as M Pieterse "The Promotion of Equality and Prevention of Unfair discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?" (2000) 117 *SALJ* 627 where the author criticized s 8 (e) of the Act, saying that it would create a legal vacuum in that it would abolish the entire customary law of succession without taking into consideration the ramifications for such a step. It was also argued that the question of lobola was a vaguely phrased provision in s 8 (d), what is actually required in these instances is progressive transformation.

⁴⁷ Since the enactment of this legislation, domestic violence is yet to abate and the enormity of the problems associated with such gender-based violence are far from being solved as the cycle of violence against women of all ages rages on in South Africa. The SABC News 20 June 2006 showed the footage of a woman who received synthetic eyes after undergoing major surgery as a result of acid poured on her and severe beating by her ex-husband. However, more women are learning to seek help through the works of the Legal Aid Boards.

cases of rape occurred between 2003 and 2004.⁴⁸ Also about 50.3 percent of femicide victims knew their perpetrators. It is envisaged that women could approach the courts for redress by obtaining protection order. Although this Act exists, there is minimal impact on its effectiveness for the majority of women especially the rural poor women and there are no methods of monitoring and evaluating the impact of the legislation.

As alluded to above, the Courts have also handed down landmark judgments, which have the effect of ameliorating the legal position of women. In the groundbreaking decision the Constitutional Court in *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the RSA*,⁴⁹ abolished the principle of primogeniture. The court reiterated the importance of removing the inequalities of the past. The court, in promoting gender justice, indicated that neither the status of the children (whether legitimate or illegitimate), nor whether lobola had been paid or not could preclude the offspring of a deceased man from inheriting from the estates of their late fathers.⁵⁰

⁴⁸ Naeemah Abrahams "What we know (and don't know) about Intimate Partner Violence in South Africa" Gender and Health Research Unit, Medical Research Council of South Africa.

⁴⁹ 2005 (1) BCLR 1 (CC). This trilogy of cases dealt with the same issue of inheritance by women. The rule of primogeniture is derived from the unwritten rule of customary law that is based on patriarchy as noted in AJ Kerr *The Customary Law of Immovable Property and Succession* 3 ed (1990) 99. Succession according to this system devolves through the male bloodline to the exclusion of females.

⁵⁰ See page 49 of judgment, where Langa DCJ (as he was then called) said that "the exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as

The reformist approach of the judiciary is also reflected in *Mabena v Letsoalo*⁵¹ where the court developed customary law rules relating to lobola negotiations and the headship of the family where the male head was absent. The courts have in different cases developed customary law to be consistent with the Constitution in the same manner that common law is developed.⁵²

perpetual minors under the tutelage of the father, husbands, or the head of the extended family". In his judgment, Langa indicated that the application of s 1 of the Intestate Succession Act of 1987, to only surviving spouse does not take into consideration spouses in more than one customary marriage. Therefore there is need to provide for situations in customary law where more than one surviving spouse may exist. It is therefore envisaged that all must have equal share in the deceased's estate by way of making s 1(1) (c) and 1 (4) (f) of the Intestate Succession Act to apply to situations of more than one customary law marriage. Hence, the position of women in Polygynous marriages is also given a boost to ensure that they are not disadvantaged in any way.

The issue of illegitimacy most of the time is discussed in some of these cases. See also J Omotola "Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture" (2003) *Speculum Juris* 181-203.

⁵¹ 1998 (2) SA 1068 (T)

⁵² *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA). The Supreme Court of Appeal said that the common law should not be trapped within the limitations of its past but should be allowed to evolve with the changing times. See also the case of *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) where the court in *Carmichele 2* developed the rules by finding that the police had obligation to protect women and children from abuse and violation. In Wieland Lehwert "The Role of the Courts in the Conflict between African Customary Law and Human Rights" 21 (2005) *SAJHR* 214 at 261-262 argues for the development of customary law where it is in conflict with human rights principles. In C Himonga "The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of Customary Law of Marriage and Succession" (2005) *Acta Juridica* 82, the author gave

It is worth noting that women's issues have been largely advocated by human rights organisations and the international community as a necessary requirement for development in any given society. These organisations seek to ensure women's equal access to resources particularly land.⁵³ A leading scholar on women's issues, Martha

insights into the kinds of reform taking place and she concluded that customary law is not being developed but is being replaced by common law, a situation the author sees as a dangerous trend. In *Daniels v Campbell* 2004 (5) SA 331 (C), the court also adopted a reformist approach in the interpretation of the rules governing succession in Islamic marriages. *Mabuza v Mbatha* 2003 (4) SA 218 (C), Hlope JP had a similar approach in the consideration of the Seswati law and custom relating to the integration of the bride into the family of the bridegroom. Sachs J in the case of *S v Baloyi* 2000 (1) BCLR 86 (CC), regarded domestic violence as an issue of gender inequality as well as a reflection of the patriarchal nature of our society.

Gender equality analysis played a role in the case of *Bannantyne v Bannantyne* 2003 (2) SA 363 (CC) where it was noted that mothers who frequently become custodial parents are placed with additional financial burden, which has the effect of double disadvantage in terms of responsibilities and under-resource in terms of means.

⁵³ Women have important roles to play in development and need to have access to basic opportunities that would cater for their needs in society. See M Robertson "Land and Post Apartheid Reconstruction in South Africa" in S Bright and J Dewar (eds) *Land, Law Themes and Perspective* (1998) 311, where the author advocates the need to bridge the gap between poverty, land access and democracy and human rights. He deals with access to land as an issue of social justice, and social welfare. See also JM Pienaar "Broadening Access to Land: The Case of African Rural Women in South Africa" (2002) 2 *TSAR* 177 where the author indicated that 57 percent of African women live in rural areas and they are those mostly affected by customary land tenure and poverty, power relations in the home also shape women's access to land. See also E Knoetze "Notes On a Black Woman's Right to Inherit" (2000) *OBITER* 416 where the author affirmed the believe that unequal social structures institutionalized by law deprive women powers to essential autonomy and empowerment.

Nussbaum has developed an approach in which she contends that in the political arena, the abilities of human beings can only be developed when given the appropriate educational and material support.⁵⁴ According to the author the rights of women are underpinned by the inter-related principles of equity, development and democracy. It is therefore important that governments in developing countries develop appropriate mechanisms that would help further the interests of women as well as enhance governance through the appropriate developmental policies.⁵⁵

⁵⁴ M Nussbaum "Human Dignity and Human Capabilities" in M Molyneux and S Razavi (eds) *Gender Justice, Development and Rights* (2002) 49-74. The author in developing her approach said that women in developing world face numerous problems because of their sex. The philosophy underpinning this approach lies in basic constitutional principles that must be respected and implemented by the governments, as a minimum standard of what respect for human dignity requires. Its focus is on what people are actually able to do in a life that is worth of the dignity of a human being.

⁵⁵ S Jagwanth and C Murray "No Nation Can Be Free when One half of It Is Enslaved: Constitutional Equality for Women in South Africa" in B Baines and R Rubio-Marin (eds) *The Gender of Constitutional Jurisprudence* (2005) 236-238, where the authors said that the only means to actualize the issues surrounding women's rights issues is by placing men and women at par by way of appropriate legislative measures backed by judicial interventions where cases of violation of the legislations to that effect arise. See also the White Paper on Local Government Section D at www.local.gov.za/DCD/policydocs/whitepaper/wp4.htm (accessed on 30 May 2005) in which the common themes of promotion of equity, social justice and democracy are seen through the entire document. Moreover, the document deals with the role of traditional leaders as stakeholders in local authorities as well as the role of women in local governance. See also DS Koyana "The Role of Women in Rural Governance" (1991) 20 *OBITER* 267 where the author gave historical insights into the chieftaincy positions held by women especially in

In Nigeria, the dynamics are much more complicated because of the multi-ethnic and multi-cultural influences on the lives of the people. The country had a long history of military incursion into the political arena; the military ruled for 25 years out of the 46 years of its independence.⁵⁶ Although, the wives of the military heads of state attempted to bring the plights of women into the national political agenda as already mentioned; the actual political, social, economic and cultural lives of the women remain unchanged.

The Land Use Act⁵⁷, which is the current legislation on land matters in Nigeria vests land in the hands of the state under the trusteeship of the governor. The effect of this Act is that private ownership of land has ceased to exist. This particular position drew a lot of criticisms from academics and teachers of law.⁵⁸

As a result of the multi-cultural nature of the society, the proprietary rights of women are delimited along tribal lines. In other words, the three dominant tribes of Hausa, Yoruba and Igbo have different ways of

the Lobedu tribe in Limpopo where a woman has been the reigning queen since the 1800s.

⁵⁶ The first military coup took place in Nigeria in 1966-1975; subsequently there were military dictatorships from 1976-1979, 1985-1993, and 1995-1998.

⁵⁷ Cap 202 1990 Laws of the Federation

⁵⁸ J Fekumo "Does the Land Use Act Expropriate" (1987/88) 869 *Journal of Private & Property Law* 5. These criticisms were based on the provisions of section 5 (2) of the Act which states that "Upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section all existing rights to use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished." The general feeling is that it removes the rights of existing owners of other rights of occupancy.

dealing with proprietary rights.⁵⁹ For example, in the Northern areas of Nigeria, inheritance is based on Islamic law and customary intestacy whereas in non-Muslim areas, inheritance is patrilineal. Women had proprietary rights in land during the reign of the Sokoto Caliphate⁶⁰ though such rights were not uniformly applied in all the states of the Northern Nigeria.

In the 1980s, there were other socio-political factors such as military rule and the suspension of the Constitution in line with military junta regimes, which, contributed to the non-recognition of women's rights. Also the political conditions at the time did not allow for pro-active measures by NGOs or the international community to intervene in ensuring that the rights of women receive the necessary attention it deserves. The consequence was total disregard for women's rights issues and equal treatment before the law.⁶¹

The position is different under Yoruba customary law because under that system children of the deceased person inherit from their father's estates irrespective of age,

⁵⁹ HJ Abdulla and I Hamza "Women and Land in Northern Nigeria: The Need for Independent Ownership Rights" in L. Muthoni Wanyeki (ed) *Women and Land in Africa: Culture, Religion and Realizing Women's Rights* (2003) 150-155.

⁶⁰ "Caliphate" refers to the Emirs and members of the kingmaker's dynasty in the Northern Nigeria. There are two well known of these monarchical institutions in Nigeria namely the Sokoto Caliphate and the Kano Caliphate. No Emir or king for the Northerners is instituted without the explicit approval of the particular caliphate.

⁶¹ HJ Abdulla "Religious Revivalism, Human Rights Activism and the Struggle for Women's Rights in Nigeria" in AA An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) 174. See also GI Udom Azogu "Women and Children-A Disempowered Group Under Customary Law" in B Ajibola (ed) *Towards A Restatement of Nigeria Customary Law* (1991) 129-135.

sex or even absence at the time of the death of the parent.⁶² Contrary to the position of the Yoruba people, the Igbo people still practice the customary law rule of primogeniture. This is so despite the existence of customary law courts in most part of the country where some of these customary law cases could be heard, regrettably, most of these courts have been abolished.⁶³

Nigeria, like other countries on the African continent, is a signatory to international conventions that seek to ensure the protection and promotion of the rights of women. In terms of article 3 of CEDAW, State Parties are obliged to:

"Take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedom on a basis of equality with men".⁶⁴

Despite assertions to protect the rights of women, nothing has been done to give effect to the provisions of CEDAW. For example, the Matrimonial Causes Act⁶⁵ has no definition of domestic violence in its provisions. There

⁶² MG Yakubu "Property Inheritance and Distribution of Estates under Customary Law" in B Ajibola (ed) *Towards A Restatement of Nigerian Customary Law* (1991) 137. Irvin J in the case of *Salami v Salami* (1957) Western Region of Nigeria Law Report 10 held that according to Yoruba customary law, the plaintiff in this case has the right to inherit under the law because neither absence nor minority and sex could preclude her from inheriting from the estate of the deceased father.

⁶³ GG Ojiako "Judicial Administration of Customary law in Southern Nigeria" in B Ajibola (ed) *Towards A Restatement of Nigerian Customary Law* (1991) 234.

⁶⁴ Nigeria ratified CEDAW in 1985.

⁶⁵ Cap 221 Laws of the Federation of Nigeria (LFN) 1990 is the principal legislation on domestic relations.

has been no pressure on the National Assembly to redress the situation.⁶⁶

Lesotho, Like Nigeria has ratified the Conventions on the Political Rights of Women,⁶⁷ International Covenant on Civil and Political Rights (ICCPR),⁶⁸ CEDAW⁶⁹ as well as the African Charter on Human and People's Rights.⁷⁰ However, the country has made very little progress to implement the provisions of the Conventions through appropriate legislative mechanisms or developmental programmes aimed at dealing with basic rights.⁷¹

The issue of gender imbalance in terms of proper representation of women in governmental institutions is appalling. Statistics show that the percentage population of women is 51 percent against that of men of 49 percent, and also the number of literate women in Lesotho is the highest in Southern Africa.⁷² Unfortunately, the number of women in the National Assembly of that country is 17 out of 120 members of Parliament (barely 14 percent of women representation). Interestingly, like South Africa, the

⁶⁶ S Koyonda "A Contemporary Appraisal of the Law's Response to Domestic Violence in Nigeria" (1998) 11 (2) *Lesotho Law Journal* 320.

⁶⁷ Ratified the Convention on 4 April 1974.

⁶⁸ Lesotho ratified the ICCPR on 9 September 1992.

⁶⁹ Ratified CEDAW on 22 August 1995.

⁷⁰ Ratified ACHPR on 10 February 1992.

⁷¹ J Akokpari "Contemporary Governance and Development Issues in Lesotho: Implications for the Ombudsman's Office" (1999) 12 *Lesotho Law Journal* 78. The paucity of specific legislations to women issues in Lesotho is evident, however, some notable changes could be seen by the enactment of Sexual Offences Act 29 of 2003 and the Married Persons Equality Bill aimed at dealing with equality problems between the sexes in marriage in that country.

⁷² ML Lehohla 'The Role of Customary Law in Developing African Countries: The Lesotho Position' July 2004 in a paper delivered by the Chief Justice of Lesotho in Washington DC.

speaker of the National Assembly of Lesotho is a woman.⁷³ It has been observed that the roles of women in development do not receive the necessary support; the patriarchal nature of the society contributes in the inability of men to realize that women are partners in development. Most African men are not comfortable with career wives, but it has been observed that through awareness campaigns by gender activists, patriarchal notions on this matter are changing drastically.

Cultural clashes with human rights provisions are features of Lesotho political and social landscape, whose consequences have left indelible marks on the basic rights of the people. Lesotho's human rights record has been regarded as an affront to modern democracy particularly in view of the fact that Lesotho is a signatory to most human rights Covenants.⁷⁴

Rights over land are equally a thorny issue in Lesotho. The nature of the political system of parliamentary government as well as monarchical institution have played significant role in the manner that access to land and ownership are determined in that

⁷³ See "The Lesotho Parliament, Members of the National Assembly" at <http://www.parliament.ls/national/members.php> (accessed on 8 March 2006).

⁷⁴ P Letete "The Notion of Culture and Equality in International Law: Conflict of Laws In Lesotho" (1998) 11 (1) *Lesotho Law Journal* 169-174, where the author deals with the inappropriate ratification on International Instruments by Lesotho. These instruments were designed to protect women who are subjected to guardianship as perpetual minors under customary law whether married or not. In fact, Lesotho upholds an old custom of male prejudice against women with regards to chieftaincy, to which they made reservations to in CEDAW.

country.⁷⁵ During the pre-colonial period, chiefs exerted a lot of influence in the acquisition of any land rights under customary law. The Chiefs were in charge of the allocation of land rights. The consequences were that they had unlimited powers and the people had to comply with the personal whims and caprices of the particular individual who is only respected in the community because of his status. During the colonial period, attempts were made to ameliorate the situation through the establishment of committees whose reports served as guidelines to future steps to be taken in dealing with the allocation of land. Hitherto, propositions for reform had not yielded much fruit but grand efforts are being made to change the position.⁷⁶

From the aforementioned survey, it is clear that Lesotho and Nigeria are dogged by traditional customary influences, which, still persist to the disadvantage of women in these countries. It is hoped that developments in South Africa would have a positive effect on Nigeria and particularly on Lesotho in view of its close proximity to South Africa.

1.6 Research Plan in Chapter Headings

⁷⁵ S Rugege "Chiefs, Commoners and the Land: Struggles Over Control and Access to Land in Colonial Lesotho" (1992) 8 (1) *Lesotho Law Journal* 51-52.

⁷⁶ In 1999, the Commission of Inquiry (Land Policy Review Commission) set out the terms of reference aimed at reviewing land tenure systems in Lesotho, its nature and causes of problems as well as inheritance laws. It was aimed at reviewing the entire body of laws governing access to land and land use rights. See in this regard U Kumar and SP Sakoane "Current Legal Developments: Lesotho" (2000) *CILSA* 391.

This work is divided into six (6) chapters. Chapter one has already been dealt with above. Each chapter deals with various issues raised in 1.1 and 1.2 above.

Chapter Two

This chapter is a brief comment on the origin of gender justice as a human rights norm and its impact on the development of women's rights.

Chapter Three

This chapter considers in depth the legal position of women in the three countries in regard to land ownership and associated problems, the issue of marriage and its consequences. The incidence of witchcraft in so far as it affects women in South Africa is commented upon. There is also a brief comment on the status of widows in Nigeria.

Chapter Four

The focus of this chapter is the correlation between democracy and the attainment of gender justice. The chapter will also briefly look at institutions supporting gender justice in a democratic state.

Chapter Five

This chapter focuses on the impact of international instruments that protect human rights of women in the three countries.

Chapter Six

The concluding chapter deals with recommendations for reform of some specific laws that affect the rights of women.

CHAPTER TWO

Customary Law: A Stumbling Block to Gender Justice?

2.1 Introduction

The rights of individuals are mostly protected in national laws. From this writer's perspective as well as that of some feminists,⁷⁷ there is a perception that in countries with legal pluralism, African women are often subjected to a system of selective morality in terms of which men would claim the benefit of culture or tradition whenever it suited them.⁷⁸ Although there are fundamental rights that provide for equal rights, women often have to fight for the full enjoyment of these rights because of the so-called selective morality already alluded to above. Gender roles and traditional expectations of women in public and private spheres and systemic structure of

⁷⁷ See F Kaganas "The Context Between Culture and Gender Equality Under the Interim Constitution" (1994) 21 *Journal of Law and Society* 409. See also K Van Marle "Women On, and, In Law: I've this Creeping Suspicion that Things Are Not As They Seem" (2001) 34 *De Jure* 435 where the author made expositions on the feminist theories and the different viewpoints on what equality should be or not.

⁷⁸ This perception is inescapable when one reads the argument on behalf of the male parties in *Mthembu v Lestsela and another* 1997 (2) SA 936 (TPD) and *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (2) SA 544 (C).

unequal access to resources and opportunities are reasons for lack of full realization of women's rights.⁷⁹

The countries chosen for this study have made provisions in their respective Constitutions that deal with fundamental human rights such as equality and non-discrimination on the basis of sex.

2.2 Origin of Gender Justice as a Human Rights Norm

Within the context of the history of human rights, the recognition of equality between the sexes in all aspects of life is a recent development.⁸⁰ The principles of equal rights of men and women enshrined in the Charter of the UN gained more ground much slowly in national legal systems. The UN set standards to promote the rights of women through some of its specialized agencies which, in the course of time, have led to a tight network of international regulations in favour of the rights of women.⁸¹ Although these regulations exist, their dissemination to the population at large leaves much to be desired. There is also the problem of inadequate monitoring and advocacy groups in some countries.⁸² The vast majority of women require empowerment to enable them

⁷⁹ CA Brautigam "International Human Rights Law: The Relevance of Gender" in W Benedek, E Kisaakye and G Oberleitner (eds) *Human Rights of Women: International Instruments and African Experiences* (2002) 9.

⁸⁰ Recognition first came from the international community; the United Nations (UN) established in 1945 after the carnage of the Second World War has been at the forefront to promote the rights of women.

⁸¹ E Vogel-Polsky "The Right of Employed Women to Equal Pay and to Protection" (Theme 111), Working Paper for the Symposium on the European Social Charter and Social Policy Today (1977) AS/Coll/Charte 4-E. Some of the other agencies of the UN are International Labour Organisation (ILO), United Nations Education, Social, and Cultural Organization (UNESCO), United Nations Development Programme (UNDP).

⁸² CA Brautigam in Benedek *et al* (2002) 10.

to put pressure on their governments to observe these rights and international standards.

In 1985, the General Assembly of the United Nations adopted the Nairobi Forward Looking Strategies (FLS) for the advancement of women up to the year 2000. After five years of the set objectives of the FLS, it transpired from its appraisal that interdependence exists between different political and social sectors, on one hand, and the legal and social situation, on the other. Priority is given to issues of equality before the law as well as equal opportunities. According to Gaudart⁸³ eradication of discrimination will require the intervention of both government and non-governmental bodies (NGOs). Other strategies would include massive educational campaigns on human rights issues.

The General Assembly of the UN resolved in 1994 to use both formal and non-formal educational materials to publicize women's rights issues.⁸⁴ The UN created the Division for the Advancement of Women (DAW), which works under the auspices of the Economic and Social Council (ECOSOC). The Commission on the Status of Women was also created to foster relations that will improve and promote the rights of women in all spheres.

According to the gender expert Fekade,⁸⁵ the idea of gender mainstreaming is an important strategy of taking the struggle for women's rights forward. According to him,

⁸³ D Gaudart "Charter-based Activities Regarding Women's Rights in the United Nations and Specialized Agencies" in W Benedek, E Kisaakye and G Oberleitner (eds) *Human Rights of Women; International Instruments and African Experiences* (2002) 50 -51.

⁸⁴ CA Brautigam in Benedek et al (2002) 16.

⁸⁵ See K Fekade Gender Mainstreaming Analysis in L Muthoni Wanyeki (ed) *Women and Land in Africa; Culture, Religion and Realizing Women's Rights* (2003) 352.

gender mainstreaming involves the pursuit of balance between the gender, which would in turn efface stereotyping and social construct roles.

The UN commitment to women's equal rights formed the basis for the comprehensive body of international instruments that would develop and promote women's rights. The Commission for the Status of Women (CSW) was established in 1947 to give specific attention to the promotion of the rights of women. The Commission takes the leading role in elaborating on policies and strategies aimed at achieving gender equality.⁸⁶ From this standpoint, the Commission through its mandate gave a voice to the concerns of women starting from the Nairobi Forward-Looking Strategies in 1985, by way of policy implementation to reviews and progress appraisal made in the advancement of women at national, sub-regional and global arenas.

The Fourth World Conference on Women in Beijing, China gave new impetus to the gains made in ensuring the full enjoyment of women's rights. For the fourth time, world governments, non-governmental organizations and stake holders converged to re-evaluate the policies made and to map out new ways of dealing with novel areas or issues not covered in the original mandate.⁸⁷ Through the series of global actions and events on the advancement of women starting from mid-seventies, the achievement of women's equal rights and development have moved steadily to national sphere where most of the attention is required.⁸⁸

⁸⁶ Brautigam in Benedek *et al* (2002) 5.

⁸⁷ The Beijing Conference in 1995 created a platform for action from which world governments and non-governmental organizations could act upon to continue to promote gender equality.

⁸⁸ Brautigam in Benedek *et al* (2002) 6.

2.3 Gender justice and Customary Law

Gender justice refers to the attainment of an egalitarian society in which men and women have the same opportunities without any form of inhibition.⁸⁹ This kind of concept is not alien to customary law because it has a unique form of protecting the rights of the people by way of communal rights.⁹⁰ Most of the rules and practices have their basis on what the community considers to be right for them, with emphasis placed on the roles of the rulers and community elders. To put it differently, the concept of human rights has its basis on individual rights while customary law considers the community as a whole. To this extent, patriarchy⁹¹ as a norm refers to the crucial role played by men and elders in the society in shaping the social, political and economic lives of the people. It is a power structure in which, mostly men control means of production, political power, and economic influence in the society. The society thus fashions itself along the lives of the figure of the male person. Under this position, it is highly improbable that women would measure up because a divide has been created in which the men are the power

⁸⁹ See note 10 above where the notion of equality was described to mean the idea of equal access to opportunities and resources for men and women alike.

⁹⁰ It is generally known that in the traditional African society, the male person in the house cares for women and children and property is usually owned communally, people look out for each other as members of a community and problems are dealt with at clan meetings and gatherings.

⁹¹ See RB Mqoke "Patriarchy and the Bill of Rights" (2004) 25 (1) *OBITER* 109 at 111-112.

brokers in the public eye whilst women are relegated to the domestic sphere.⁹²

Within the context of customary law, most women in African society are hugely affected by rules and practices that affect them adversely thereby entrenching gender inequality. Such practices are mostly consequences of marriage under customary law and rules governing succession and inheritance, widowhood rites in places like Nigeria and witchcraft violence, which is prevalent in South Africa.⁹³

One of the key essentials of customary law marriage involves the payment of *lobola*, dowry, or *bohadi*.⁹⁴ As a result of the nature of marriage under customary law, the union is not necessarily that of the two people involved but more integrated kind of union between the two families. The consummation of customary law marriage bring into being reciprocal rights and obligations, which the

⁹² See D Singh "Woman Know your Rights! Recognition of African Marriages Act: Traditional Practices and the Right to Equal Treatment" (1999) *De Jure* 314 where the writer enjoins women to be aware of their rights and not to accept discriminatory inferior position, especially on the consequences of marriage under customary law.

⁹³ See generally these articles that deal with the issues listed above, P Mashangane " The Gender Implications of Witchcraft Violence and Strategies to Combat It" (2001) *De Jure* 488; V Bronstein "Reconceptualizing the Customary Law Debate in South Africa" (1998) *SAJHR* 403; W Van der Meide "Gender Equality v Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the 'Official' Version of Customary Law" (1999) *SALJ* 112; Kaganas and Murray "Law, Women and the Family: The Question of Polygyny in a New South Africa" (1991) *Acta Juridica* 116-134 and M Pieterse " Killing It Softly: Customary Law in the New Constitutional Order" (2000) *De Jure* 35.

⁹⁴ WCM Maqutu *Contemporary Family Law of Lesotho: A Historical and Critical Commentary* (1992) 117-125.

families are collectively responsible.⁹⁵ The wife's family gives certain guarantees to the husband's family that the wife will fulfill her duties within the family such as proper keeping of the house and rearing of children. High premium is placed on children in a customary law marriage, and in some cultures, having male children takes pre-eminence as they are expected to carry on the family name while the women are expected to be married off. The undertaking by the wife's family has a reciprocal response from the husband's family group that the wife will be treated well to enable her take proper care of the home, her husband and children.⁹⁶

The significant point to note from this situation is that it tends to create a sense of belonging and social status for the parties involved but the down side is that customary law marriage is not easily dissolved. The marriage relationship is not terminated by death, because the wife is united to the husband's family group and after his death she still remains wife to his family until the customary marriage could be dissolved in a manner valid under customary law, which would entail paying back the dowry or *lobola*. Otherwise, the wife may be given in marriage to a relation of the deceased husband in terms of

⁹⁵ See *Mabuza v Mbatha* 2003 (4) SA 218 (C) where Hlophe J dealt with the integration of the bride into the family of the Bridegroom.

⁹⁶ In a marriage ceremony to which the present writer was in attendance, these were the sentiments put forward for the appropriate conclusion of the marriage ceremony in a town called Mgbowo in Awgu Local Government Area of Enugu State, Nigeria in 1991. This area is also one of those in the Igbo land of the South East people of Nigeria.

levirate relationship especially where the husband died without having children with the wife.⁹⁷

In Nigeria a husband married under statutory law cannot take another wife under any other regime of marriage but in reality men who are married under statutory law, do contract subsequent marriages even though they are aware that it amounts to bigamy, which is a criminal offence under Nigerian law.⁹⁸

The legal position of women in Lesotho is no better than the Nigerian scenario already sketched above. In that country, women are regarded as minors and cannot enter into any contract on their own without the help of their husbands or someone who acts as a legal guardian.⁹⁹ The role of *bohali* in a Sesotho marriage has attracted significant academic interest.¹⁰⁰ Sesotho marriage is an

⁹⁷ JC Bekker (ed) *Seymour's Customary Law in Southern Africa* (1989) 273. It flows from these consequences arising from customary law marriage that though the marriage may raise social status, on the one hand, it also places women in a dependent position, on the other hand. However, the social status of being married in recent times has diminished considerably given that women no longer depend on a male person for her to have all the necessary social standing, and also the high rate of divorce as well as successful career women raising children as single mothers add to the irrelevancy of the culture described above.

⁹⁸ The only record of prosecution for bigamy in Nigeria was the case of *R v Princewell* 1963 2 All NLR 31. This is a poor reflection of the current situation.

⁹⁹ J Akokpari "Contemporary Governance and Development Issues in Lesotho: Implications for the Ombudsman's Office (1999) 12 *Lesotho Law Journal* 79.

¹⁰⁰ R Songca "A Critical Analysis of Customary Marriages, Bohali and the South African Constitution" (1997) 10 (1) *Lesotho Law Journal* 28-29 (and other sources cited therein), the writer argued here that *Bohali* acts as the link between the families and does not mean the 'selling' of daughters as many people considers it to be.

institution that recognizes the importance of family relationship and the role of families in the formation of a marriage. Previously, the Christian Church in Lesotho did not accept the payment of *lobola*, as it considered it a form of commercial venture in which a woman is exchanged for a number of cows.¹⁰¹

The issue of polygamy has also been a cause of concern, as it is perceived as a custom, which is degrading to women. This is because the women are used excessively as labour hands on the farm; they are often regarded as servants not partners thereby depriving them of their dignity and equality as man's partner for life.¹⁰² Polygamy discriminates against women because it allows men to marry more women as wives at the same time but the same does not exist for women, women also do not exercise proper control of their reproductive autonomy because they often have children randomly in the bid to have heir to the estate and these children are not usually spaced. However, women who enter into polygamous marriages contend that it gives them social status and the rate of divorce in monogamous relationship does not produce any better result

In South Africa the Recognition of Customary Marriages Act has remedied the situation in a number of ways by introducing the necessary safeguards for the

¹⁰¹ WC Maqutu "Current Problems and Conflicts in the Marriage Law of Lesotho" (1979) XII *CILSA* 176. See also "Lesotho's African Marriage is not a "Customary Union"" (1983) XVI *CILSA* 1983 374 by the same author. Presently, giving of cows is an acceptable practice in Lesotho even for those who contract civil marriages.

¹⁰² Songca (1997) 24-28, compare and contrast the position in South Africa as noted in F Kaganas and C Murray "Law, Women and the Family: The Question of Polygyny in a New South Africa" (1991) *Acta Juridica* 116-134.

protection of women in the form of a written contract to be concluded should the husband wish to take a second wife.

2.4 Conclusion

From the above discussions, it is clear that some outdated customary practices constitute a major stumbling block in the achievement of gender justice in countries that recognize a system of legal dualism or pluralism. With the exception of South Africa, in the other countries chosen for this survey women do not have access to land. The mechanisms considered by the various governments do not produce the desired effect of ownership and right to alienate land by women.

The high incidence of deaths as a result of witchcraft violence in South Africa is a major concern that requires urgent action on the part of parliament to revisit the current Act and make required changes as recommended by the Ralushai Commission.

Widowhood rites in Nigeria infringe on women's rights to equality because the rites only adversely affect women; their rights not to be subjected to inhuman and degrading treatment are also affected.¹⁰³

¹⁰³ The Constitutions of these countries prohibit inhuman and degrading treatments, See generally note 127 below on the status of widows in Nigeria and the various treatments they could receive at the hands of their in-laws. Some of these treatments are meted out to the wife that is suspected of having contributed to the death of the spouse especially in the case where the death is mysterious or viewed with suspicion.

CHAPTER THREE

Legal Positions of Women: Inconsistencies and Practices

3.1 Introduction

It is indisputable that land is the most important resource for the African people.¹⁰⁴ The social status and economic viability of any group or person depend on the ownership and use of land and its fruits by them whether as individuals or as a group. Despite the fact that African women produce about 75 percent of food and provide about 80 percent of Africa's farm labour,¹⁰⁵ they cannot own or inherit these lands that they till. The impact of this form of discrimination cannot be overstressed especially given the major role African women play today in a continent plagued by hunger, poverty and diseases (such as HIV/AIDS) where they have to fend for the majority of patients and orphans and women-headed households. To this extent, this chapter seeks to investigate the extent to which the three countries treat women issues particularly women's access to land, marriage and succession.

¹⁰⁴ M Robertson "Land and Post-Apartheid Reconstruction in South Africa" in S Bright and J Dewar (eds) *Land Law, Themes and Perspectives* (1998) 310.

¹⁰⁵ See the *In Brief: April 2002* of the LandWeb (NGOs and Land Advocacy in Eastern and Southern Africa), "African Women and Land Ownership" at www.mwengo.org/land/inbrief-april02-1.htm (accessed on 10 November 2005).

3.2 Legal Position of Women in South Africa, Nigeria and Lesotho

3.2.1 South Africa

In South Africa although constitutional democracy has replaced the previous system the grave injustice that the oppressive apartheid system¹⁰⁶ unleashed on the people spanning over four decades is still evident in the lives of the majority.¹⁰⁷ Land restitution by the Land Affairs Ministry of the government is still trying to redress the injustices of the past.¹⁰⁸

¹⁰⁶ The system of segregation referred to as 'apartheid' which was based on racial discrimination and segregation that started in South Africa in the 1950s and ended in 1994 when South Africa achieved democracy. See The United Nations publication on Human Rights, "Historical Images of Apartheid in South Africa" at <http://www.un.org/av/photo/subjects/apartheid.htm> (accessed on 11 November 2005).

¹⁰⁷ The impact of apartheid on the majority is evident in the slow transformation of the judiciary, lack of adequate housing, high unemployment rate, free education in some provinces recently announced by the Minister of Education to bridge the gap of poor education and the current wave of Black Economic Empowerment (BEE) aimed at ownership of businesses by black people.

¹⁰⁸ The Government White Paper on South African Land Policy of the Department of Land Affairs (1997) noted the following land policy issues: Violence orchestrated by insecure status of most forms of black land rights gives rise to disputes and uncertainty. The White Paper recognizes that many tenure arrangements such as tribal and communal tenure, legacy of apartheid and colonisation discriminate against women, coupled with lack of women in decision-making in land issues and management at 3.21 and 3.24 respectively. This kind of situation is also noted in the Niger-Delta area of Nigeria where one crisis after another has been taking place for the last five years.

Given the history of South Africa regarding land matters, it has also been imperative to curb unwarranted invasion of land other than through the measures identified by the land restitution programme. Some pieces of legislation enacted for this purpose are the Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998, which is deeply anchored in s 26 (3) of the Constitution, and the Extension of Security of Tenure Act 62 of 1997.¹⁰⁹

Generally women acquire land in South Africa through their husbands or as a group of people in a community or they purchased from an owner but this particular type of acquisition occurs mostly in the metropolitan and urban areas. The land rights of women may include: right to occupy a homestead, to use land for annual or perennial crop, to have access to the fruits of the land, mortgage or lease and rent land.¹¹⁰ Where a testamentary disposition exists, the issue of distribution of property is not a problem.

¹⁰⁹ The whole essence of these legislations is distributive and corrective justice as well as equity. The courts have had its own fair share of determining the extent of the rights in these legislations in the cases of *Ndlovu v Ngcobo; Bekker and Another v Jijka* 2003 (1) SA 113 (SCA), *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelters* 2000 (2) SA 1074 (SECLD) and *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W).

¹¹⁰ Martin Adams, Siphon Sibanda and Stephen Turner "Land Tenure Reform and Rural Livelihoods in Southern Africa" (1999) 39 *Natural Resource Perspectives* 2 at <http://www.odi.org.uk/nrp/39.html> (accessed 10 November 2005). Although these rights in land may exist, it is very important that to achieve sustainable economic development in the society, women need to be involved in decision-making process of land reform, see in this regard JM Pienaar "Land Reform and Sustainable Development- A Marriage of Necessity" (2004) *OBITER* 269.

Communal Land Rights Act¹¹¹ is one of those pieces of legislation that would improve equality for women, when implemented because in terms of this Act, people including women would be encouraged to acquire land as members of a group in terms of the land restitution programme of the government and they would be able to acquire land on their own. Although the Act intends to support gender equality, certain allegations have been levelled against it with respects to the kinds of people that it would protect. For example, the Act purports to make reference to communities, which is not actually the same as tribal community or tribes as it exists under the custom of the people.¹¹²

With respect to marriage under customary law, the Recognition of Customary Marriages Act¹¹³ has considerably changed the position for women in South Africa. Notable among these are the following: the definition of marriage, its recognition and validity, personal and proprietary consequences and the dissolution provision. The most profound effect is on the status of women under customary marriage. Section 6 provides that:

"A wife in customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter contracts and to litigate, in addition to any rights and powers that she might have at customary law"

The section has removed the constraints on women and gave them legal capacity like their male spouses; in other words, women are no longer perpetual minors. The Act also provided for matrimonial property regime which is,

¹¹¹ Act 11 of 2004.

¹¹² RB Mqoke *Customary Law and the New Millenium* (2003) 112.

¹¹³ Act 120 of 1998, which came into force on 15 November 2000.

previously unknown under customary law. Women married under customary law could acquire proprietary rights during the subsistence of the marriage. This is an historic move to ensure that women are not unduly disadvantaged when the marriage is dissolved.¹¹⁴

The position of women regarding succession and inheritance has been radically changed by the decision of the Constitutional Court in the *Bhe* case, because female descendants of a deceased man could inherit from his estate in the same way as a male descendant, under

¹¹⁴ Section 7 deals with the proprietary consequences while section 8 deals with a variety of issues such as grounds for dissolution, rescission, variation or suspension of orders. The Act further provides for accrual system which gives either of the spouses the opportunity to share in the profits made to their estates during the subsistence of the marriage. S 8(1) provides that "A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of marriage". And s 8(3) "Mediation in Certain Divorce Matters Act 24 of 1987 and s 6 of the Divorce Act 70 of 1979, apply to the dissolution of customary marriage". The relevance of the two Acts in the Recognition of Marriages Act is that it creates the opportunity for safeguarding the interests of dependent as well as minor children. It further provides for the intervention of the Family Advocate in divorce cases to protect the interests of the children. S 8 (4) (b) of the Act provides that "in the case of a husband who is also a spouse in more than one customary marriage, must take into consideration all relevant factors including any contract, agreement or order made in terms of s 7 (4), 5, 6 or 7 and must make any equitable order that it deems just". The significance of this particular provision is that it provides for gender justice for spouses in polygny unions to be able to have equitable share in the family estate. One may argue that these provisions are not aimed at developing customary law but rather to continuously view customary law through the prism of common law. However, note the criticisms levelled against these forms of reform in C Himonga "The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession" (2005) *Acta Juridica* 82.

marriages conducted in terms of customary law. What remains is to harmonize the laws to properly reflect the strides that the courts have made to promote equality jurisprudence with respect to customary law of succession and inheritance in South Africa.

Another issue that has raised considerable concern in South Africa is the response by Africans to matters of witchcraft. Witchcraft is a mythical belief and a traditional African belief system from which, regrettably many women have met their deaths at some unsubstantiated allegations of witchcraft. The current legislation on witchcraft is the Witchcraft Suppression Act¹¹⁵. The mere fact that there is an Act related to this issue is an express concession of its existence as a belief system in the country. It is mainly women who are attacked by mob justice on suspicion of witchcraft as noted in the case of the people in Limpopo Province as well as media information.¹¹⁶ The anomalous situation, which this belief system has created, is the notion that only women are witches and the law is not clear on who is a witch and the requirements to be met to properly make identification on cases of suspicion or actual witch-hunting. The Ralushai Report¹¹⁷ made suggestions on words to be inserted into the Act to make the position of the law clear. The situation calls for a revision of the law governing this aspect of the lives of the people. To continually ignore the

¹¹⁵ Act 3 of 1957.

¹¹⁶ See generally the *Daily Sun* 9 December 2005 and *Daily Dispatch* 10 January 2006 where it was reported that three women have been killed for allegedly being witches. See also P Mashagoane "The Gender Implications of Witchcraft Violence and Strategies to Combat It" (2001) *De Jure* 488 on why witchcraft is gendered.

¹¹⁷ The report of a Commission of Inquiry into the witchcraft violence of 1995 in Limpopo Province. Phosa Mashangane (2001) 496.

ramifications of the numerous deaths caused through unsubstantiated allegations of witchcraft would be making a mockery of equality guarantees contained in chapter two of the Constitution. Also in the judgment of the Constitutional Court in *Carmichele v Minister of Safety and Security and Another* the court indicated that vulnerable people of the society should be protected.¹¹⁸

3.2.2 Nigeria

The Constitution that governs Nigeria is the Federal Constitution of 1999. The writer observes that the only plausible reason for the late constitutional framework given that the country gained independence on 1 October 1960 is as a result of the fragmented history of military incursion into the politics of the country. It is also common knowledge with the Nigerian context; the military suspends the Constitution whenever they are in power and adopts its own decrees. According to the Constitution,¹¹⁹ it is the supreme law of the land from which all other laws derive their source.¹²⁰ With regards to equality as a

¹¹⁸ 2001 (4) SA 938 (CC); See also J Harnischfeger "Witchcraft and the State in South Africa" in John Hund (ed) *Witchcraft Violence and the Law in South Africa* (2003) 45.

¹¹⁹ The 1999 Constitution of the Federal Republic of Nigeria. Section 1 of the Constitution provides that 'the Constitution is supreme and its provisions shall have binding force on authorities and persons throughout the Federal Republic'.

¹²⁰ The legitimacy of this Constitution has been questioned by some writers such as Chris U Anyanwu "General Introduction" in MM Gidado, CU Anyanwu and AO Adekunle (eds) *Constitutional Essays in Honour of Bola Ige; Nigeria Beyond 1999: Stabilizing the Polity through Constitutional Re-engineering* (2004) and Julius Ihonvbere "Principles and Mechanisms of Building a People's Constitution: Pointers for Nigeria" in the same volume. The criticisms were made because of the origin of the Constitution as a product of military decree 24 of 1999

value as found in South Africa, the country has been unable to develop her equality jurisprudence that is aimed at both substantive and *de facto* equality.¹²¹ Within the country's Constitution, there is an equality clause that generally forbids discrimination on grounds of sex, religion, and political opinion.¹²² Although these grounds exist, they constitute a closed-list that do not allow for further expansion. Generally the Constitution does not forbid discrimination on the basis of gender. In this writer's opinion this is a huge oversight in view of the multi-ethnic and multi-cultural nature of the country because where there are no integrated efforts at making equality a value that would be of immense benefit to women, it is possible for society to hide behind customary law practices to discriminate against women.

The tribe to which the individual belongs determines land rights in Nigeria as alluded to in Chapter One. In other words, there are no uniform rules on customary land tenure but merely broad principles that exist to guide the different communities. The Land Use Act of 1978 has dramatically changed the customary land tenure system for the worse¹²³. It does not, however, detract from the fact that customary law is still an important part of the majority of the people.

of the Provisional Ruling Council of the Nigerian Armed Forces. See also the criticisms on the wordings of the Constitution as being predominantly male rather than gender neutral in Agomo CK "Gender and Human Rights in Nigeria" (2003) 1 *Codesria Bulletin* 4.

¹²¹ It is not entirely clear from the writer's perspective on why equality issues are hardly brought into focus as an important national issue by way of pieces of legislation that would protect the rights of women.

¹²² Section 42 of 1999 Nigerian Constitution.

¹²³ AA Utuama "Customary Law and Land Use Act, 1978" in B Ajibola (ed) *Towards a Restatement of Nigerian Customary Law* (1991) 124.

In terms of succession and inheritance according to the Yoruba law, the most current position is that the children of the deceased are entitled to inherit from their deceased parent's estate to the exclusion of other blood relations; also on the death of intestate father, his property devolves on his children as family property. All the children are entitled to this family property under the management of the eldest surviving son called *Dawodu*.¹²⁴ Children born of the deceased and those he acknowledged as his children under customary law can inherit from his property. The same applies to all children irrespective of age, sex or absence.¹²⁵ The general rule with the people of the South East part of Nigeria comprising Igbo speaking tribes of Imo, Enugu, Anambra, and the Ijaws, Kalabari and Ibibio people on the riverrine areas is that the property of the deceased devolves according to male descendants.¹²⁶ Similarly, the Igbo custom discriminates against women in total disregard of the equality guarantee contained in the Nigerian Constitution. For instance, in Igbo tradition of some

¹²⁴ M Yakubu "Property Inheritance and Distribution of Estates Under Customary Law in B Ajibola (ed) *Towards a Restatement of Nigerian Customary Law* (1991) 136. Compare the idea of 'Dawodu' with the "stepping into the shoes of the father" espoused by some writers in South Africa, see generally L Mbatha "Reforming the Customary Law of Succession" (2002) 18 *SAHRJ* 259 where the author dealt with the problems associated with heirs stepping into the shoes of the deceased.

¹²⁵ *Salami v Salami* (1957) *Western Region of Nigeria Law Report* 10. In this case, the plaintiff who was a daughter of the deceased left for another country. When she returned, she requested for her own share of the father's property and accounts from her brothers. The brothers contested the claims on the basis that she is a female. See the Judge's decision in note 53 above.

¹²⁶ M Yakubu in Bola Ajibola (1991) 138-139.

parts of the East of Nigeria, female children cannot inherit property from their parent's estates according to the 'oliekpe' custom of the Nnewi people, where male children are the preference.¹²⁷

Another instance where the Constitution has created a loophole for people to hide behind custom and religious belief is the popular case of Sharia law, which is basically about the customs and culture of Islam. In 2000, Zamfara State became the first to adopt the Sharia penal code to govern the State; ten other Northern States have since adopted the penal code as well.¹²⁸ Today, the existence of the Sharia law side by side with the supreme Nigerian Constitution has resulted in many unresolved legal and cultural conflicts and uncertainties. The Sharia penal code as it is applied in Nigeria condones marital

¹²⁷ *Mojekwu v Mojekwu* 1997 (7) *Nigerian Weekly Law Report* 283 at 288-289. In this case, the Court stated: "'Oliekpe' custom, which permits the son of a deceased brother of a deceased person to inherit his property to the exclusion of his female child, is discriminatory and therefore inconsistent with the doctrine of equity, we need not travel all the way to Beijing to know that some our customs, including the Nnewi 'Oliekpe' custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant. In my humble view, it is the monopoly of GOD to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that GOD, the creator of human beings is also the final authority of who should be male or female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty GOD himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oliekpe' custom of Nnewi is repugnant to natural justice, equity and good conscience".

¹²⁸ Barnaby Phillips, "Nigeria's Borno state adopts Sharia" at <http://news.bbc.co.uk/1/hi/world/africa/887355.stm> (accessed on 22 June 2006). Other states that have adopted the Sharia penal code are Sokoto, Kaduna, Niger, Yobe, Kano, Jigawa, and Borno states.

rape by the husband of his wife, and there are fatal consequences for fornication or adultery for the woman but not the man.¹²⁹

In most parts of the Igbo land, customary law marriage is a relationship usually founded on the mutual agreement between the two families. It is considered an aberration for a person to contract a marriage without the consent of the parents.¹³⁰ In these parts of the country, no valid marriage exists between a man and a woman until the bride price is paid, or at least in part.

With respect to the acquisition or ownership of land in the Okigwe area of Igbo land, a woman cannot acquire land in her own name; she can only do so in her husband's name or in the name of her children.¹³¹ However, the family of the woman at the time of her marriage may give land to her as a present. Under this situation, the husband may have use of the land but may not alienate or dispose of it without the consent of the wife. The little gains made here are usually lost because the woman cannot dispose of her property by will to a person outside of her nuclear

¹²⁹ The case that made world headlines in 2003 was that of Amina Lawal, a thirty-year-old woman that was to be stoned to death for having a child out of wedlock. The situation evoked international outcry and had since been resolved in favour of Amina. See also the following writers where the issue of Islamic religion affected women adversely and prevents them from participating in governance or religious office; Rolien Ross "Gender Differentiation within Religious Communities" (2004) 18 (1) *Speculum Juris* 96, P Paidar "Encounters Between Feminism, Democracy and Reformism in Contemporary Iran" in M Molyneux and S Razavi (eds) *Gender Justice, Development and Rights* (2002) 242-243.

¹³⁰ C Okoroafor "Memorandum on Customary Laws Centred Around the Customary Marriage Law of Okigwe Local Government Area, Imo State" in B Ajibola (ed) *Towards a Restatement of Nigerian Customary Law* (1991) 438.

¹³¹ Okoroafor in Bola Ajibola (1991) 439.

family because it is fixed under customary law that her husband and children only should inherit her property.¹³²

Widows in Nigeria suffer a lot of human rights abuses, which are degrading and inhuman. In the Eastern part of the country, it is common knowledge that a widow is expected to shave her hair a few days after her deceased husband's interment. In addition, the widow would be expected to wear black clothing for one year or white attire depending on the age and status of the deceased in the community.¹³³ At the time of the mourning rites, the widow is kept away from other people and her interaction with people is restricted, for fear of any further ill-luck that might befall the widow as a result of too many people around her and touching her at the time. Failure to perform any of these rites by the widow would generate irate responses from the family resulting most of the time in lots of threats and psychological trauma for the widow. In a situation where the deceased died of mysterious circumstances, the conditions for the widow take a very inhuman twist because the family of the deceased man could use any means to prove the innocence of the widow.¹³⁴ It is a general rule that a widow cannot re-marry until she has

¹³² This kind of situation underlies the indignity suffered by women because under the system described above, the husband may inherit from the woman from a land she got as a gift but she may not inherit under any circumstance with her husband under customary law.

¹³³ BE Madunagu "Gender Rights and Gender Politics in the Fourth Republic" in MM Gidado, CU Anyanwu and AO Adekunle (eds) in *Constitutional Essays in Honour of Bola Ige; Nigeria Beyond 1999: Stabilizing the Polity through Constitutional Re-engineering* (2004) 160-163 where the author dealt with the issues of marriage, citizenship and harmful practices against widows in Nigeria.

¹³⁴ Madunagu in Gidado, Anyanwu and Adekunle (2004) 162.

finished the length of the mourning period as prescribed by the particular community.¹³⁵

This unbearable position of widows, never applies to men in the manner experienced by women. In fact, most men do not observe the lengthy period of mourning and the associated dressing attire. The community expects the man to remarry as soon as possible to enable him take care of his family especially where there are minor children involved. The treatment meted out to widows in Nigeria is clearly an indication of the persistent violation of women's rights.

3.2.3 Lesotho

In Lesotho, there is the monarchical head as well as the Prime Minister who has the executive powers of the country.¹³⁶ The Constitution provides for fundamental human rights and freedom irrespective of sex and it further provides for equality before the law and equal protection of the law.¹³⁷ Although these constitutional provisions exist, section 18 (4) (b) of the same Constitution provides for the application of customary law that may be discriminatory because the grounds of discrimination provided in s 18 (3) cannot be applied to personal matters such as adoption, marriage, burial and devolution of property on death. This position, in this writer's view, contradicts the equality provisions and to a large extent completely erodes the same right.

¹³⁵ C Okoroafor in Bola Ajibola (1991) 441.

¹³⁶ See "The Lesotho Cabinet" at <http://www.lesotho.gov.ls/executive/cabinet.php> (accessed on 22 June 2006).

¹³⁷ Section 4(1) and s 19 of the Lesotho Constitution respectively.

Customary law as applied in Lesotho renders women perpetual minors, who cannot enter into any binding legal contract, or have *locus standi in judicio* without the consent of a husband.¹³⁸ Women married under this law can only inherit property as a widow in a family with no sons. The female children are not considered in any way to inherit property. Women are always under the guardianship of a male figure. In some cases, under customary law, a man may make written instruction regarding the distribution of his property, if left for a female descendant and for the purposes of validity, the major part of the estates must go to a male heir.¹³⁹

Indeed, in Lesotho, just like in Nigerian customary law, there is conflict with both the received law and the country's Constitution. In this regard Lehohla makes the following comment:

"It is, however, in the fields of customary marriage and succession to deceased estates that differences are clear between Basotho custom and the received Roman Dutch law..."¹⁴⁰

The Lesotho customary marriage is a complex one because people equally conduct civil marriages after the customary ceremony, which must be characterized by the

¹³⁸ WC Maqutu "Current Problems and Conflicts in the Marriage Law of Lesotho" (1979) XII *CILSA* 176.

¹³⁹ Although this position may benefit women in some ways, the central figure remains the male person to whom the woman must be directly or indirectly attached. See "Lesotho" (Equality Now submission to the United Nations Human Rights Committee 65th Session, March 1999) at (http://www.equalitynow.org/english/campaigns/un/unhrc_reports/unhrc_lesotho) (accessed on 15 November 2005).

¹⁴⁰ ML Lehohla "The Role of Customary Law in Developing Africa" (2004) 10. These comments were made in a paper delivered in Washington DC by the author as Chief Justice of the Kingdom of Lesotho.

payment of *Bohali* at least in part.¹⁴¹ As a result of this common trend, a dual system of marriage exists in that country which has in no way ameliorated the position of women. Proprietary consequences of marriage for women become more complex because of the legal dualism, where each one of these marriages has different consequences.¹⁴² In fact, the situation creates further problems associated with polygamy such as the times the wives visit their husbands or whose turn it is to make food for their husbands or who should accompany the husband on important occasions. Customary marriage in Lesotho is potentially polygamous, and as such a man can marry more than one wife.¹⁴³ Recently, polygamy seems to be on the decline because of the number of animals that are required by custom for marriage, which is twenty head of cattle. Consequently, in practice a lot of men do not marry more than one wife.¹⁴⁴

On the question of land in Lesotho, the Land Use Act of 1979 is the legislation guiding land issues in that country. In terms of this legislation, the land vests in the monarch in trust for the people of Lesotho. Traditional leaders have roles to play in the management of land affairs because of the traditional character of the country. Lesotho is land-locked within South Africa,

¹⁴¹ WCM Maqutu "Lesotho's African Marriage is not a "Customary Union"" (1983) XVI *CILSA* 374.

¹⁴² NAM Fanana "Legal Dualism and the Rights of Women: Thoughts for Law Reform in Lesotho" (2001-2004) 14 (1) *Lesotho Law Journal* 133-140, it is stated that the Lesotho situation demands urgent attention because it is not only women married under customary law who are in an unequal position but also women married under common law in that country.

¹⁴³ NAM Fanana (2001-2004) 132.

¹⁴⁴ See also ML Lehohla, (2004) 9 where the writer stated that polygamists constitute about 10 percent of the population.

so it suffers from acute shortage of arable land, which by 1986 had shrunk to 9 percent of the land area and 25 percent of rural population were landless.¹⁴⁵

Given the statistics above, it is obvious that land issue in Lesotho is a precarious one and the position of women would not be any better than already seen under customary law system. The government has made proposals for a new Land Bill, which will take into account the problems of the past. To what extent this proposed Bill would consider gender equality remains to be seen.¹⁴⁶

3.3 Conclusion

South Africa has created a pathway in the short time of her democracy (11 years), which other African Countries could emulate. It has enacted almost 720 legislations, with a good number of them aimed at ensuring, promoting and protecting equality between the sexes. Although significant progress has been made in South Africa, areas that require urgent attention are securing the land tenure, accelerated land claims and restitution as well as sustainable developmental projects aimed that educating women on their rights as well as managers of service deliveries to ensure compliance with the law.

¹⁴⁵ Martin Adams, Siphosiso Sibanda and Stephen Turner "Land Tenure Reform and Rural Livelihoods in Southern Africa" (1999) 39 *Natural Resource Perspectives* 9 at <http://www.odi.org.uk/nrp/39.html> (accessed 11 November 2005).

¹⁴⁶ CQ Selebalo "Creation of Land Records Prior to Formal Registration in Lesotho" (2000) 8-11. The author of this article who is the Chief Surveyor in the Department of Lands, Surveys and Physical Planning in Lesotho pointed out areas that require reforms in the acquisition and ownership of land in that country. Another Bill that would alleviate the position of women when it is signed into law is the Married Persons Equality Bill.

Lesotho, has not truly tapped into the potentials of her proximity with South Africa in areas of gender equality, law reform to democratize its institutions and government agencies. The rights of women urgently require reform in areas of legal capacity, customary law and land ownership and acquisition. The level of progress is still very slow and must be accelerated by governments by way of creating an enabling environment for democratizing its institutions.

Nigeria could do better in promoting gender justice by way of enacting specific pieces of legislation that would protect the rights of the ordinary woman. Although, in some areas, modern life styles may seem to be changing the position of women but where these lifestyle changes are not backed by proper legislative measures the majority tends to suffer unnecessary consequences.¹⁴⁷ The courts, on the other hand, are making progress on the pronouncements regarding the customary rule of primogeniture,¹⁴⁸ the House of Senate must then harness these progresses made by putting appropriate legislative measures in place.

Nigeria has a multi-ethnic and multi-cultural links and these dynamics must be taken into consideration in order to create appropriate equality jurisprudence.

¹⁴⁷ Nigerians are known to be travellers especially people from the Igbo and Yoruba tribes, and so they imbibe cultures of other people as a result of these interactions.

¹⁴⁸ Notable among them is the landmark judgement in the case of *Mojekwu v Mojekwu* 1997 (7) Nigerian Weekly Law Report 283.

CHAPTER FOUR

The Correlation Between Gender Justice and Democracy

4.1 Introduction

One of the tenets of democracy¹⁴⁹ involves representative government in which the people elect their leaders from the small communities to the national level and it is expected that both men and women are part and parcel of this representation. As a result of the trend of making the world a global village, new ways are emerging to ensure that world's governments set the stage for development. The process commences with a wide and robust definition of a modern democracy. Modern democratic principles of any government must include adequate representation by the people in which they are duly informed of the plans and activities of the government

¹⁴⁹ B Crick *Democracy: A very Short Introduction* (2002) 8-9. In this book the author said that democracy in today's world has been the most frequently used word to explain the process of rights, governance and development. It is also one of the most misused concepts, as the word could mean different things for people such as respect for human rights, freedom of expression, equality and freedom. All these values are necessary for the society but does it mean that one aspect will suffice or will all of them be sufficient; the achievement of these values would lead to a process being institutionalized which would ensure development, state security and peace for the society. The concept of right to democratic governance has taken root in Africa as noted in Chapter Two; "Articulating the Right to Democratic Governance in Africa" in NJ Udombana *Human Rights and Contemporary Issues in Africa* (2003) 35 -106.

through appropriate medium, for example, the Constitution, statutes and regulations and policy formulations.¹⁵⁰

In the previous chapters, the writer dealt with the rights of women in different aspects of their daily living, and the focus here would be on the extent of women participation in levels of government and the effect of the participation in achieving gender justice.

Also under subtitle 4.5 below, the writer would briefly discuss the various agencies and institutions that support democracy in the countries under study. It is common knowledge that the ideals of democratic principles are mostly streamlined where there are agencies supporting them as well as non-governmental agencies such as the Women's Legal Centre in South Africa, Lesotho Council of Non-governmental Organisation and the National Council for Women Societies in Nigeria.

4.2 Representative Democracy In South Africa

From the beginning of the multiparty negotiations¹⁵¹ leading up to the democratically elected government in 1994, the government envisaged a peoples' government¹⁵² founded on the following values: "(a) Human Dignity, the achievement of equality and the advancement of human rights and freedoms, (b) non-racialism and non-sexism... a multi party system of democratic government to ensure accountability, responsiveness and openness"

To give effect to these ideals, the government considered proportional representation as the most

¹⁵⁰ Crick (2002) 8.

¹⁵¹ Prior to the democratic elections that took place in South Africa in 1994, Trade Unions, Civil Societies, Governments and all stakeholders met at Kempton Park to deliberate on the epoch-making return of South Africa to democracy and to the Committee of Nations.

¹⁵² S 1 of South African Constitution.

appropriate means of reaching its target at all levels of government.¹⁵³ According to the Beijing Platform for Action,¹⁵⁴ it was agreed that women should make up at least 30 percent of the representation at all government levels. In South Africa, women MPs in the National Assembly account for 29.8 percent and it is an impressive 27.4 percent increase to the representation in 1987. In fact, South Africa ranks 13th among nations in female representation and second in Sub-Saharan Africa.¹⁵⁵ It is an important policy of the ruling ANC to include a 30 percent quota for women representations in Parliament. The basis for this could be linked to the importance of women in nation building, which the government realized early on at the inception of democracy in South Africa.¹⁵⁶

It has been argued by several writers that large numbers of women in the governing structures would have a positive impact on public policy and political process.¹⁵⁷

¹⁵³ C Murray and L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 11.

¹⁵⁴ See generally the UN documents of the 1995 Beijing Conference declarations, "Fourth World Conference on Women Beijing Declaration" at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> (accessed on 22 June 2006), Article 13 of the declaration provides for women empowerment and full participation on the basis of equality in decision-making process and access to power as key elements for equality, development and peace.

¹⁵⁵ SA Nolan "Electoral Reform and Female Representation in South Africa's National Assembly" (2004) 19 (2) *South African Public Law* 378. Rwanda ranks first in the world and Mozambique ranks second in Africa.

¹⁵⁶ Most currently, President Mbeki in his State of the Nation address 2006 announced that the ratio for representation between men and women would now be 50/50. This is evidenced in the increased number of women holding government positions in the country.

¹⁵⁷ SA Nolan (2004) 379. See also AM Goetz and S Hassim "In and Against the Party: Women's Representation and Constituency-Building

According to them¹⁵⁸ women groups and coalition have been instrumental in ensuring that women are represented in governing structures and it is only through such involvement that they are able to influence decisions and policies. The writers compared the situation in South Africa and Uganda, where women reached an agreement with the incumbent President Yoweri Museveni to support him as a presidential candidate with the aim and objective of being appointed into government positions. The alliance has helped immensely in the kinds of policies affecting women that have been adopted by that government. Notable among them is the programme adopted by the Ugandan government to reduce the rate of HIV/AIDS infection in Uganda, one of the few success stories of government working together with women. The increase of women representation does not only reflect positively on the ruling party of the ANC in South Africa, but other parties such as the opposition party, Democratic Alliance (DA) have noted marked increase in representation.¹⁵⁹

It is very significant that women could have positive influence on government of the day as seen by the actions of women in Uganda. The South African position is not very far from such co-ordinated actions on the part of the ruling ANC to make women part of the governing structure, not as a token that they are women but as competent, high

in Uganda and South Africa" in Molyneux and Razavi (eds) *Gender Justice, Development, and Rights* (2002) 317. These writers comment on the basis for women representation in South Africa, which is according to them linked to the liberation movements for freedom and dignity during the Apartheid era. They also reviewed the efforts made by women coalition groups and the Parliamentary caucus of women MPs in ensuring adequate women representation within the levels of government.

¹⁵⁸ AM Goetz and S Hassim in Molyneux and Razavi (2002) 306.

¹⁵⁹ SA Nolan (2004) 386-389.

calibre and exceptional individuals as could be seen from the likes of the Deputy-President; Ms Phumzile Mlambo-Ngcuka, the Minister of Foreign Affairs Dr Nkosizana Dlamini-Zuma and the Minister of Public Service and Administration, Grealine Fraser-Moleketi to name just a few.

Despite the significant number of women at all levels of government in the country, South Africa remains one of the most violent countries of the world in which acts of violence committed against women are enormous.¹⁶⁰ This situation depicts the darker side of the spectrum and the question would be to what extent these significant changes in law better the position of women in all its ramifications in the country. It is the perspective of most people including human rights organisations that the levels of violent crimes committed in South Africa which is 100 times more than obtained in the United States of America is as a result of gun proliferation and lack of proper gun control.¹⁶¹ At the level of judiciary, women representation is still very insignificant, For example, there are only three women judges in the Constitutional Court, one white and the other two, black. This is a poor representation given the fact that this particular organ of government has the important work of dispensation of justice; it is believed that women judges could bring their presence and knowledge to bear on this government

¹⁶⁰ H Combrinck "The Dark Side of the Rainbow: Violence Against Women in South Africa After Ten Years of Democracy" (2005) *Acta Juridica* 172. These sentiments were also expressed by F Kaganas and C Murray "Law and Women's Rights in South Africa: An Overview (1994) *Acta Juridica* 1.

¹⁶¹ This statistic was given by Director Policy and Research on Arms Control of the Amnesty International Secretariat in London on SABC AM live programme 27 June 2006.

organ to achieve the desired outcome for women and the society in general.¹⁶² The present writer feels that urgent steps should be taken to combat the levels of violence particularly with regard to rape.¹⁶³

4.3 Representative Democracy in Lesotho

Women represented in the National Assembly of Lesotho are very small compared to the number of men in the entire Assembly. The country operates on two levels of representations in the Parliament one part is proportional representation and the other is based on constituency list.¹⁶⁴

At present, there are only four women ministers and two women deputy ministers. The chief of police and the speaker of the National Assembly also are women. Lesotho has a population of approximately 2.15 million. Out of this number, women account for 51 percent whilst men

¹⁶² S Jagwanth and C Murray "No Nation Can Be Free When One Half of It is Enslaved" in B Baines and R Rubio-Marin (eds) *The Gender of Constitutional Jurisprudence* (2005) 232. The authors have observed that in the South African Superior Courts, out of 190 judges, there are only 21 women. This is considered an appalling representation for this particular organ of government. Various legal organisations have called for transformation of the judiciary.

¹⁶³ The number of rapes reported to the South Africa Police Service between 2003 -2004, is a record of about 52 733 cases. This represents a 15 percent increase from the position 1994-1995, See H Combrinck (2005) 171.

¹⁶⁴ In total, there are 17 MPs out of 120 members of Parliament, which is just about 14 percent of representation. See "Members of The National Assembly" <http://www.parliament.ls/national/members.php> (accessed on 8 March 2006). Also according to the African Union Commission, on the world classification as at 31 March 2004, Lesotho ranks 66 by its elections in 2002 with only 11.7 percent. See African Union "The Road to Gender Equality in Africa: An Overview" (2004) 30.

account for 49 percent.¹⁶⁵ Women are under represented in politics in Lesotho, and the legal disabilities and associated difficulties experienced by women in that country show the wide margin between *de facto* rights and representative democracy. Ironically, women in Lesotho have one of the highest literacy percentages in Africa. According to Lehohla¹⁶⁶ the functional rate of literacy of women far exceeds that of men. The plausible reason for the slow translation of these gains into proper rights is the influence of the customary practices still prevalent in the country. The problems faced by women are exacerbated by the HIV/AIDS prevalence in the country in which the rate is 51 percent for women to 28 percent for men.¹⁶⁷

¹⁶⁵ See U.S Department of State Information at www.state.gov/g/drl/rls/hrrpt/2003.27734.htm (accessed 10 November 2005). In that country, prior to colonisation, women have also been part of the rural governance. There are about 35 percent women Chiefs to the overall number of male Chiefs in the country. Reasons proffered for this increase are changing social environment and the contributions made by women towards national development as noted by DS Koyana "The Role of Women in Rural Governance (1991) *OBITER* 267.

¹⁶⁶ ML Lehohla "The Role of Customary Law in Developing Africa: The Lesotho Position" (2004) 25. The author in a key note address given at the Lesotho Embassy in Washington DC said that the large number of literate women in that country should bring about the much-needed reform in areas of succession and legal capabilities.

¹⁶⁷ The United Nations Development Program (UNDP) has the statistics about the HIV/AIDS prevalence among other factors that militate against the achievement of the goals set by Lesotho with respect to the Millennium Development Goals (MDGs). See Anja Tranovich "Development: 50 Countries, 700 Million People, One Poverty Trap" http://www.un.org/special-rep/ohrlls/News_flash2005 (accessed on 1 February 2006). Nigeria and other African countries have aspired to the ideals envisaged in the MDGs.

4.4 Representative Democracy in Nigeria

Participatory democracy as alluded to in the opening paragraph of this chapter, is seen as a vehicle by which African societies will be transformed into vibrant nations ready to meet the demands of the Millennium Development Goals, which is a world wide response to the needs of the majority of the countries of the world. Nigeria as one of the founding members of NEPAD is also positioning itself to accommodate the aspirations embodied in the NEPAD objectives.¹⁶⁸ However, the representative strategy that multi-party political systems of the country adopt is usually based on individual bearers under a particular political banner.¹⁶⁹ Under this system, very few women have been flag bearers in any political structure from the time of independence in 1960 up until this fourth Republic. Any attempts to include women in political discourse were (and continues to be) met with stiff opposition especially in the Northern parts of the country where women are put in 'purdah'.¹⁷⁰ The incursion of the military into the country's political arena did not improve the position of women but the first woman appointed as a commissioner was

¹⁶⁸ See generally, the issues relating to the influence of NEPAD as dealt with in Chapter five below.

¹⁶⁹ It is a common scenario in Nigeria especially during the party conventions where they elect party representatives for any election as mostly gubernatorial and presidential candidates. Women are rarely supported either financially or by the party for these kinds of positions.

¹⁷⁰ 'Purdah' is a method of confinement for Muslim women. Note the position of women in Iran in P Paidar in Molynuex and Razavi (2002) 243.

in 1970 just after the 'Biafran' civil war.¹⁷¹ During the second (1979-1983) and third (1999-date) Republic, women were virtually excluded from any meaningful participation in government. Women were only appointed at state levels as mere tokenism and only in sectors such as education or welfare.¹⁷²

The current position of women is still far from meeting the aspirations contained in the Beijing Platform of Action. In fact there has been a decline from 7.3 to 6.1 per cent.¹⁷³

Comparatively, Nigeria does not perform favourably with the positions in the other two countries under study.

4.5 Government Institutions and Non-Governmental organisations Supporting Democracy in the Three Countries

4.5.1 South Africa

In 1994, the government created several institutions aimed at protecting human rights in general and issues of

¹⁷¹ Flora Nwapa was appointed the first woman commissioner by the then government of East Central State in 1970 during the tenure of General Yakubu Gowon as the military ruler. The time marked the end of the civil war where the East fought against the Central government in a bid to secede as a separate country. Unfortunately, the Igbos lost the war and have been marginalized ever since in the political stage in Nigeria.

¹⁷² A Mama "Feminism or Femocracy: State Feminism and Democratisation" in J Ibrahim (ed) *Expanding Democratic Space in Nigeria* (1997) 82-97. The author gave a detailed history and insight into the reasons for women participation in politics in Nigeria. She ascribed reasons for this situation to elements such as military interventions and patriarchy.

¹⁷³ African Union "The Road to Gender Equality in Africa: An Overview" (2004) 29. According to the above document of the Union, countries in the same position as Nigeria are Egypt and Ethiopia.

gender in particular. Some these institutions commonly referred to, as Chapter Nine (9) institutions¹⁷⁴ are the Commission for Gender Equality and the South African Human Rights Commission. There are also other non-governmental agencies that contribute positively towards ensuring that the ideals of democracy and human rights are maintained while working for specific targets. For example in South Africa is the Women's Legal Centre in the Western Cape.

Commission for Gender Equality

The Commission for Gender Equality established in terms of Act 36 of 1996 is an independent, statutory body. It has the task of developing policy frameworks that would transform the gender position. Among the Commission's tasks are the training of government personnel carrying out investigations of cases, providing user-friendly tools for policy makers as well as monitoring and evaluation of gender programs.¹⁷⁵

The Commission receives complaints from individuals and other bodies. In 2003-2004, it received about 2127 complaints and out of this number, 50 percent were gender-based violence. It is infact a disheartening realisation of the problems associated with violent crimes in South Africa. To make contributions in ensuring that perpetrators are brought to justice, the Commission lends its support to some cases in courts as *amicus curiae*.¹⁷⁶

¹⁷⁴ They are listed under chapter Nine in the Constitution.

¹⁷⁵ See generally the "Commission on Gender equality" at www.cge.org.za (accessed on 22 June 2006). The Commission conducts evaluation of its activities periodically to measure areas that are effective and those that need to be improved.

¹⁷⁶ Some of the cases in which the Commission has been involved are *Esack NO v Commission on Gender Equality* 2001 (1) SA 1299 (W), *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC), in this particular case,

The Commission has proved to be a very good catalyst for change in bringing succour to women who need to approach the courts for redress.¹⁷⁷

The Women's Legal Centre

The Women's Legal Centre (WLC) is one of the South African non-governmental agencies that have been working with government and the parliament since 1999.¹⁷⁸ It is a private agency, which has been very active in bringing cases to the courts and as such has helped many women more than some of the government agencies that are created to deal with gender issues. In its five-year record, the Centre litigated almost 60 cases including: *Bhe v Magistrate Khayelitsha*, *S v Jordan*, *Daniels v Campbell*, *Moseneke v Master of the High Court*, *Volks v Robinson* to name but a few.¹⁷⁹ In seven of these cases brought by the Centre to the Constitutional Court, five of them were successful.

the Commission was *Amicus Curiae*. Its interests in this case arise from the fact that since its inception it has viewed the administration of maintenance payments as a major obstacle to women fully attaining equality.

¹⁷⁷ There are, however, some writers who feel that the Commission has not been effective in dealing with the numerous gender issues and whatever its achievements have been, they had not been strong enough to deliver the changes needed. See S Jagwanth and C Murray "Ten Years of Transformation: How has gender equality in South Africa fared" (2000) 14 *Canadian Journal of Women and Law* 255.

¹⁷⁸ See RB Cowan "The Women's Legal Centre During its First Five Years" (2005) *Acta Juridica* 273.

¹⁷⁹ *Bhe v Magistrate Khayelitsha*, 2005 (1) BCLR 1(CC); *S v Jordan* 2002 (11) BCLR 1117(CC); *Daniels v Campbell* 2004 (7) BCLR 735 (CC); *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC); *Volks v Robinson* 2005 (5) BCLR 446 (CC). See RB Cowan "The Women's Legal Centre During its First Five Years" (2005) *Acta Juridica* 273.

South African Commission on Human Rights

The Commission was inaugurated on 2 October 1995 to consolidate the gains made in pursuit of the rights of the people.¹⁸⁰ Since its establishment it has been instrumental in a number of landmark cases as *amicus curiae*. From 2003-2004, it has dealt with cases of human rights violation numbering about 9464. From the number of cases dealt with by the Commission, it is evident that respect for human rights is uppermost in the plans and actions of the South African government. It is noteworthy that there is an agency such as the SA Human Rights Commission that could independently deal with cases of human rights abuse as a place where ordinary people can go to seek redress. Although at the time of writing, it has not been established on how effective this method of seeking justice have been, the fact that the Commission could equally be called as a 'friend of the court' in cases is a measure of its importance.

4.5.2 Lesotho

The country has the National Gender Affairs office as part of the government department tasked with the work of developing policy framework on gender issues. However, at the time of writing, it is not clear what this government agency has been able to do concerning the situation of women in that country.¹⁸¹

¹⁸⁰ See generally the website of the South African Human Rights Commission at www.sahrc.org.za (accessed 1 February 2006).

¹⁸¹ There are no records of what the department has been able to do concerning women rights issues in Lesotho. It is the view of the present writer that some gender offices located within the government structure suffers from lots of hindrances such as non-availability of funds to carry out research and lack of capacity to deal with specific problems.

There is also the Lesotho Council of Non-Governmental Organization. Although not a government agency, it has contributed to fostering democracy and good governance in the country.¹⁸²

4.5.3 Nigeria

The Ministry of Women Affairs

This is the government department charged with women issues nationally. The Minister, Inna Ciroma in a press release at the end of the year, 2005 reiterated the vision of the ministry to "focus attention of both public and private sectors on issues that promote full participation of women and children in the national development process." The Minister presented loans and grants to women organizations worth 2.1 million rand.¹⁸³

National Council for Women Societies

This is one of the agencies that provide links between the government and women around the country. The organisation by nature is not political but could be in a position to influence government policies where

¹⁸² The council has been running commendable programmes ranging from civil society support and Human Rights Monitoring to democratic and elections management since its inception in May 1990

http://www.lecongo.org.ls/commissions/election_mngt.php

(accessed on 1 February 2006).

¹⁸³ To help women in their community projects to boost self-sufficiency and empowerment. This grant was presented to mark the International Women's Day 2006 in Nigeria. See the press briefing by the Honourable Minister of Women Affairs, Mrs. Inna Maryam Ciroma, held on Tuesday, December 20, 2005 at the Jakaranda hall, Sheraton Hotel & Towers, Abuja titled "Enhancing Gender Equality and Child Development" at http://www.nigeria.gov.ng/fed_min_women_affairs.aspx (accessed on 14 March 2006).

necessary.¹⁸⁴ The President of the Organisation Mrs Zainab Maina lent her voice to issues of participatory governance by women in Nigeria in a paper titled "The Imperatives of Effective Participation in the Political Process" in which she said that political programme would not succeed without the full participation of women and that there is an urgent need to reengineer the process of participation in governing structures to have women as equal partners.¹⁸⁵ One of the major constraints of poor participation of women was economic deprivation. It is alleged that sponsors to party leaders prefer males to women and as such not too many women could afford to be party flag bearers. It is envisaged that where the participatory policies are made to create access for women into power, the objective of equality and sustainable development would be achieved.

Association of Army Officer's Wives

This is another agency used by the wives of the senior military officers during the time of military rule in Nigeria. It is also an avenue for the elite women of the Army, Navy and the police to contribute to national development. Regrettably, some of these organisations do very little for the rural woman except for superfluous programs of alleviating poverty that lacked depth and substance for women's rights.¹⁸⁶

¹⁸⁴ See generally Women's Organisations Nigeria www.distel.ca/womlist/countries/nigeria.html (accessed on 27 June 2006).

¹⁸⁵ See "Article On Gender Political Equality" at www.motherlandnigeria.com/articles5.html (accessed on 27 June 2006).

¹⁸⁶ Amina Mama "Feminism or Femocracy: State Feminism and Democratisation" in Jibrin (ed) *Expanding the Democratic Space in Nigeria* (2004) 90-96.

National Human Rights Commission

In 1999 the President Obasanjo established a Commission of Inquiry into human rights violation perpetrated against the people of Nigeria in terms of mysterious deaths, assassinations and other human rights violation from January 1984 to May 1999.¹⁸⁷ The Commission under the chairmanship of retired Justice Chukwudifu Oputa had as one of the terms of reference to recommend measures, which may be taken to redress injustices of the past especially those committed during the military regime in Nigeria and forestall future abuses of human rights. The Commission held its sitting in Lagos, Nigeria and some of those people incriminated in the alleged human rights abuses such as the former military ruler Ibrahim Babangida failed to appear before the Commission despite numerous summons.¹⁸⁸ The Commission had long concluded its sitting and it is not clear to what extent it succeeded in the work it was commissioned to do since some of the people summoned to appear before the Commission blatantly failed to do so and nothing was done about it or what the government did with the report submitted to it.

4.6 Conclusion

Closely inter-linked with democracy, human rights and development is the role of women in democratisation. In a paternalistic world, the role of women is given specific mention because all indications point to the fact that they are usually left out in the shadows of everything for no absolute fault of their own except for how they are

¹⁸⁷ A Atsenuwa "Nigeria" in Christof Heyns (ed) *Human Rights Law in Africa* (2004) 2 1398.

¹⁸⁸ Ibid 1398.

treated in the society. Lesotho and Nigeria are cases in point showing the effect the minimal political participation have had on women's legal rights. In the words of Professor Naussbaum¹⁸⁹ women in these countries have been rendered incapable of developing their potentials and as such there are no societal pressures that would guarantee any visible growth.

In this chapter the writer has shown that there is, as shown in the case of South Africa, a close correlation between democracy and the respect for women's legal rights. This interrelatedness between these concepts for South Africa is somewhat relative in the sense that all the pieces of legislation and human rights agencies seem not to be able to protect women. The high incidences of rape, killing of women and children by their partners and fathers respectively mentioned in Chapter One of this work is an indication of the continued ineffectiveness of some of these measures. The rights of women in relation to marriage may have been protected in terms of the law but the practical aspects still remain to be evaluated given the criticisms levelled against emasculating customary law while trying to make it at par with common law.

Nigeria and Lesotho need to be more pro-active in appointing women to positions of decision-making in governments and state-owned enterprises. Both countries have not made adequate attempt in developing equality jurisprudence that would go a long way in dealing with poor participation in governance structures and protecting women's rights in laws relating to land, marriage, succession and inheritance. These two latter countries

¹⁸⁹ M Naussbaum "Women Capabilities and Social Justice in M Molyneux and S Razavi (eds) *Gender Justice, Development and Rights* (2002) 45-73.

have the potential to improve on sustainable national growth in terms of gender-specific laws, economic growth and socio-cultural aspects of their respective countries given the high level of women literacy found in Lesotho, that aspect of national development is hugely untapped and needs to be harnessed. On the part of Nigeria, it is a country with lots of human and material resources but poor governance and corruption have greatly vitiated any laudable progress that could be made in that country.

CHAPTER FIVE

The Role of the African Union, Influence of NEPAD, Regional and International Conventions on the Development of Gender Justice in African Countries

5.1 Introduction

In this chapter, the writer would examine the role of the AU in engendering equality and women's rights issues, the extent of influence of the New Partnership for Africa's Development (NEPAD) especially on the three countries under review, two of which are both proponents of this great vision for the continent. Further, the study will expatiate on the efficacy of the roles played by the global Conventions of the UN such as the CEDAW and its Optional Protocols, Regional Charter such as the African Charter of Human and Peoples' Rights (ACHPR) in addressing human rights issues in Africa.

It cannot be said that these Conventions have not contributed in steering the countries of Africa in the right direction but what arouses a great deal of interest for purposes of this study is the efficacy of these Conventions; that is, whether they can be adjudged a success or a dismal failure in achieving gender justice for African women.

5.2 The Role of African Union (AU)

The idea of an African continent devoid of war, diseases, hunger, unemployment and stunted economic growth has been uppermost in the minds of African leaders as

early as the 1960's onwards.¹⁹⁰ At the behest of the Libyan President Muammar Ghadaffi, 44 African heads of states and government met and unanimously adopted the motion to establish the African Union.¹⁹¹ The AU has been hailed as a new paradigm for Africa's consolidation and one of the most integrated initiatives of African leaders in decades. All countries in Africa form part of this shift in paradigm with the exception of Morocco.¹⁹²

In the Constitutive Act of the AU, it appears that issues of good governance, democracy, economic integration, peace, security and human rights would receive priority.¹⁹³ This is also evident in the AU's readiness to intervene on matters of grave violation of human rights.¹⁹⁴ In order to achieve the objectives set out

¹⁹⁰ E Baimu "The African Union: Hope for Better Protection of Human Rights in Africa?" (2001) 2 *AHRLJ* 300 where the author said that the success of the ideals envisaged in the AU largely depends on the political will of the State Parties to give effect to those ideals, progressive interpretation of the Act by the African Court of Justice and the leadership by the Union to champion human rights cause on the continent.

¹⁹¹ Although this was not the first time ever the idea of a 'United States of Africa' was mooted, it received thumbs up. It was decided that the newly formed AU would replace the OAU and inject new life into the organizational structures and agencies of the previous organization to give it a new impetus.

¹⁹² T Maluwa "The African Union, The Southern African Development Community, and the New Partnership for Africa's Development: Some Observations on South Africa's Contribution to International Law-Making and Institution-building in Africa 1994- 2004" (2004) 29 *SAYIL* 10-12.

¹⁹³ Article 3 and article 4 of the Act.

¹⁹⁴ The AU seeks the right to intervene in a member state in cases of grave human rights abuses such as war crimes, genocide, and crimes against humanity. It is an impressive development of International law jurisprudence that state parties could intervene on request from the AU to restore peace and security. It has also developed the

in article 3 of the Act, the Union has created various organs that would drive the processes such as the Financial Institutions, Specialized Technical Committee, African Court of Justice and the Pan-African Parliament. The latter is the first of its kind in the continent.¹⁹⁵ The need to involve the peoples of the continent in matters affecting them is explicitly provided in articles 4 (c) and 17 of the Act. It is realized that unless the people are made part of the process for economic development, there would be no sense of ownership in the whole development process.

Another great initiative of the Union is the recognition accorded to gender and social justice. The importance of partnership in development of both men and women is re-echoed in this instance. It is envisaged that attaining social justice would greatly improve the quality of lives of women and ensure that they remain equal partners in development with men on the continent. The same applies to the need for balance in economic

principle to condemn and reject unconstitutional changes in government. An example of this kind of situation arose in Togo when the Togolese president Gnassingbe Eyadema passed away in 2005.

¹⁹⁵ Article 5 of the Act lists the different organs of the Union, the financial Institutions are aimed at creating an integrated economic strategy through establishing by means of a protocol African Central Bank, African Monetary Fund and African Investment Bank. The Specialized Technical Committee would oversee matters relating to Agriculture, Immigration, health and labour. The Pan-African Parliament currently hosted by South Africa at Gallagher Estates in Midrand had its first sitting in 2000. It is indeed a novel initiative and clearly depicts the commitment of the African leaders to steer the course of the continent on the path of sustainable growth and development.

development, which can only be achieved through the promotion of social justice.¹⁹⁶

Clearly, there are innovations in the AU, which makes it remarkably different from its precursor, the OAU. Furthermore, specific measures have been taken to ensure that member states fulfill their financial obligations to the Union and that they also abide by the decision made by the Union on behalf of the continent.¹⁹⁷ To this extent the AU has made tremendous effort to create measures that would guard against making it an ineffective body.

The AU has been instrumental in establishing various declarations and protocols that would protect the rights of women and ensure gender justice on the continent. Some of those initiatives are the Protocol on the Rights of Women adopted in 2003 and came into force in 2005 and the Solemn Declaration on Gender Equality in Africa adopted in 2004.¹⁹⁸ The Union's interventions to the human rights abuse, displacement of women and children in the Darfur region of Sudan by sending observer mission to assess the extent of the problem in that country and the initiation of dialogue on human rights violation in Zimbabwe, point

¹⁹⁶ Articles 4 (1) and 4 (n) of the Act.

¹⁹⁷ Article 23 of the Act provides for measures against defaulters of the member contributions to the Union or failure to comply with policies and decisions of the Union.

¹⁹⁸ The Protocol on the Rights of women provides for the elimination of discrimination against women by integrating a gender perspective in policies and legislation, right to inheritance and elimination of harmful practices (article 2, 21 and 5 respectively). The AU Assembly of Heads of State and Government adopted a declaration in Addis Ababa in 2004 and agreed to expand and promote gender parity principle as well as actively promote the implementation of legislation to guarantee women's land, property and inheritance rights. See generally C Heyns and M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* 2 ed (2006) 41 and 96.

to the commitment to ensure social justice, peace and security on the continent.¹⁹⁹ The AU affirms under its Constitutive Act the promotion of democracy, human rights, sustainable development and peace in the African continent. It further envisages gender equality but unfortunately this concept of gender justice is yet to bear fruits in NEPAD's governing structures. In practice, there is very little of women as part of the framework and its program. Again, the major criticism against the AU is the lack of political will on the part of some leaders to deal decisively with the violations of human right. However, one area that deserves commendation is submission by certain countries for the voluntary African Peer Review Mechanism (APRM).²⁰⁰

The impact of the Union on the three countries under review could be seen in the strong dependency on Nigeria and South Africa to deal with peace initiatives in the different parts of the continent. Both countries have shown a strong sense of commitment to good governance, thereby sending a strong message against misadministration and corruption.²⁰¹ Comparatively, in the area of promotion

¹⁹⁹ Although Sudan and Zimbabwe are not the focus of this work, it echoes the extent of abuse and violation of rights of women in Africa. Unfortunately, African women usually bear the brunt of these violations.

²⁰⁰ APRM is essential for the credibility of NEPAD. It was officially launched in Kigali, Rwanda on 13-14 February 2004 at the 9th summit of the HSGIC. As at July 2004, the following countries adhered to the rules, procedures and evaluation of APRM: Nigeria, Algeria, South Africa, Rwanda, Uganda, Mali, Mauritius, Burkina Faso, Kenya, Republic of Congo, Gabon, Mozambique, Cameroon, Ghana, Botswana, Comoros and Angola. Lesotho is one of the countries that have not volunteered to be evaluated by this mechanism.

²⁰¹ Indicative of this commitment in South Africa comes from the Deputy-President of the ANC in which Jacob Zuma was relieved of his

of gender justice, South Africa has done more than Lesotho and Nigeria. However, the three countries are yet to accede to the Protocol for the establishment of the African Court on Human and Peoples' Rights.²⁰² It is expected that accession to this Protocol will elicit further commitment to ensure that violations of the Charter are redressed.

5.3 The Influence of NEPAD

The leaders of the continent committed themselves to achieving the following objectives:²⁰³

- Eradicate poverty;
- Place African Countries, both individually and collectively on a path of sustainable development and growth;
- Halt the marginalization of Africa in the globalisation process and enhance its full and beneficial integration into global economy;
- To accelerate the empowerment of women.

It is noteworthy that the NEPAD framework has set objectives on the issues that are of particular concern to

duty as the country's Deputy President as a result of charges of corruption against him. The corrupt ANC officials in some of the municipalities were also relieved of their duties as well as corrupt police officials. In Nigeria, President Olusegun Obasanjo reiterated the plan of his government to rid the country of corruption evidently shown in the case of the Bayelsa State Governor found with millions of Naira in Britain. The culprit was arrested in London from where he escaped back to Nigeria. He was subsequently rearrested and removed from office as Executive State Governor.

²⁰² See the Chart of Ratifications of OAU Human Rights Treaties as at 30 June 2001 printed in (2001) 2 *African Human Rights Law Journal*.

²⁰³ See also NEPAD framework at www.nepad.org/2005/files/documents/inbrief.pdf (accessed on 22 June 2006).

women. However, these set objectives do not translate into any real commitment to curb violence against women, trafficking in women and girls and other gender-based violence on the continent. It is argued that sustainable development would continue to be elusive unless women are partners in development, having equal opportunities and access to resources. Where women are equal partners in development, holistically integrated to influence policies and decisions, creating awareness on the pandemic of HIV/AIDS, tackling problems associated with displacement and trafficking in women in war torn areas, it is expected that the lives of the people would be greatly improved. However, to achieve these objectives, urgent action is required to bring about change through judicial reform.

NEPAD is widely perceived as a catalyst for change in Africa by the powerful countries of the West as well as some African writers.²⁰⁴ However, in some quarters, the framework has received numerous criticisms as being pro-west in nature and outlook, as having no African value and also highly unattainable set goals.²⁰⁵ The present writer

²⁰⁴ D Venter and E Neuland (eds) *NEPAD and the African Renaissance* (2005) 292.

²⁰⁵ The writers that have expressed great criticism on the objectives of NEPAD include Patrick Bond (ed) *Fanon's Warnings: A Civil Society Reader on the New Partnership for Africa's Development* (2002) 81 - 219 The editor himself commented extensively on the inappropriate structures of NEPAD and the manner of approach towards good governance, sustainable development and economic stability, J Adesina "Development and the Challenge of Poverty: NEPAD, Post-Washington Consensus and Beyond" (2002) 8, J Adesina "NEPAD and the Challenges of Africa's Development: Towards the Political Economy of a Discourse" (2004) *Society in Transition* 35 (1) 133-134 where the author argued that the NEPAD framework was the product of a group of government officials in Pretoria, so the whole process became a 'neoliberal Africanist Project' instead of being an all inclusive

is also of the opinion that the NEPAD framework failed dismally in buttressing the relevance of women in the agenda and process as a whole. Although the emphasis is to accelerate economic and sustainable growth for Africa, it is not entirely feasible where one section of the people is largely unrepresented. The framework failed to identify specific gender targets that would involve active participation of women in the agencies of NEPAD as co-partners with men in development. Gender justice can only be achieved where specific target areas are identified and all parties concerned put proper mechanisms in place to ensure adherence. It is the opinion of the writer that lack of a proper gender agenda undermines the entire idea of the empowerment of women.²⁰⁶

5.4 The African Charter on Human and Peoples' Rights

The African Regional System has the dual mandate to protect and promote human rights on the continent. The advisory body that administers the provisions of the Charter is the African Commission for Human and Peoples' Rights (the 'African Commission').²⁰⁷ The Charter has notable features that distinguish it as an African instrument which include emphasis placed on individual duties *inter partes*, duties towards the family and the community at large, it also seeks to protect the family,

framework where all the stakeholders were part of the drafting process from origin.

²⁰⁶ The continent has not come to any specific course of action against the government of Sudan on the violation of human rights, ethnic and religious displacement as well as rape of women in the Southern Darfur region, neither has anything been done on creating proper policing methods to avoid the trafficking in women and girls into prostitution from Africa to countries in Europe.

²⁰⁷ The Commission met for the first time on 2 November 1987.

morals and traditional values of the community.²⁰⁸ These features underscore the importance of the African tradition and communal existence of the people. The Charter allows for complaints from both individuals and other agencies to the Commission for consideration.²⁰⁹ The relevance of this procedure makes it distinguishable in that people with genuine cases of human rights violation could approach the Commission for redress. The Commission has dealt with about 110 complaints on violations of the Charter provisions from all over Africa, and they admitted 42 of those cases as at 1 January 2002.²¹⁰

One of the interesting aspects of the application of the Charter as an international treaty came to the fore in several complaints notably among them is the case of *Dawood v Minister of Home Affairs*.²¹¹ In the *Dawood* case, article 18 of the Charter was relied on by the applicants demonstrating the importance of the 'right to family life' and marriage and the state's obligation to protect the family. One of the problems faced by the Commission is the enforcement of the Commission's decisions in cases brought before it because of the non-binding nature of their findings. One possible way of remedying this shortcoming

²⁰⁸ See Article 27 and 28 of the African Charter on Human and Peoples' Rights as published by the Secretariat of the African Commission, Banjul: The Gambia.

²⁰⁹ See generally the African Commission on Human and Peoples' Rights Information Sheet 2 of the Guidelines on the Submission of Communications 5 and 8.

²¹⁰ C Heyns (2001) 434-439 for further analysis on complaints dealt with by the Commission. It should be noted that there are no particular cases dealing with women or brought to the commission by individual women or women as a group. This paucity of cases on issues of women's rights is an indication of more work to be done by all stakeholders.

²¹¹ As reported in South Africa in 2000 (8) BCLR 837 (CC).

would be by adopting a Protocol that would empower the African Court on Human Rights to enforce the rights embodied in the provisions of the Charter.²¹² The concerns expressed by NGOs on the perennial violation of women's rights gave rise to the draft Protocol to a specific African Charter on Human and People's Rights on the Rights of Women.²¹³ The Commission further appointed a Special Rapporteur on women's human rights whose duties involve giving communications to the Commission on violations of women's rights in Africa.²¹⁴ The most important aspects of the provisions of the Protocol relate to the role of women in development, peace and security, promotion of equality between men and women and the preservation of African values.²¹⁵ Inherent in the provisions of the Protocol are the inalienable and inviolable rights of women as human beings and their rights as an integral part of human rights.

It is very important that African values are protected; however, the general consensus of women

²¹² The findings of the Commission are given as merely 'recommendations' to the main body of the organization, OAU. Attempts to adopt a Protocol establishing the court have been in motion since 1997 and as at 1 January 2002, only five states (Burkina Faso, The Gambia, Senegal, and Uganda) have become State Parties to the Protocol. It is expected that where, at least fifteen member states have ratified the Protocol, it would aim to supplement the protective mandate of the Commission and thus potentially improving the deficiencies noted in the application of the Charter.

²¹³ Adopted in Maputo, Mozambique in July 2003 and entered into force in November 2005.

²¹⁴ See African Commission on Human Peoples' Rights at www.achpr.org/english/_info/women_en.html (accessed on 16 February 2006).

²¹⁵ See generally the preamble to the Protocol in C Heyns and M Killander (eds) (2006) 41.

activists is that customary practices that are harmful to women should be outlawed.²¹⁶ Such a measure would empower state parties to deal with gender issues as a matter of priority.

Another sub-regional instrument relevant to the issues of women is the Southern African Development Community (SADC) Declaration on Gender and Development.²¹⁷ The sub-region recognizes the debilitating effect of poverty, discrimination and violence against women on the enjoyment of women's rights. So member countries have committed themselves to prevent and eradicate these social vices from the region.

5.5 International Human Rights Instruments of the UN on Women's Rights

Since the Beijing Conference, women's rights as human rights have become the focal point of attention all over the world. The conference on women under the auspices of the UN in 1975 in Mexico City contributed immensely to the

²¹⁶ E Delpont "Women in Africa" in C Heyns (ed) *Human Rights Law in Africa* (2004) (1) 845.

²¹⁷ In 2000, the SADC Regional Conference in Maseru, Lesotho deliberated on the progress made in the implementation of the sub-region's human rights instruments concerning women. From papers studied during this research, it would seem that Southern Africa has made great contribution to the protection of women's rights through appropriate legislations. However, the high incidence of rape, violence against women and other marriage related abuses cast shadow on the progress already made in the region. To see further intervention by SADC on gender see generally SADC and Gender 2005 Campaign fact sheet 1 at www.genderlinks.org.za/page.php?p_id=266 (accessed on 22 June 2006).

embodiment of women's rights in the Convention on all Forms of Discrimination Against Women (CEDAW) in 1979.²¹⁸

From the onset, The UN envisaged that men and women should be treated equally in all spheres of life where the same conditions prevail. To achieve this end, the body provided mechanisms by establishing the Commission for Status of Women (CSW) under the Economic, Cultural and Social Council (ECOSOC) in 1946.²¹⁹ The mandate of the Commission was to prepare reports and recommendations to ECOSOC on the promotion of the political, social, cultural and educational aspects of women's lives to ensure the compliance with their human rights. The early recognition afforded the rights of women at this stage prompted the global body to formulate resolutions that would guarantee equality between men and women.²²⁰ Notwithstanding this early international recognition, women's rights were not given specific content by way of enactments in state parties' domestic legislation.²²¹ This omission has had the

²¹⁸ Brautigam in Benedek *et al* (2002) 4.

²¹⁹ The UN was established at the end of the World War II in 1945, in the preamble of the Charter establishing the body, it affirms "faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small."

The establishment of this Commission was due to the part played by Mrs. Eleanor Roosevelt as the only woman and wife of the then President of the United States during the negotiations towards the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.

²²⁰ The UDHR subsequently adopted in 1948 by member countries of the UN firmly believed that 'all men and women are born free and equal in dignity and rights...' as stated in article 1 of the Declaration, the rights contained in the document ensure that such beliefs are firmly in place.

²²¹ Except for Nigeria that has the Charter on Human and Peoples' Rights as part of the domestic legislations of the country. However,

effect of excluding women from participating in decision-making bodies or in law making institutions. In the light of this, the UN began to take concrete steps to address women's issues in the form of human rights declarations.²²² Unfortunately, the establishment of the CSW six decades ago²²³ has not really benefited women in a meaningful way as their legal position in the majority of African states is still far from being satisfactory. The specific problem of certain customary laws²²⁴ especially those relating to

in the light of the development of laws specific to women's rights, Nigeria seems to be lagging far behind.

²²² Some of the legal instruments developed to supplement the general provisions were, Convention on the Political Rights of Women (1952), requiring that women have access to political positions at all levels of national and global environment and the Convention on the status of Nationality of Married Women (1957). The latter sought to redress issues of citizenship in trans-boundary marriages. Other declarations include the Declarations on the Protection of Women and Children in Emergency and Armed Conflict (1974). More than 30 decades after the adoption of this legal instrument, women and children still suffer immeasurably from war in different parts of the world, Sudan, Burundi, DRC, Philippines, Palestine, and Iraq. In 1985, the Third World Conference on Women held under the aegis of the UN adopted the Nairobi Forward-Looking Strategies. The strategies only provide measures to improve the rights of women in all spheres and to address the root causes of discrimination against women in order to provide measures for combating them. Unfortunately, the strategies are not legally binding but only a moral consensus of the participating member countries.

²²³ Brautigam in Benedek *et al* (2002) 4.

²²⁴ Some countries in Africa practice widow inheritance and other rites that are harmful to the welfare of women. KwaZulu Natal girls living in communities that observe customary law are made to undergo virginity testing as a means of combating promiscuity and diseases like HIV/AIDS. The Zulu monarch at the 2005 Annual Reed dance of the kingdom, insisted that virginal testing is a tradition of the people that does not cause any harm, but it has not been considered by the traditionalists that more diseases could be transmitted through this

marriage, succession, inheritance and land still cause problems of practical application in African countries. These international instruments have not yet tackled the thin line between respect for the cultural belief of the people and the respect for individual rights. It is my opinion that the international instruments would remain an idealistic concept without any real substance for the people unless the ramifications of the provisions in the various instruments are given an African identity and context.

The UN and its Agencies, nevertheless, continued to explore ways of protecting women. In 1979, it adopted the Convention on the Elimination of all Forms of Discrimination Against women (CEDAW) and the Convention on the Elimination of Violence Against Women in 1993. These two Conventions form the most relevant and important instruments concerning the rights of women.²²⁵

CEDAW is the most comprehensive human rights instrument concerning the rights of women. The provisions of the Convention touch on the social, cultural,

means and some form of exploitation that would arise from it as little girls dance naked before the entire world. More people are becoming gender sensitive to these forms of exploitation as could be seen by people including Zulu women and maidens who sent memorandum to the Commission on Gender equality protesting against virginity testing as part of the culture. For more on virginity testing, see Suzanne Leclerc-Madlala "Virginity Testing Diverts Attention from the Lack of Male Sexual Responsibility" (Summer 2001) *WHP Review* 4 at <http://www.wits.ac.za/whp/newsletter.pdf> (accessed on 22 June 2006).

²²⁵ D Gierycz "Human Rights at the Fiftieth Anniversary of the United Nations" in W Benedek, E Kissakye and G Oberleitner (eds) *The Human Rights of Women: International Instruments and African Experiences* (2002) 30.

economical and political lives of women.²²⁶ To ensure compliance with these provisions, state parties are called upon to create measures that would protect and promote the rights of women. "The unequal balance between men and women in almost all spheres of life gave impetus for the Convention, which is aimed at full development, and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"²²⁷

In the remainder of this chapter the writer seeks to show the extent to which the three countries under review have complied with the above international instruments relating to women's rights.

5.5.1 Lesotho

Lesotho became a signatory to CEDAW on 17 July 1980 and ratified it on 21 September 1995.²²⁸ State parties to the instrument are required to submit reports once every four years. Regrettably, Lesotho has not yet submitted her report, which became due in 2004. And, the country as well entered a reservation on article 2 of the treaty. She contends that the country would not abide by any obligation if it were contrary to the traditionalist

²²⁶ Article 1 of CEDAW defines discrimination as "any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

²²⁷ Article 3 of CEDAW.

²²⁸ See UNHCHR documents at www.unhchr.ch/tbs/docs.nsf (accessed on 18 February 2006).

elements of Lesotho.²²⁹ An example of the country's violation of the instrument is in the area of succession to the chieftaincy, where succession is according to male lines.²³⁰ This means that any obligation requesting equality for women on succession matters would not be binding on the country. Clearly, this amounts to non-compliance with the obligations imposed by the instrument on all state parties.

To ensure that state parties are held accountable to the treaty they have signed, it became necessary to adopt a Protocol, which seeks to ensure that they are legally bound to the provisions of the CEDAW treaty. Lesotho has ratified this Protocol on 24 December 2004.

It is all very well that Lesotho has signed the Protocol that legally bind her to the provisions in CEDAW, however, her inability to make available the country reports on human rights issues as it affects women in Lesotho to the Committee on CEDAW depicts gross lack of concern for making women rights issues a national agenda for the country. It further makes it impossible to monitor the country's progress concerning adherence to women's rights treaty.

5.5.2 Nigeria

Nigeria became a signatory to CEDAW on 23 April 1984 and subsequent ratification took place on 13 July 1985.²³¹ The country has also signed the Optional Protocol on 8

²²⁹ C Heyns (ed) *Human Rights Law in Africa* (2004) 55 for exposition on the reservations entered on CEDAW by Lesotho as well as other African countries.

²³⁰ Ibid.

²³¹ See generally www.unhchr.ch/tbs/doc.nsf (accessed on 18 February 2006).

September 2000, which came into effect on 22 February 2004.

It has been established that Nigeria has complied with her obligations in terms of submitting her country reports to the relevant body and the next report is only due this year.²³²

Despite meeting her reporting obligations to the Committee on CEDAW, a major source of concern is the paucity of legislation dealing with specific issues of women's rights. This makes it almost impossible to monitor her adherence to the provisions of the treaty because the Committee is unable to measure the progress made in those areas of concern. The only legislation specific to women is the Maintenance Order Act,²³³ which deals with compliance to orders made in Ireland and Nigeria.

5.5.3 South Africa

South Africa became a signatory to the treaty on 14 January 1995 soon after the advent of her new constitutional order. It is, however, a matter of regret that the country has not given any report to the world body on issues of women rights and on the extent to which it has complied with her obligations under CEDAW.²³⁴ It is not clear why South Africa has not submitted any reports to the committee. This inaction is indeed a cause of concern particularly in the light of the publicity the country has received with regard to high levels of

²³² Ibid.

²³³ Act 8 of 1921. One would argue that it is imperative that more women-specific legislations should be passed by the Nigerian Parliament to deal with gender justice.

²³⁴ See generally www.unhchr.ch/tbs/doc.nsf (accessed on 18 February 2006).

violence against women. It is also not clear why the country has not signed the Optional Protocol.²³⁵

5.6 Conclusion

It is noteworthy that in the 60 years of the UN existence, it has made tremendous efforts to put the issues of women on the agenda for member countries, civil societies, and non-governmental organizations. It is therefore, imperative that these actors work together to bring about change in the manner women issues are dealt with both regionally and globally.

From all indications, the efficacy of the Conventions lies in the importance accorded to them by state parties, for example, since governments are directly involved in appointing members to the CEDAW Committee, one would expect diligence in complying with the reporting procedure.²³⁶ The Committee discusses the reports sent in by the various state parties once every four years and they have encountered numerous problems in terms of implementing the provisions of the Treaty. Among the problems faced by the Committee are improper monitoring and evaluation criteria, insufficient time for the committee to deal with the amount of work it has since it meets for three weeks only once every four years, and problems relating to incompatibility of the provisions with certain customs, traditions or religion of some countries giving rise to reservation on some key provisions.

It is therefore, imperative to build capacity in the area of monitoring and evaluation and developing

²³⁵ Ibid.

²³⁶ See www.unhchr.ch/tbs/doc.nsf (accessed on 18 February 2006).

strategies to measure successes and weaknesses in the implementation of the treaty by state parties.

Human rights watchdogs such as Amnesty International (AI)²³⁷ and Human Rights Watch (HRW)²³⁸ are critical agencies in ensuring that state-parties commitments to gender justice are enforced through their programmes of activism.

²³⁷ See generally the official website of AI at www.amnesty.org

²³⁸ See generally official Human Rights Watch website www.hrw.org

CHAPTER SIX

Concluding Remarks and Recommendations

6.1 General

Various African governments have attempted to deal with women's issues through the Bill of Rights in their respective Constitutions proscribing discrimination on grounds of gender. Most countries are at the level of implementation of the relevant provisions of the Bill of Rights.

In this study, the writer has identified the various problem areas particularly the reluctance on the part of the governments of the three countries under review to face headlong the culture bound elements in cases where there is a conflict between equality and culture. The reluctance may be attributed to respect accorded to cultural heritage of a people as one of the core means of identifying them. In South Africa for example, there is a constitutional right to cultural belief.²³⁹ Academic writers on customary law have repeatedly warned of emasculating the rules and practices of custom as revered by the majority that would have far reaching implications for equating customary law practices with those provisions found under common law. Perhaps the only means of understanding these clashes would be to convene a national conference or workshop²⁴⁰ where all stakeholders would

²³⁹ S 30 of the South African Constitution, provides that "Everyone has the right to the use of the language and to participate in the cultural life of their choice...".

²⁴⁰ The idea of a national conference on culture v human rights debate could be undertaken by any one of these countries under review while making it possible for parliamentarians, academics as well as traditional leaders from other countries to participate in the debate.

participate in reaching acceptable compromises without unduly doing away with customary law or human rights provisions.

The new initiatives embarked upon by members of the AU regarding putting Africa on the path to sustainable development and growth through espousing good governance, democratic principles and human rights are very commendable. The African Union is the new paradigm for Africa's integration and it is the expectation of both member countries and the international community that Africa moves away from a continent characterized by unstable governments, war, diseases and wanton violation of human rights. Having established the role played by the AU, it is important to make recommendations on how the different countries under study could continue to engender gender justice. In this concluding chapter, we would proffer specific recommendations for the countries under review to ensure that the rights of women are protected on every level and by all standards under law and in practice.

6.2 Specific Recommendations

6.2.1 Lesotho

The country has not made much progress in alleviating the plight of women. Although the Constitution has prohibited grounds of discrimination such as sex, the position of women as perpetual minors is an affront to modern democracy. Based on this and all other issues discussed in the text, I make the following recommendations:

- Mechanisms must be put in place to ensure that women have *locus standi in judicio* as well as

the legal capacity to enter into contracts without the aid of a male person.

- The level of women participation in governing structures is low. For example, there are insignificant numbers of women in the executive and no women in the judiciary. The minimal or absence of women in these structures means that they have no role in influencing policies of the government. In 2005 Lesotho appointed its chief of Police as a woman.²⁴¹ Although this is a step in the right direction, urgent steps are necessary to improve the situation.
- Women's lack of legal capacity means that they would be denied credit facilities unless they obtain help from their parents, brothers or husbands. Women, who are subject to customary law, cannot inherit or own land thereby depriving them of a very important resource. Poverty is entrenched in this way, and causes untold suffering on women because of the cyclic nature of the entire process. It is suggested that government should enact legislation to remove the legal disability of women. There is also the negative effect on women's rights as a result of the country's reservation to CEDAW. The reservation indicates: "The Government of the Kingdom of Lesotho declares that it does not consider itself bound by Article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship. The Lesotho Government's ratification is subject to the understanding

²⁴¹ See Lesotho government website www.lesotho.gov.ls (accessed on 18 February 2006).

that none of its obligations under the Convention especially in Article 2 (e) shall be treated as extending to the affairs of religious denominations. Furthermore, the Lesotho Government declares it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho”²⁴²

- The country’s stand on CEDAW means that it will be slow in reversing legal disability areas from the country’s law.²⁴³ This flies in the face of the country’s constitutional provisions as well as her commitments to international treaties to which she is a party. It is not just appropriate to be signatories to these treaties if the country involved is not in any way ready to abide by the obligations but to have selective process that would ultimately hinder social development, equality and freedom.
- The country must review her reservations in CEDAW because the same principles apply to the ACHPR to which Lesotho is also a party.
- Lesotho has not taken any progressive steps towards utilizing the proximity of that country with South Africa. As a member of the SADC, and AU, the country needs to take cognizance of the changing circumstances with the continent and to be part of the progressive nations. At the moment, it remains very inconspicuous in the scheme of things within the region as well as the continent.

²⁴² See generally the reservation clauses to CEDAW in C Heyns Human Rights Law in Africa (2004) 55.

²⁴³ KA Acheampong “The Ramification of Lesotho’s Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women” (1993) 9 (1) *Lesotho Law Journal* 98.

6.2.2 Nigeria

Nigeria has the potential to remain one of the greatest countries on the continent, in the light of issues already discussed; the following recommendations would be necessary:

- The current Nigerian Constitution needs to be amended to give effect to more inclusive rights in its equality provisions. The prohibited ground of discrimination in the Constitution is only on the basis of sex. It is suggested that prohibitions should extend to issues of gender, pregnancy, age and sexual orientation.²⁴⁴
- The cultural and social values need to be re-orientated. In the Nigerian context, equality is not complemented in the roles played by women and the respect accorded to them. NGOs and government need to embark on enlightenment programmes to eradicate negative attitudes and stereotypes built around equality and other family values.
- Men are the major players in the political life of Nigeria. Women take back seats and are not given the necessary financial support, like their men counterparts, to enable them play a

²⁴⁴ Pregnancy should be a prohibited ground because in some states in the country, pregnant single women are not accorded the same rights as their married counter-parts. The same kind of discriminatory treatment is meted out in terms of working conditions for women in some parts of the country. There are no statistics on the number of people with different sexual orientation but like some countries applying the sharia penal code, gay men and women are exposed to some kind of discrimination in the work place and medical care.

meaningful role in the various spheres of government.²⁴⁵

- The status of women in the Northern parts of the country is not in accordance with the level expected of a country that ratified CEDAW without any reservations. Although Nigeria is a secular state she has witnessed instances of human rights abuse as a result of the application of the Sharia penal code. The Constitution is silent on the status of Islamic laws in the country.
- The role of women in judiciary is still very insignificant. There are no women judges of the Supreme Court of Nigeria. There are lacunae in the laws of the federation in specific areas of concern for women. For example, there is no law on domestic violence and in the area of moral education. Domestic violence is rife in Nigeria and it is mostly regarded as part of the private lives of the people that the law cannot operate on those levels. It is important to have legislation on this aspect of social life to combat the scourge of violence that occurs within the family. The absence of any formal legislation on moral education in the society

²⁴⁵ According to government information, there are only 2 women in the Senate of 109 members. There are no women governors or even deputy governors. In ministerial positions, there are only 6 women ministers out of 50. The implication is that women do not put their weight in influencing government policies; it is therefore imperative to include affirmative action in the constitution to address the great imbalance in a populous country as Nigeria. The amendment should envisage affirmative action for a fifty-fifty percent of men and women in politics.

brings about the issues of high mortality rates for quack abortion, HIV/AIDS, and sexual perversions. Education on these issues would help combat the HIV/AIDS situation in Nigeria before it reaches an epidemic proportion as well as other social vices associated with these kinds of behaviour.

- The different schools of law should have customary law as a subject of its own rather than lumping it under family law. Customary law governs the majority of the people's lives; therefore it is imperative to dedicate adequate teaching curriculum to this huge area of law. By this means, further development of the law could take place.
- Nigeria needs to strengthen its commitments to the International treaties to which it is a party. The reporting to CEDAW committee must be as regular as it should be. By having ACHPR as part of the domestic law is a commendable progress and as such mechanisms need to be put in place to ensure the proper application of the provisions of the Charter. Nigeria is yet to ratify the Protocol on the rights of women as well as the Optional Protocol to CEDAW. By ratifying these Protocols, it places the country's commitment on world map and as such the global community would keep watch on how the country honours its obligations with the international standards.
- All the harmful cultural practices relating to widows must be stopped and legislations made to

protect women from degrading inhuman treatment such as widow inheritance.

6.2.3 South Africa

South Africa is the most progressive of the three countries under review in terms of the equality provisions and jurisprudence. However, certain areas that need attention include the following:

- Land ownership and security of tenure. The very slow system of land restitution still permits undue hardship on women. The process takes a very long time and frustrates beneficiaries some of whom die before receiving their restitution claims. This creates a continuous cycle of struggle for the women.
- South Africa is lagging behind in her reporting obligations to CEDAW. It is important that the country develops its gender department through education on gender issues, reporting to the international body and procedures involved with the obligation.
- The Parliament is yet to take into consideration most of the recommendations of the South African Law Reform Commission (SALC) regarding the harmonization of laws. It is appropriate that customary law be developed in the same way as the common law. It has already been stated that customary law cannot be wished away as it forms the basis of the lives of the majority. Therefore it is important that regard is had for the Constitutional obligation to develop customary law in terms of s 39 (1) of the

Constitution. It must also be necessary for parliamentary Committees to make use of NGOs, academics and traditional leaders to elucidate on areas of complexity in customary law and its concomitant implications on the common people.²⁴⁶

- The areas of law that discriminate against women on ground of sex and gender must be removed from the statute in its entirety, the judiciary should be pro-active in striking out pieces of legislation that are unconstitutional especially where these were enacted to perpetuate gender discrimination.
- The Parliament needs to revisit the Witchcraft Suppression Act. The Act has to define various issues related to this problem so that people do not lose their lives through extra-judicial killings that occur in the rural areas.
- The country must move swiftly in transforming the judiciary and creating more positions for more women on the benches in the different courts in the country.

²⁴⁶ The changes on Children's Bill to prohibit virginal testing in certain parts of the country raised very pertinent issue on culture and human rights. Part of the means of resolving the impasse is by engaging key stakeholders in fleshing out areas of contention. NGOs are of the opinion that virginal testing is a violation on girls, while on the other hand maidens of the Zulu kingdom as well as their ruler find comfort in the practice as part of who they are as a people and that it should not be corrupted by westernisation. See also the elucidations on the need to engage with key players when issues of customary law are involved as noted by AJ Kerr "Customary Law, Fundamental Rights and the Constitution" (1994) *SALJ* 720.

6.2.4 Areas of Reform for the AU/ACHPR

For the African continent to be relevant in the globalized world, certain areas of international law had to be part of the human rights context of the continent.

The merging of the AEC/OAU into a single body through the Constitutive Act of the AU created more complex work in dealing with the obligations of the body. The ACHPR and its Commission should service the AU but in the annual meeting of the Commission in the Gambia, it is not clear what role the AU plays as a parent body to this important organ. It is therefore important to inject life to the activities of the commission by the AU through coordinated programs between the AU and the commission.

The Commission is entrusted with the mechanism to evaluate the reporting process of the Commission. It is argued that the lack of appropriate mechanism prevents states from meeting their obligations to the body. There must be enough time to deal with the numerous human rights issues of the continent.²⁴⁷

The normative provisions of the Charter needs reform especially the ones dealing with the claw-back clauses in the Charter. The manner in which this provision is drafted gives rise to concern so it is important for the words of the provision to as clear as possible without the Commission having to resort to different kinds of interpretation of the clause. However, it is necessary to make explicit provision on the operation of the clause if it must be part of the Charter by providing that international supervision should be obtained in certain circumstances. The State-Parties unfortunately have a tenuous obligation towards the Charter regarding creating

²⁴⁷ GW Mugwanya "Examination of State Reports by the African Commission: A Critical Appraisal" (2001) 2 *AHRLJ* 268.

legislative measures to give effect to rights and duties as provided for in the charter.²⁴⁸

The ACHPR is an innovative tool for the continent and all efforts should be made to ensure that these treaties do not become mere diplomatic steps for the countries to just ratify without seriously meeting the obligations therein. The strong unity of the Inter-American Union or the European Union is the alliance felt by its members and the purpose of a common belief in culture, trade, economics and politics.

For Africa to achieve the its plans for a unified continent, the members must be ready to take the AU serious by abiding to the provisions of the Constitutive Act, shun undemocratic principles and eschew the tendency to create instability with the continent by African leaders not relinquishing power when they are supposed to, rather they change the Constitutions.²⁴⁹ When situations such as these arise, important issues such as human rights of women and men are overtaken by violence and state of general unrest.

²⁴⁸ C Heyns "The African Regional Human Rights System: In Need of Reform?" (2001) 2 *AHRLJ* 155. In this article, the author gave detailed areas of reform that could improve the African Human Rights Systems.

²⁴⁹ President Robert Mugabe changed the Constitution of his country so that he could run for a third term in office. Ugandan President has been inaugurated for the third time in office despite oppositions from different quarters. The people in Kenya rose up to the challenge by overriding such intentions through a referendum. It has become the idea for ruling presidents to thwart any gains made democratically by this unprincipled and undemocratic behaviour, which invariably adversely affect the lives of men, women and children in their respective countries.

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