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Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa

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INTRODUCTION

The law that governs family relations — the law of marriage and inheritance, among others — is an area of law that has an immense impact on the status and welfare of women in Africa. It is an area that is rendered particularly complex by the interaction of plural legal systems. For reasons ranging from history to culture, the average African is today subject to at least two distinct, and sometimes conflicting, legal systems. Customary law usually regulates family and allied relations, while statutory law regulates other aspects of life. There is no denying the fact that some aspects of customary law and practices are discriminatory and harmful. The competing values of these plural legal systems more often than not result in denial of rights, and, ultimately, access to justice is adversely affected.

In most parts of Africa women make up a large portion of the economically and politically vulnerable population. Legal pluralism does much to deny them their rights. This denial of rights is more patently seen in the areas of marriage and inheritance. The issue of inheritance is an important one because it is one way by which women can have access, especially, to economic resources such as land. Most African communities are agrarian based. Accordingly, a lack of access to the main resource, land, makes women economically dependent and thwarts their efforts at achieving economic independence for themselves and their families. As a result of legal plurality, the law of inheritance is fraught with uncertainty and inequality.

This Article examines the concept of legal pluralism by tracing its historical dimensions and how it plays out in African society. It focuses on how the concept has affected the rights of women where marriage and succession to property is concerned. Further, it considers whether harmonization of the different, prevailing legal systems is at all possible. This Article will examine attempts made by some African countries at effecting such harmonization in an effort to ensure respect for equality. A final look will be taken at the international obligations of states where these issues are concerned.

I. THE CONCEPT OF LEGAL PLURALISM IN THE AFRICAN SOCIETY

Legal pluralism, simply put, is the situation where two legal systems apply in the same social field — a state of affairs in which behavior pursuant to one or the other system of law is governed "concurrently . . . without spatial separation within a single territorial jurisdiction."[1]

[1] ANTONY ALLOT, ESSAYS IN AFRICAN LAW, WITH SPECIAL REFERENCE TO THE LAW OF

In Africa it is reflected in the existence of customary law, statutory law, and religious law in variable combinations on the same subject matter. Its existence is a product of culture, a history of colonialism, as well as religious incursions. Under these various systems of laws, customary and religious law governs family issues while statutory law governs everything else. Customary law has the tendency to discriminate against women, especially in the areas of marriage and inheritance.

Africa is home to well over a thousand different ethnic groups with about as many cultures and related customary laws as there are ethnic groups. The norms and dictates of these customary laws and practices regulate the lives of the members of particular ethnic groups. The substance of customary law varies from ethnic group to ethnic group, sometimes even from village to village.

Factors that account for such extreme diversity include, but are by no means limited to, the history, culture, environment, language, geographical location, and level of development of the particular locality. Further, cultural interactions and economic and sociopolitical changes have ensured that customary rules have not remained static. These laws and practices of custom are deeply rooted in community-specific historical, socioeconomic, and cultural experiences. Therefore, it is extremely important that one be very cautious when making value judgments about customary laws and practices.

Historical legacies in the form of colonialism and religion have played a big role in such sociopolitical change, and this is what has informed legal pluralism in Africa. Whilst colonialism created the classic form of legal pluralism, the concept was not altogether alien to African societies. Some of the colonized societies were already legally pluralistic, owing to the fact that pre-eighteenth century Islamic missionaries or Muslim migrants had introduced Islamic law in those places. For such peoples, Islamic law is their customary law.[2]

Nevertheless, legal pluralism in its most classic form in Africa is a product of colonization. The late nineteenth century colonialists were mainly positivists who believed in a conceptual conventional nature of law: that a legal system exists only in the presence of a government, a legislature makes rules, courts apply those rules, and police enforce

GHANA 154 (Greenwood Press 1975) (1960).

[2] This was the case in various parts of Northern Ghana before those parts were declared British Protectorates in the early twentieth century. *See* Ken Y. Yeboa, *Bigamy and Islamic Marriages in the Law of Ghana: The Legislator's Dilemma or Studied Silence*, 19 R. GHANA L. 69, 69 (1993-95).

them.[3] In some colonized territories, these structures did not exist in a form recognizable by colonial administrators, and they therefore assumed an absence of law in the colonies. Indeed, the supposed absence of law became a justification for the colonial experience in those places, and the colonials saw themselves as bringing law to lawless peoples.[4] Where such structures were seen as existing, colonial administrators nevertheless imposed their systems of law to further economic interests and maintain order in the territories.[5]

The colonial entities that were created wiped away the autonomy of disparate villages. This put unrelated and even warring groups into one political unit. It also separated societies that were related through blood, marriage, or other long-standing social relations, all for the ease of colonial administration.[6]

For most of the colonial period, the colonial administrators operated the courts, which they established according to the principles of the portions of their legal systems that they had imported into the colonial territories. These principles were patronized by the colonialists themselves. Natives were seldom parties in cases before these courts. In those rare instances when they were, colonial judges and magistrates used norms of custom in a way that subjugated it to the imported common law and furthered the interests of the administration of the territories.[7] Colonial administrators put up with customary law so long as natives used it to regulate matters among themselves and their actions did not threaten colonial rule.

During the immediate post-independence period, the new nations emphasized nation building, and preserving and strengthening the fragile unity that existed in these regions. Building politically and

[3] *See* Jean G. Zorn, *Making Law in Papua New Guinea: The Influence of Customary Law on the Common Law*, 14 PAC. STUDIES 1, 6 (Dec. 1991).

[4] *See* Jennifer Corrin Care & Jean G. Zorn, *Legislating Pluralism: Statutory "Developments" in Melanesian Customary Law*, 46 J. LEGAL PLURALISM 49, 101 (2001).

[5] *See* Ken Y. Yeboa, *The History of the Ghana Legal System: The Evolution of a Unified National System of Courts*, 18 R. GHANA L. 1, 4 (1991-92).

[6] *See* Care & Zorn, *supra* note 4, at 53-54.

[7] For instance, Section 2 of the Order-in-Council of September 3, 1844, required colonial judicial authorities in the Gold Coast, when exercising jurisdiction among the indigenous inhabitants, to "observe such of the local customs as were compatible with the principles of the law of England," and in default of such customs, to proceed in all things as nearly as may be according to the law of England. Also on March 6, 1844, the Governor of the Gold Coast signed a bond (Bond of 1844) with the local Fanti in which the chiefs acknowledged the de facto power and jurisdiction exercised by the British in the Gold Coast and further agreed that serious crimes should be tried by the Queen's judicial officers sitting with the chiefs, molding "the customs of the country to the general principles of British Law."

economically viable nations would be near impractical if the different customary societies were allowed to assert their customary laws without limitations or qualifications.

In some countries, customary norms and practices have been extensively altered by statutory interventions, and their legal status varies from country to country. While statutory law fully upholds and grants official recognition to custom in some places, in others it is abrogated outright. Still some others straddle the two positions by recognizing custom only in so far as it does not run counter to statutory laws. Nevertheless, the fact remains that members of the various communities, whether overtly or covertly, and whether sanctioned by statute or not, regulate various affairs in accordance with custom. Matters such as family relations and inheritance continue to be regulated by custom in almost all parts of Africa, and inconsistencies in these statutory interventions render women vulnerable. Its continued application jeopardizes their statutory rights and disadvantages them.

II. MARRIAGE, INHERITANCE, AND THE PROBLEM WITH CUSTOMARY LAW

Although marriage creates a contractual relationship between the parties, its validity and consequent rights are dependent on law. In countries where there are multiple systems of law, the implication is that there are also different kinds of marriages, and there is substantial asymmetry between these attendant rights. In other words, the type of marriage that a couple contracts determines the rights, such as succession, that attach to such marriage.

Customary law may be defined as a body of rules and norms whose legitimacy is rooted in tradition and is claimed to have existed since time immemorial. As a body of laws rooted in tradition and historical experiences, customary law is fraught with certain inherent problems that render its application disadvantageous to women, especially in the area of marriage and succession. It operates in such a manner as to give men precedence over women. Such gender inequality relegates women to a subordinate position, which in turn affects their access to resources. For this reason, traditional customary conceptions of marital rights do not always acknowledge the contributions that wives make to the acquisition of family wealth, regardless of what statutory law has to say on the subject. Tensions are brought to the fore when a husband dies intestate and customary law is to apply to distribution of property.

The complexities are even more pronounced where marriages are contracted under more than one legal system. For instance, in Ghana today there is hardly any marriage celebrated under statutory law that is not preceded by the performance of all the essential rights of a valid marriage under customary law.[8] The issue then becomes under what law dissolution of the marriage and distribution of property should be carried out.

Another dimension to the issue of complexity is the fact that customary law marriages, which also include marriages contracted under Islamic law, are potentially polygamous even though not necessarily so in practice. Whatever the social and economic advantages of polygamy in traditional society might have been, it must be admitted that under modern conditions it is a cause of many social ills; a happy and intimate family life cannot be established in the atmosphere of jealousy and rivalry which usually characterizes polygamous unions.[9] It is criticized as being reflective of inequality between men and women. Problems with resource allocation, ownership of property, and inheritance issues are heightened in a polygamous context.

A. Inheritance Rights of Spouses Under Customary Law

The rules of succession under customary law are closely linked to the kind of kinship system practiced in the particular locality or the edicts of the religion said to constitute the customary law of a particular people.[10] In most parts of Africa, inheritance depends on whether one comes from a patrilineal or matrilineal family (religious customary law excluded). In some localities the kinship system is bilateral where children are equally related to both their mother's and father's families and every biological descendant, male or female, is a recognized relative.

The right to succeed to and enjoy rights in property is determined by membership in the family, and such membership is traced through females from a founding female ancestor (matrilineal) or through males from a founding male ancestor (patrilineal). Therefore, an heir

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[8] *See* Akua Kuenyehia, *Women and Family Law in Ghana: An Appraisal of Property Rights of Married Women*, 17 U. GHANA L.J. 72, 99 (1986-90).

[9] *See* Muna Ndula, *The Changing Nature of Customary Marriage in Zambia*, *in* WOMEN AND LAW IN SUB-SAHARAN AFRICA 33-35 (Cynthia Grant Bowman & Akua Kuenyehia eds., 2003).

[10] Most cultures in Africa limit the range of people through whom descent is traced by using the unilineal descent principle, which traces descent through a single line of ancestors, male (patrilineal) or female (matrilineal).

must necessarily be related to the deceased through such a male or female ancestor. Although the rules and incidents of inheritance differ for the kinship systems, in all cases inheritance does not result in any greater independence for married women.

Under customary law in most communities in Ghana, for instance, a woman has the right to own property in her own name. Nevertheless, customary law takes the position that a wife is duty-bound to assist her husband in his undertakings, and any property acquired with such assistance belongs exclusively to the husband. Customary law treats the customary family's rights of inheritance as paramount. Because a wife is not considered a part of her husband's family, whether patrilineal or matrilineal, any claims she may purport to make to marital property is met with severe opposition.[11] Blood ties take precedence over affinal ties, and because the entire estate, by custom, devolves on the husband's customary family, widows often become destitute. The closest a widow may come to benefiting from property jointly acquired with her deceased husband is if, by the relevant customary law, her children are heirs.[12] Even Islamic law, which allows women to inherit from a deceased husband, discriminates in terms of quantum along sexual lines: whereas a widow is allowed a quarter of her husband's estate, a widower takes half of his deceased wife's estate.[13]

In the past there existed certain sound underlying assumptions for what now seems to be the lack of protection for widows. By custom it was the legal responsibility of the customary successor to maintain the surviving widow and children out of the estate of the deceased. This obligation was discharged with all seriousness by customary successors. In this present individualistic age, however, the interests

[11] *See* Sogunro-Davies v. Sogunro-Davies & Ors [1929] 2 N.L.R. 79, 80 (Nigeria) (Beckley, J., expressing that native Yoruba law and custom deprived wife's inheritance rights in her deceased husband's estate because devolution of property follows blood ties); *see also* Florence Butegwa, *Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 495, 497 (Rebecca J. Cook ed., 1994) (stating that under customary succession law in Uganda "[i]n case of intestacy, the widow has no claim on her late husband's land"); Margaret Mulela Munalula & Winnie Sithole Mwenda, *Case Study: Women and Inheritance Law in Zambia*, *in* AFRICAN WOMEN SOUTH OF THE SHAHARA 93, 94-95 (Maragaret Jean Hay & Sharon Stichter eds., 2d ed. 1995).

[12] In most patrilineal societies, the sons of a deceased man have the right to inherit.

[13] *See* Ayodele V. Atsenuwa, *Women's Rights Within the Family Context: Law and Practice*, *in* WOMEN IN LAW 117, 127 (Akintunde Obilade ed., Pub. No. 1, S. U. Law Centre, Baton Rouge & Faculty of Law, U. Lagos Project Series, 1993).

of the widow and children are more often than not subjugated to the personal interests of the customary successors.[14] It is not uncommon to find widows who have been thrown out of their matrimonial homes upon the intestate death of a husband.

Roles that were historically played by the customary family in the lives of the surviving wife and children, such as bearing all the funeral expenses for the deceased, are in some communities now foisted on the wife and children. In the face of these realities, it is unconscionable to still insist on the preeminence of the customary family in matters of inheritance.

B. Judicial Interventions

Because of the discriminatory practices of customary law, more and more widows are taking their cases to court in their quest for redress. Unfortunately, formal courts of law do not always reward their efforts with justice. In some cases, judges feel constrained to a strict interpretation of customary law to the disadvantage of widows.

In the Ghanaian case of *Gyamaah v. Buor*,[15] decided in 1962, the widow of the deceased sued the husband's customary successors for a specific share of eleven cocoa farms, which she said she assisted her husband to develop during his lifetime. It was held that under Akan customary law, a widow is not entitled to a share of the husband's farms merely on the grounds that she assisted in cultivating it.

The court stated further that because the husband's successors had previously agreed to give the widow an unspecified portion of the farms, the court should give the successors absolute discretion in what they considered appropriate to leave to the widow. Based on Akan customary law, the court said it could not order them to give a specific share to the widow. The court added that it is only where the wife's assistance takes the form of substantial financial contribution that she would be entitled as of right to a share in the properties acquired by the husband.

The difficulty with this latter statement by the court is that in most instances it is almost impossible to quantify what amounts to "substantial financial contribution." Contributions made by wives do not always take the form of direct cash payments and are more

[14] *See* Christine Dowuona-Hammond, *Women and Inheritance in Ghana*, in WOMEN AND LAW IN WEST AFRICA: SITUATIONAL ANALYSIS OF SOME KEY ISSUES AFFECTING WOMEN 132, 132 (Akua Kuenyehia ed., 1998).

[15] [1962] 1 G.L.R. 196 (Ghana).

difficult to prove. Thus, where women are unable to prove such contribution, they get nothing.

The Tanzanian Court of Appeal's decision in *Scholastica Benedict v. Martin Benedict* exemplifies the complexities posed by polygamous marriages.[16] In this case the court ordered a junior wife to leave her matrimonial home because, by custom, the son of her husband by his elder wife was successor to the property.

However, in a few cases, courts have recognized the hardships caused by the application of customary law rules and have adjudicated cases in such a manner as to alleviate the hardship. In the 1997 case of *Mojekwu v. Mojekwu*, the Nigerian Court of Appeal overturned a long-standing custom in southeast Nigeria under which a widow was not entitled to inherit her husband's property. The court held that "a court of law being a court of equity as well, cannot invoke a customary law which is repugnant to natural justice, equity and good conscience. The 'oli-ekpe' custom is one of such customs."[17]

Judicial pronouncements on customary law have often been criticized as inaccurate. Because customary law is essentially unwritten and, as already noted, differs from locality to locality, it is inevitable that any purported judicial pronouncements will be flawed. As observed by a writer in Zimbabwe:

> [C]ustomary law as recorded in the books and applied by the superior courts is more myth than reality . . . . [T]he custom being applied by the courts . . . was not the custom of the people themselves but a judicial and administrative version of custom created from processes turned into rules by the modes of recording, the operation of precedent and the internalization of custom within the courts. . . . The structures of traditional society do not translate readily into modern nuclear lifestyles so that what may have been once supportive may be viewed as oppressive under new conditions if its adaptation is restricted and delimited by rules of content.[18]

Nevertheless, the trend of judicial decisions reveals a gradual inclination toward the recognition and protection of the rights and interests of spouses and children of the deceased, as opposed to those

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[16] *See* GENDER AND LAW: EASTERN AFRICA SPEAKS 71 (Gita Gopal & Maryam Salim eds., World Bank 1998).

[17] Mojekwu v. Mojekwu, [1997] 7 N.W.L.R. 283 (Nigeria).

[18] K. Dengu-Zvogbo et al., *Inheritance in Zimbabwe: Law, Customs and Practice*, *in* WOMEN AND LAW IN SUB-SAHARAN AFRICA, *supra* note 9, at 196-99.

of the customary family, in the absence of an adequate legislative provision on the subject. The cases reflect a shift in the assumption that it is the man who solely provides for the family and, therefore, singularly acquires all family property. Even though some of these cases show considerable judicial empathy for the position of women, the courts are clearly limited in the scope of remedies they can grant to women. This is a consequence of the confines of customary law rules of succession. It is also a result of the lack of adequate legislation defining the rights of surviving spouses vis-à-vis the customary family.

C. Statutory Interventions

The shift in judicial attitudes toward marital property has been followed closely by legislative initiatives in some countries. In light of the injustice perpetrated by the application of customary law rules, some governments have taken various legislative steps aimed at gender parity generally and intestate succession specifically. Widespread critical discussions in these countries prompted such legislative initiatives.

1. Situational Analysis

a. Uganda

Until the passage of the Succession (Amendment) Decree, No. 22 of 1972, customary laws on inheritance operated side by side with the Succession Act of 1964 ("Succession Act"). Whereas the application of customary law was restricted to indigenous Ugandans, the Succession Act applied only to the expatriate community. In 1972, the Succession (Amendment) Decree of 1972 ("the Amendment") was passed and made the Succession Act applicable to all Ugandans, with extensive amendments. The Amendment incorporated most of the recommendations made by the Kalema Commission, which was established in 1964:

> [The commission will] consider the laws and customs regulating marriage, divorce and the status of women in Uganda bearing in mind the need to ensure that those laws and customs while preserving existing traditions and practices as far as possible, should be consistent with justice and

> morality appropriate to the position of Uganda as an independent nation and make recommendations.[19]

The amended Succession Act now restricts the application of customary laws and, inter alia, recognizes the right of women to succeed their husbands. Under the law, widows are to inherit fifteen percent of the estate. Portions are also allocated to the customary heir, dependent relatives, and lineal descendents (children and grandchildren) who receive the greatest share: seventy-five percent.[20]

b. Ghana

Recognizing that the existing law on inheritance did not sufficiently reflect the increasingly significant role that women play in the household economy, the Ghana Legislature in 1985 enacted the Intestate Succession Law, also known as the Provisional National Defense Council Law 111 ("PNDC"). The PNDC established a uniform intestate succession law to be applicable throughout the country, irrespective of the type of marriage contracted or ethnic background. The Memorandum to the PNDC states that the statute's primary objective is to provide greater protection than was provided under customary law for the surviving spouse and children of a person who dies intestate.

The law attempts to strike a delicate balance between the rights of the aforementioned people and the customary family by establishing specific portions of the estate to devolve on the various beneficiaries. The surviving spouse and children of the deceased are entitled to one house and all household chattels. Specific fractions of any residue are then apportioned to the spouse and children and other beneficiaries, including the parents of the deceased and the customary family. To forestall any interference with the rights of the surviving widow, the PNDC makes it an offense for anyone to eject surviving widows or their children from the matrimonial home.[21]

c. Zambia[22]

Discussions on inheritance problems began as far back as the 1970s. In 1976 the Zambian government commissioned the Law

[19] *See* United Nations Human Settlements Programme, Rights and Reality 79 & n.293 (2002).

[20] Succession Act, (1972) Cap. 139, § 28(1)(a) (Uganda).

[21] Intestate Succession Law, PNDCL 111, § 1 (1985).

[22] This section draws on Munalula & Mwenda, *supra* note 11, at 93-100.

Development Commission to review the law on inheritance. Despite the Commission's recommendations for legal reform, it was not until 1989 that the Intestate Succession Act (No. 5) was passed. This was due mainly to intense lobbying by various women's groups in Zambia.

Section 2 of the Act applies to all persons who at their death are domiciled in Zambia and to members of communities to whom, but for the Act, customary law would have applied. This Act also establishes specific portions of the estate to devolve on the various beneficiaries: twenty percent of the property to the surviving spouses(s), fifty percent to the children of the deceased, whether born in or out of wedlock, twenty percent to the parents of the deceased, and ten percent to any other dependants. The matrimonial home and all household chattels go to the surviving spouse.

2. An Appraisal of the Legislative Initiatives

The laws that have been passed to alleviate the hardship caused by the application of customary law rules on matters of inheritance constitute a radical departure from customary law and are significant landmarks in family law reform in sub-Saharan Africa. To some extent they have helped the plight of women in those countries where they have been passed. The impact of the laws on women, however, have been minimal for a number of reasons.

The high illiteracy rate, especially among the rural population and the urban poor, means that a lot of women are ignorant of the existence of these laws and the rights they afford. Even where they are aware of the existence of such a law, financial considerations hamper any efforts to enforce the rights that women may have under the law. The harsh reality is that legal procedures relating to estate administration are cumbersome and costly. Most women cannot afford to pursue the rights spelled out under these laws. The snail's pace at which cases are handled invariably defeats the whole purpose of seeking legal protection from the courts. As equity aptly states, justice delayed is justice denied.

The laws themselves have inherent problems that limit their effectiveness in protecting the rights of women. The mode of distribution described in some of the laws gives rise to certain complications. The portions allocated to surviving spouses are sometimes criticized as being inadequate and not reflective enough of a spouse's contribution to marital property. With customary marriage being the most common form of marriage in sub-Saharan Africa, polygamy remains a fact. Where division of the estate has to be among different groups with differing interests, conflict is inevitable.

The result is fragmentation or depletion of the estate as, to minimize conflict, affected parties may prefer to convert the property into cash and divide the proceeds accordingly.

A critical look at some of these laws will reveal their shortcomings. Despite the seeming strides made by these statutes, they are actually ineffective in improving the lot of women. The laws contain certain exceptions that make the statutes practically ineffective. The Zambian Intestate Succession Act, for example, which in theory is supposed to have uniform application across Zambia, contains a number of exceptions that have serious consequences for the rights of widows. Section 2(2) provides, inter alia, that the Act shall not apply to land that at the time of death of the intestate had been acquired and was held under customary law, and land that is characterized as "family property."[23] Apart from some urban land, land in the rural areas is predominantly held under customary law with most land being customarily vested in families. Excluding customarily held land from the application of the Intestate Succession Act is in effect denying women access to the one resource that they need most to make it in these agrarian communities.

Last, but more importantly, the statutory enactments are a superimposition of legal edicts on time honored notions of marriage, property, and succession rights, which are themselves founded on traditional customs and norms. These customs and norms have operated within the framework of established patterns of kinship systems and gender segregated patterns of behavior, and they cannot be done away with by the mere stroke of the legislative pen. Societal perceptions on the role and position of women and their limited access to the formal justice system constitute a hindrance when it comes to enforcing the inheritance rights of women. In many cases, social and family pressure, and the fear of offending the customary family and being isolated often compel women to give up their rights.[24] To the disadvantage of women, in the majority of cases customary law continues to apply upon the intestate death of a person.

The ingrained position that customary law still occupies in inheritance matters, in spite of legislation on the subject, is reflective of the fact that in-depth social research and public debate prior to the passage of these laws were lacking. Most women are ignorant of the rights afforded them under the laws. If these laws are to have their desired impact, then it will be expedient to launch extensive

[23] "Family" here should be read to mean the customary family.

[24] *See* Dowuona-Hammond, *supra* note 14, at 132-33.

educational as well as legal aid programs that target mainly the rural areas where these laws are yet to have any significant impact. Legal literacy is an invaluable tool for the empowerment of women because it provides essential information that allows women to exercise their rights. The Beijing Declaration and Platform for Action of the Fourth United Nations World Conference on Women stated that "[w]hile women are increasingly using the legal system to exercise their rights, in many countries lack of awareness of the existence of these rights is an obstacle that prevents women from fully enjoying their human rights and attaining equality."[25] Governmental organizations as well as civic society have always acted as indispensable agents in the protection and promotion of the rights of the vulnerable in society, and continue to do so. Their continued and intensified efforts to promote women's rights through legal literacy programs in the areas discussed are encouraged.

III. CONSTITUTIONAL AND INTERNATIONAL OBLIGATIONS

Besides statutory provisions, most countries have constitutional provisions that seemingly guarantee the rights of women in the issues under discussion. Such provisions usually spell out the relationship between customary laws and the constitution as the supreme law of the land. This relationship is sometimes not expressed in clear terms. It is done in a manner, rather, that leads to more confusion and problems for women. Nonetheless, such provisions are a step in the right direction in the sense that they offer a standard against which all subsidiary laws are to be judged. They also create an awareness of rights even though they are more theoretical than practical. The hope is that from theory, they will eventually be translated into practice for the welfare of all women and widows in particular.

The Constitution of Ghana, for instance, states in article 1(2) that the constitution shall be the supreme law of Ghana, and any other law found to be inconsistent with any provision of the constitution shall, to the extent of the inconsistency, be void. Article 11 provides the hierarchy of laws as follows:

> The laws of Ghana shall comprise—
>
> (a) this Constitution;

[25] Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 227, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), *available at* http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en.

> (b) enactments made by or under the authority of the Parliament established by this Constitution;
>
> (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.
>
> (d) the existing law; and
>
> (e) the common law.[26]

"Common law" is defined to include "the rules of customary law including those determined by the Superior Court of Judicature,"[27] and "customary law" is itself defined to mean "the rules of law, which by custom are applicable to particular communities in Ghana."[28] It is obvious from a reading of these provisions that the constitutional provisions in general, and any rights guaranteed therein in particular, are superior to any customary law dictates.

The application of customary law invariably warrants a discussion on human rights, particularly equality before the law, non-discrimination, the right to own and hold property, access to justice, and related rights. The Ghanaian Constitution provides for equality for all before the law and prohibits discrimination on any grounds including gender.[29] The right to own property is guaranteed in article 18 as follows: "Every person has the right to own property either alone or in association with others.[30] On the specific issue of spousal inheritance rights in marital property, article 22 provides: "A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will."[31]

The Ugandan Constitution is very similar in substance. The supremacy of the constitution is asserted in article 2(1), and "[i]f any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."[32] The equality of all persons before the law and non-discrimination on the basis of sex, inter alia, is also emphasized.[33]

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[26] CONSTITUTION, ch. 4, art. 11(1) (1992) (Ghana).
[27] *Id.* art. 11(2).
[28] *Id.* art. 11(3).
[29] *Id.* art. 17.
[30] *Id.* art. 18(1).
[31] *Id.* art. 22.
[32] CONSTITUTION, ch. 1, art. 2(2) (1995) (Uganda).
[33] *Id.* ch. 4, art. 21.

Even more interesting in the Ugandan Constitution is article 33, which specifically relates to women and is titled "Rights of Women." Article 33 provides that:

> (1) Women shall be accorded full and equal dignity of the person with men.
>
> (2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
>
> (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
>
> (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
>
> (5) Without prejudice . . . women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
>
> (6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.[34]

Uganda has made great strides in women's rights, especially in the area of politics.[35] This authoritative position taken by the Ugandan Constitution where customary law is concerned is another feather in the cap of women's rights advocates. However, as discussed earlier, mere legislative pronouncements prohibiting long-established practices will not turn the tide as quickly as is hoped.[36]

Most African nations have also ratified international treaties that oblige them to ensure equality as well as respect for women's rights. International treaties on women's rights are expedient for a number of reasons. They offer universal definitions for these rights, and while these definitions may not suit specific places and instances, they are a starting point. Further, they constitute important tools in the efforts to improve the lot of women. Signatory countries to these treaties have an obligation to take concrete steps for the realization of the guaranteed rights. Such steps begin with ratification, and although

[34] *Id.* ch. 4, art. 33.

[35] The current Ugandan Parliament has 74 female representatives.

[36] *See supra* Part II.C.2.

simple ratification of international treaties does not immediately translate into improved rights for women, it paves the way for the passage of implementing legislation if such does not already exist.

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") is one such international treaty that is relevant to the issues under discussion. Presently, fifty out of fifty-four African states have ratified CEDAW. Under CEDAW, state parties condemn discrimination against women in all its forms. They also agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women.[37] CEDAW imposes a positive obligation on states to do away with customary rules and practices that discriminate against women. Article 5 specifically states:

> [All state parties shall] take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; . . .[38]

Even more specific to Africa is the African Charter on Human and People's Rights ("ACHPR"), which provides in article 2 that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political opinion.[39]

Article 3 of the ACHPR also stipulates that every individual "shall be equal before the law" and "shall be entitled to equal protection of the law."[40]

The position of the ACHRP on the family, women and the obligations of the state is stated in article 18:

> 1. The family shall be the natural unit and basis of society. It

[37] Convention on the Elimination of All Forms of Discrimination Against Women art. 2, opened for signature July 17, 1980, 1249 U.N.T.S. 13, 19 I.L.M. 33.

[38] *Id.* art. 5.

[39] African Charter on Human and People's Rights art. 2, Oct. 21, 1986, 21 I.L.M. 58.

[40] *Id.* art. 3.

> shall be protected by the State, which shall take care of its physical health and moral.
>
> 2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.
>
> 3. *The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.*[41]

The importance of these international instruments in the fight for equal rights for women cannot be emphasized enough. Progressive judges have been known to call them to their aid when domestic legislation on an issue is lacking. Witness, for instance, the statements of the learned judges in the Botswana case of *Attorney-General v. Dow*.[42] The court of appeal affirmed the decision of the court *a quo* that section 4 of Botswana's Citizenship Act infringed fundamental human rights. On CEDAW[43] and the ACHPR, Judge Amissah held:

> Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.[44]

Judge Aguda also took the following view:

> [I]n all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in Chapter 2 of our Constitution which deal with fundamental rights and freedoms of individual, is entitled to look at the international agreements, treaties and obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties and obligations binding

[41] *Id.* art. 18 (emphasis added).

[42] [1992] 6 B.C.L.R. 1, 1992 SACLR LEXIS 7, *2-4 (Bots.).

[43] Interestingly, at the time of the judgment, Botswana had not ratified CEDAW. It acceded to it in 1996.

[44] *Dow* at *92.

> upon this country save upon clear and unambiguous language.[45]

The pro-rights stance taken by the judges in this case is worth emulating by judiciaries all over the continent. The failure of the judiciary to incorporate international human rights standards into their decisions is a sad omission, as human rights based decisions would certainly go a long way to contribute to the human rights jurisprudence in Africa. The *Dow* decision represents a very progressive attitude toward the rights of women, and it is submitted that judges should similarly not hesitate to call international instruments in aid when domestic legislation does not suffice to address the injustice associated with the application of customary law.

CONCLUSION

Family law issues, particularly those of inheritance, have been rendered peculiarly complex by the interaction of plural legal systems in Africa. Historical legacies in the form of colonialism and religion have played a big role in sociopolitical change in Africa, and this is what has informed legal pluralism in its current form.

In some countries, customary norms and practices have been extensively altered by statutory interventions, and their legal status varies from country to country. In spite of legislative restrictions on, or prohibition of, customary norms and practices, the fact still remains that members of the various communities still regulate most of their affairs in accordance with custom, especially within the family. This jeopardizes the statutory rights of women and puts them at a disadvantage to men.

Customary law of inheritance generally puts the interests of the deceased's customary family ahead of those of a surviving spouse and children, with widows usually being worse off than widowers. As a body of norms deeply rooted in traditions and culture, customary laws and practices still hold sway in most African societies. Judicial and statutory interventions have attempted to assuage the problem, but much more needs to be done in terms of human rights education, legal aid, and in-depth social research into customary laws and practices, the results of which should inform the promulgation or amendment of existing statutory laws on the subject. In the words of the United Nations General Assembly, human rights education is "a life-long process by which people at all levels of development and in all strata

[45] *Id.* at *136.

of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies."[46]

Constitutional provisions and international law provisions addressing the issues of marriage and inheritance are indispensable tools in the struggle for equality and improved access to resources for women. Governments, the judiciary, and civil society all have an important role to play in this struggle. A progressive approach by judges to the provisions guaranteeing women's rights in national constitutions and international human rights instruments will go a long way in improving the lot of women. Legal literacy should also be a major facet in the activities of government agencies and civic society.

African women are snared by the conflicting legal systems that exist. Customary and statutory laws have not always merged in such a way as to guarantee protection and enforcements of women's rights. Customary law must reflect the realities of the modern African society and uphold the rights of women, but when this proves difficult, customary law must give way in the interest of women.

[46] G.A. Res. 49/184, at 2, U.N. Doc. A/RES/49/184 (Dec. 23, 1994).