TOWARDS AN AFRICAN SYSTEM FOR THE PROTECTION OF WOMEN'S RIGHTS: THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

BY

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A Thesis

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A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirement of the degree

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ABSTRACT

The adoption of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* is an indication of a change of attitude by the reconstituted African Union to take the rights of women seriously on the Continent. The *Protocol* contains substantive provisions to supplement the vague protection of women's rights contained in the *African Charter on Human and Peoples' Rights*. The question that remains to be answered now is how the provisions of this *Protocol* will achieve its objective of providing adequate protection of the rights of women in Africa. This thesis argues that despite the problems faced by the African human rights system generally, with proper implementation of the *Protocol,* it can provide protection for the rights of women in Africa.

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I cannot take for granted the love and confidence that my husband, Opefolu Fagbongbe has in me, I thank you for your unwavering support of all my endeavours, folly or real. I love you so much. My children, Simisola and Tomilola, who continue to let me have my cake and eat it. My in-laws, Dr and Mrs Fagbongbe, for their support and love. My father, Chief O.O. Esan, my sisters, Mrs Seyi Disu-Sule and Mrs Ranti Popoola and their families, my brothers, Dr Segun Esan and Olumide Esan, without you all this would have been almost impossible.

Special thanks go to my friends whose friendship and love made my stay in Manitoba memorable. Pastor Deborah and her family, who took me in as a stranger. Chike Igwe, my colleague and friend whose comments, discussions and encouragement were ever useful. Members of Emmanuel Fellowship church.

And to others innumerable to mention i say thank you.

To my Lord God Almighty, the immortal, invincible, God only wise. All the glory must be unto You, Father, for ever and ever. Amen.

DEDICATION

To God
To the loving Memory on my late mother Mrs. Margaret Titilola Adesola Esan
To my husband Opefolu Fagbongbe
To my children Simisola and Tomilola Fagbongbe

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TOWARDS AN AFRICAN SYSTEM FOR THE PROTECTION OF WOMEN'S RIGHTS: THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

CHAPTER ONE

Introduction

1.1 Background to the Study

That women make basic and critical contributions to human development is not in doubt. Recognition and acknowledgement of this contribution is, however, often neglected or ignored. On the African continent, customary rules deeply embedded in the historical, economic and social experiences of individual African states still define the legal position of the majority of African women. Poverty, HIV/AIDS, globalisation and other factors combine to marginalise African women within their societies. Women constitute the majority of entrepreneurs within the informal labor sector, up to fifty percent of food production is through their efforts.[1] However, the tenacious attachment of Africans to their traditions and cultures sometimes work against the situation of women in Africa, making them powerless while they maintain a subordinate status.

The normative system for the protection of human rights in Africa was first expressed with adoption of the *Constituent Charter of the Organization of African Unity* (OAU) in 1963.[2] *The African Charter on Human and Peoples' Rights*[3] adopted at the Eighteenth

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[1] In Sub-Saharan Africa women provide 60 – 80% of the labour required for food production both for household production and for sale. "Towards Sustainable Food Security: Women and Sustainable Food Security" Prepared by the Women in Development Service (SDWW) FOA Women and Population Division. Available at http://www.fao.org/sd/fsdirect/fbdirect/FSP001.htm. Visited 27/06/2005

[2] *Charter of the Organization of African Unity* of May 25, 1963. 479 U.N.T.S.39, 3 I. L. M. (1964) 1116 (Now replaced by the *Constitutive Act of the African Union*). Another purpose of the Charter was to consolidate on the newly won independence of African States

[3] Adopted at the Conference of Heads of States and Government of the OAU, Nairobi, Kenya on 27 June 1981, entry into force 21 October 1986, O.A.U Doc. CAB/LEG/67/3 Rev.5, 21 I.L.M. 58 (1982). Ratified by all 53 member states of the OAU, available at http://www.achpr.org (hereinafter *African Charter*).

Assembly of Heads of State and Government (AHSG) meeting in 1981 in Nairobi, Kenya, provided the institutional mechanism that still constitutes the fabric of the African normative human rights system. *The African Charter* has been described as the 'beautiful jewel' and 'Africa's trumpet of liberty blowing over the land of the living.'[4] It is acknowledged to enjoy 'almost universal acceptance in participant and non-participant signatories.'[5] The *African Charter* serves as an international and regional reference instrument for the protection of human rights, while respecting and preserving the values of civilisation and culture specific to Africans.

Despite these and other initiatives to promote and protect human rights in Africa, human rights protection remains low in terms of priorities of African States. Women's rights were not a priority.[6] The recent transition of the OAU into the African Union has indicated a change in the attention paid to the issue of women's human rights in Africa.[7] In particular, adoption of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*[8] as a supplement to the *African Charter* evokes the need to re-examine the African human rights system, and its readiness to take women's human rights seriously.

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[4] N. J. Udombana, "Between Promise and Performance: Revisiting States' Obligation under the African Human Rights Charter" (winter, 2004) 40 Stan. J.Int'l L 105 p.110

[5] *Ibid.* All fifty-three African countries are signatories to the *African Charter.*

[6] This fact is apparent when women neither participated nor were they represented at the founding stage of the OAU.

[7] *Constitutive Act of the African Union*, July 11, 2000. Entered into force 26 May 2001 (as amended by the *Protocol on Amendments to the Constitutive Act of the Africa Union,* July 11, 2003, available at http://www.africa-union.org. Article 33 (1) [Hereinafter AU]

[8] Adopted on 10 July 2003. (Hereinafter *Protocol*) CAB/ LEG/ 66.6/ Rev.1.(2003), available at http://www.african-union.org. Decision on the *Protocol to the African Charter on Human and*

1.2 Statement of the Research Problem

The historical foundation of most African societies is based on patriarchy. Women in Africa are often ascribed lower status to men, subjugated and subordinated within societal structures. They hardly take part in decision-making that affects them and their societies at large. Within most African traditions and culture, women are meant to be seen but not heard. That "women's rights are human rights" essentially amount to mere rhetoric, considering the fact that the main instrument for the protection of women's rights, the *African Charter*, falls short of similar international human rights instruments in the protection of human rights.[9] Meanwhile, the African Commission on Human and Peoples' Rights, the main mechanism with the mandate to implement the rights guaranteed in the *African Charter*, faces severe limitations and challenges in the discharge of its duties.[10] Furthermore, the African Court of Human and Peoples' Rights entered into force recently, but is yet to become operative.[11] This is notwithstanding the confusion in the functions of the African Court of Human and Peoples' Rights on the one

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Peoples' Rights Relating to the Rights of Women Assembly/AU/Dec.19 (II)

[9] Article 18(3) of the *African Charter*. The adequacy or otherwise of this provision has remained a source of controversy among African human rights scholars. U.O Umozurike, The *African Charter on Human and People's Rights* (The Hague: Martinus Nihjoff Pubishers, 1997); and R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004) (hereinafter *From OAU to the African Union*); F. Ouguergouz, *The African Charter on Human and People's Rights: A comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nihjoff Publishers, 2003); K. Mbaye, "Human Rights in Africa" in K. Vasak, and P. Alston, (eds.), *The International Dimensions of Human Rights* (Westport, CT and Paris: Greenwood Press and UNESCO, 1982); R. Murray and M. Evans, *Documents of the African Commission on Human and Peoples' Rights* (Oxford: Hart Publishing, 2001)(hereinafter *Documents*) ; V. Nmehielle, *The African Human Rights System: Its Law, Practices and Institutions* (The Hague: Kluwer, 2001). Moreover, unlike the European and Inter-American human rights systems that have developed appreciable jurisprudence, the African system is just developing in that line.

[10] These limitations vary from financial to non-submission and irregular submission of State reports, among other problems, which hinder the effectiveness of the African Commission.

[11] *Protocol on the Establishment of the African Court on Human and Peoples' Rights*, adopted 9 June 1998, at the Summit of the Heads of State and Government in Ouagadougou, Burkina Faso.

hand and the African Court of Justice to be established under the auspices of the African Union.[12]

The question then is whether there is an identifiable African human rights system. If yes, is it feasible for such a system to promote and protect the human rights of women in the region? Secondly, there is a need to reconcile the existing instruments and mechanisms for the protection of human rights available to African women with the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. These will be geared towards establishing an effective system for protection of the human rights of women in Africa. Due to difficulty of covering the whole of Africa, this study will focus on select parts of Sub-Saharan Africa particularly Western and Southern Africa to serve as examples.

1.3 Focus and Objectives of the Study

The *Protocol* represents a dawn in the protection of women's human rights in Africa. By virtue of Article 29 of the *Protocol*, it shall enter into force thirty (30) days after deposit of the fifteenth instrument of ratification with the Chairperson of the Commission of the AU.[13] Taking a cue from the *Protocol on the Establishment of the African Court on*

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[12] Article 18 of the *Constitutive Act of the AU* states that "[A] court of Justice of the Union shall be established." The establishment of two courts that would have overlapping functions has been a course for concern for human rights scholars and activists alike. See Amnesty International Public Statement, African Union: The Establishment of an Independent and Effective African Court on Human and People's Rights must be a Top Priority. AI Index IOR 30/002/2005 (Public). News Service No 022. 28 January 2005. At its 3rd Ordinary Session in July 2004, the AU reversed its earlier decision reached at its 2nd Ordinary Session and decided that the African Court on Human and People's Rights and the African Court of Justice should be integrated into one court. The decision has resulted in a Draft Protocol merging the two courts. Available at http://web.amnesty.org/library/Index/ENGIOR300022005?open&of=ENG-375. See also the Coalition for an Effective Africa Court on Human and People's Rights, Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State and Government of the African Union to Integrate the African Court on Human and People's Rights and the Court of Justice of the African Union: A Submission to the African Union. October 2004. Available at http://www.interights.org/doc/Integration1_.doc. Visited 30/06/2005.

[13] Article 28 (2) of the *Protocol.*

Human and Peoples' Rights, which took approximately six years to enter into force, it is no gainsaying that intensive work has to be done not only for the *Protocol* to obtain the required number of ratifications but also to ensure its effective implementation. The *Protocol* must not be allowed to turn into protection merely on paper; but it must become a functional document impacting the lives of African women in all spheres of human endeavour in a positive way. This thesis therefore explores the framework of the *Protocol* in order to highlight it potential for African women, and seeks to raise awareness of its existence and its effective implementation.

1.4 Significance of the Study

The adoption of numerous international and regional human rights instruments by African States is yet to make enduring impact on the real life experiences of women on the African continent. This study seeks to ensure that the *Protocol* is not just another in the array of instruments adopted and ratified by African countries. For this reason, a preview of existing mechanisms for the protection of the human rights of women is made in order to assess the adequacies and limitations of the *Protocol.* It explores a philosophical grounding upon which to build the protection of women's rights in Africa, drawing from feminist jurisprudence and developments elsewhere in the world. An examination of the content of the *Protocol* highlights the problems and possible prospects for the instrument. The effective implementation of the *Protocol* is its most important aim; and for comparison, the implementation of the equality provision of the *Canadian Charter of Rights and Freedoms* will serve as a case study. The study will help increase awareness of the existence of the *Protocol*, contribute to the development of African

jurisprudence on the human rights of women and highlight the viability of the instrument in improving the status of women in Africa generally.

1.5 Hypothesis

Ensuring that states fulfill obligations freely entered with regards to women's rights has been a Herculean task.[14] Women in Africa are placed in a precarious situation compounded by problems of discriminatory practices, internal conflicts, economic deprivation and HIV/AIDS, to mention but a few. African nations have entered into treaties obligating them to protect the human rights of peoples, including women.[15] They have adopted a normative system for the protection and promotion of these rights, these efforts have scarcely affected the real life experiences of African women positively. This thesis seeks to exploit the potential of the new *Protocol* as a means for accelerating the realisation of human rights of African women. Despite limitations that surround identifying an African human rights system, the *Protocol* provides a comprehensive framework for women's rights protection in Africa.

1.6 Literature Survey

Human rights in Africa have been the subject of academic literature. A number of books and articles have documented the human rights institutions and mechanisms for the protection of human rights within Africa. Topics covered include, the OAU, the *African*

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[14] *Convention on the Elimination of Discrimination against Women* General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm. (hereinafter *Women's Convention*) It has over fifty reservations upon ratification, accession or succession. As at 18 March 2005, 180 countries had ratified the Convention. In spite of this and other conventions and document for the protection of the human rights of women, women still face discrimination and rights violation in almost all areas of human existence. See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm, last visited 18/05/2005

[15] For a list of treaties and status of ratification, see, Office of the United Nations High Commissioner for Human Rights. Status of Ratifications of the Principal International Human Rights Treaties. Available at http://www.unhchr.ch/pdf/report.pdf. Visited 27/06/2005

Charter, and the African Commission. The history and structures of the OAU, the political intrigues and the compromises that resulted in the founding of the OAU has been the subject of scholarly writings.[16] Others place particular emphasis on the evolution of human rights within the OAU.[17] The shift of attention to human rights issues by the regional body was made concrete by adoption of the *African Charter*, thus the features, content and procedures of the *African Charter*, and establishment of the African Commission pursuant to it as the enforcement mechanism, has been widely analysed. [18] Others have documented recent developments in the regional body that comprises all African States. The reconstitution of the OAU into the African Union reveals a greater commitment and role in the promotion and the protection of human rights.[19]

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[16] T.O. Elias, " The Charter of the Organization of African Unity" AJIL 59 (1965) 243- 67; A. Chanda, "The Organization of African Unity: An Appraisal" Zambia Law Journal 21-4 (1989- 92) 1 -29

[17] C. Nwankwo, "The Organisation of African Unity and Human Rights" Journal of Democracy 4 (1993) 50-4; Amnesty International, *Organization of African Unity: Making Human Rights a Reality for Africans* (London: Amnesty International, August 1998)" AI Index: IOR 63/01/98

[18] E. Ankumah, *The African Commission on Human and Peoples' Rights. Practices and Procedures* (The Hague: Martinus Nihjoff, 1996); An- Na'im and F.M. Deng, *Human Rights in Africa: Cross Cultural Perspectives* (Washington, DC: Brookings Institute, 1990); Evans, M. and Murray, R. (eds.), *The African Charter on Human and Peoples' Rights. The System in Practice 1986-2000* (Cambridge: Cambridge University Press, 2002); O. Eze, *Human Rights in Africa. Some Selected Problems* (Lagos: Nigerian Institute of International Affairs and Macmillan Nigeria, 1984); U.O Umozurike, *The African Charter on Human and People's Rights, supra* note 8; and R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004) F. Ouguergouz, *The African Charter on Human and People's Rights: A comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa, supra* note 5; K. Mbaye, " Human Rights in Africa" in , K. Vasak and P. Alston , (eds.), *The International Dimensions of Human Rights* (Westport, CT and Paris: Greenwood Press and UNESCO, 1982); R. Murray , and M. Evans, *Documents of the African Commission on Human and Peoples' Rights* (Oxford: Hart Publishing, 2001); V. Nmehielle, *The African Human Rights System: Its law, Practices and Institutions* (The Hague: Kluwer,2001); J. Oloka- Onyango, "Human Rights and Sustainable Development In Contemporary Africa: A New Dawn or Retreating Horizons" Human Development Report 2000 Background Paper (UNDP, 2000) http://www.undp.org/docs/publications/background_papers/Oloka-Onyango2000.html ; C.M. Peter, *Human Rights in Africa: A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of Rights* (New York: Greenwood Press, 1990)

[19] N.J. Udombana, "Between Promises and Performance: Revisiting States' Obligation under the African Human Rights Charter" (Winter,2004) 40 Stan. J. Int'l L 105; N.J. Udombana, "Can a Leopard Change its Spots? The African Union Treaty and Human Rights," (2002) 17 Am. U. Int'l.Rev.1117; R. Murray, *From the OAU to the African Union. supra* note 9. For more on the commitment and role of the AU, see *infra* Chapter Two.

Most of this work, however, glosses over women's rights. Some scholars have had to ask the question, how can women be taken seriously across the spectrum of human rights?[20] According to Radhika Coomaraswamy, "[I]n some ways, women's rights are the most popular of international initiatives, but they stir the most profound disagreements...."[21] The importance of women's rights issues internationally is well documented.[22] The feminist movement that seeks to improve the status of women by making their voices heard has also generated scholarly attention, even by some African scholars.[23] However a good number of writings on women's rights in Africa focus on specific issues, such as violence against women, particularly domestic violence and female genital cutting, [24] and other issues including discrimination in marriage, inheritance, and health and reproductive rights.[25] Minimal attention is paid to women

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[20] H. Charlesworth, "What are Women's International Human Rights? In R. Cook, *Human Rights of Women: National and International Perspectives* (Philadelphia: University Press, 1994)

[21] R. Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community.* The Edward A. Smith Visiting Lecturer. Human Rights Program. (Harvard Law School, 1999) 3. Ms. Radhika Coomaraswamy (Sri Lanka) was UN special rapporteur on violence against women, 1994 - July 2003. Ms. Yakin Ertürk (Turkey), since August 2003

[22] R. Cook, *International Human Rights of Women: National and International Perspective. Supra* note 20; F. Butegwa, "Women's Human Rights: A Challenge to the International Human Rights Community", 143 (50) International Commission of Jurists: The Review; 71-80, 1993; R. Cook, "International Human Rights Law Concerning Women: Case Notes and Comments" 23 Vanderbilt Journal of Transnational Law 779-818 (1990); U. A. Ohare "Realising Human Rights for Women" 21 (3) Human Rights Quarterly 364-402 (1999)

[23] C. Chinkin, " Feminist Interventions in International Law" 19 Adelaide Law Review 24 (1997); H. Charlesworth, and C. Chinkin, "The Gender of Jus Cogen," 15 Human Rights Quarterly 63-76 (1993); Byrnes, A., "Women, Feminism and the International Human Rights Law- Methodology Myopia, Fundamental Flows or Meaningful Marginalization? Some Current Issues," 12 Australian Yearbook of International Law 2005-41 (1992); J. Oloka-Onyango, and S. Tamale, "The Personal is Political or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism," 17 Hum. Rts. Q. 691 (1995)

[24] Also regarded as female genital mutilation or surgeries. See D. Green, *Gender Violence in Africa: African Women's Responses* (New York: St. Martin's Press, 1999); Schuler, M., "Violence against Women: An International Perspective" in M. Schuler (ed.), *Freedom from Violence: Women's Strategies from around the World* (Washington, D.C. OEF International, 1990) at 29-39; H. Lewis, "Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide" 8 Harv. Hum. Rts. J. 1.

[25] C. Ngwena, *Access to Legal Abortion: Development in Africa from a Reproductive and Sexual Health Rights Perspective*; Center for Reproductive Rights, *Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts.* (February, 2005) Available at

within the African human rights system and how they can utilise the mechanisms available within system to improve their status.

Recent initiatives of the African Union and adoption of the *Protocol* has necessitated a shift of attention to women's human rights within the African system.[26] Some scholars focus on the limitations of the African human rights mechanisms in protecting women's rights. Others highlight certain aspects of the Draft Protocol.[27] A number of international instruments, including the *African Charter* recognises the "rights to practice culture" but also disavows customs that offend the dignity and rights of women.[28] The role of tradition and culture as a determinant in the status of African women cannot be ignored when it comes to the rights of women in Africa.[29] Perhaps the arguments for universality of human rights on the one hand, and cultural and religious relativity on the other hand, best illustrate the tension that arises out of any discussion of women's rights in Africa.[30]

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http://www.Isa.umich.edu/eli/melab%20content.htm. Visited 28/03/2005

[26] R. Murray, and M. Evans, (eds.) *Documents of the African Commission on Human and People's Rights* (Oxford: Hart Publishing, 2001)(This book contains useful documents that relates to women in the African system); M.E. Adjami, " African Courts, International Law and Comparative Case Law: Chimera or Emerging human rights Jurisprudence?" 24 Mich. J. Int'l L. 103 (Fall, 2002); W. Benedek, E. M.Kisaakye and G. Oberleitner, (eds.)*The Human Rights of Women: International Instruments and African Experiences* (London: Zeb Books Ltd, 2002)

[27] The *Protocol* was yet to enter into force as at the time of writing works cited. E. Ankumah, *supra* note 18; R. Murray, *From the OAU to the African Union*, *supra* note 18; and H. Onoria, "Introduction to the African System of Protection of Human Rights and the Draft Protocol" in W. Benedek, E. M.Kisaakye and G. Oberleitner (eds.), *ibid* . Recently however a new book just published contains an article on the Protocol: Rachel Murray, Women's Rights and the Organization of African Unity and the African Union: The Protocol on the Rights of Women in Africa in Doris Buss and Ambreena Manji (eds.), International Law: Modern Feminist Approaches (Oxford and Portland, Oregon: Hart Publishing, 2005)

[28] H. Onoria, *ibid.* at 235

[29] N. B. Pityana, "The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context" in M. D. Evans and R. Murray (eds.), *The African Charter on Human and People's Rights: the System in Practice, 1986-2000* (U.K: Cambridge University Press, 2002); E. M. Kisaakye, "Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price" in W. Benedek *et al*, *The Human Rights of Women: International Instruments and African Experiences.* (London: Zeb Books, 2002).

[30] R.E. Howard-Hassman, "Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women? Symposium Article: (Dis) Embedded Women" (Fall 2002) 24 Mich. J. Int'l. L 227; J. Dimuro, "Towards a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law" (Summer 1996) 17 Women's Rights L. Rep. 333 at 335; A.A. An-Na'im, Human Rights in Cross- Cultural Perspective: A Quest for Consensus (Philadelphia:

In developing countries, and particularly Africa, traditional social roles and cultural values tend to conflict with the ideals of gender equality and the rights of women. The tendency is for writings, particularly western writers, on human rights of women in Africa to focus predominantly on what is perceived as the negative "culture"; this is amplified and vocalised at the expense of practices that protect women and other important issues that affect women, while others have tried to change this perception.[31] Little academic work has been done on the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, due to its currency and the fact that it is yet to have the force of law. Although the usefulness of available literature cannot be over emphasised, this thesis will make new and useful contributions to making the *Protocol* effective in Africa and promotion of development of women's rights on the continent.

1.7 Methodology

The research for this work is library based, exploring available sources on the subject while adopting an analytical and comparative methodology. Relevant materials are studied in order to sift important women's rights issues from them. The content of the *Protocol* are analysed while similar instruments, such as the *Women's Convention,* are used for comparison. Apart from this, comparative work is also done for the purpose of drawing useful lessons from other jurisdictions in the course of the work. The study also

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University of Pennsylvania, 1991); M. Mutua, *Human Rights. A Political and Cultural Critique* (Philadelphia: University of Pennsylvania, 2002)

[31] B. E. Hernandez-Truyol, "Women's Rights as Human Rights- Rules, Realities and the Role of Culture: A Formula for Reform" 21 Brooklyn J. Int'l. L. 605; R. K. Ameh, "Reconciling Human Rights and Traditional Practices: The Anti-Trokosi Campaign in Ghana" Canadian Journal of Law and Society. Vol. 19 No. 2, 2004; E. Grande, "Hegemonic Human Rights and African Resistance: Circumcision in a Broader Comparative Perspective." Global Jurist Frontiers, Vol. Issue 2 (2004) The Berkeley Electronic Press (bepress) http://www.bepree.com/gj. She argue that human rights discourse applies is ethnocentric and that double standards are applied, she compares polygamy with lesbianism and female

lays a philosophical foundation for women's rights in Africa, such that those who are to benefit from the rights are not alienated. This thesis is not only of academic interest but also meant to serve as background work for policy formulation and as a tool for further action and study.

1.8 Limitation of the Study

A major challenge to the study of women's rights generally and particularly women's rights in Africa, are the extensive nature of the issues involved. Any attempt to cover the field would be impossible in one thesis. This may account for why many scholarly works focus on specific areas, such as reproductive rights of women and domestic violence. The dearth of statistical data to support assertions, compounded by the limited available judicial decisions both from the regional African Commission and domestic jurisdictions, impose great limitation on such work. Another limitation is in the drafting style adopted by the *Protocol*. There is no orderly categorisation of the rights guaranteed. I have therefore imposed a structure that not only makes for easy analysis but also for easier understanding for interested researchers in the future. Thus, this thesis does not lay claim to an in-depth discussion of the African human rights system or coverage of all conceivable issues relating to the human rights of women in Africa. It limits itself to some of the rights contained in the *Protocol* and to how to achieve implementation, taking a cue from Canada's implementation of the equality provision in Section 15 of the *Canadian Charter of Rights and Freedoms*.

1.9 Overview of Chapters

This thesis consists of six chapters. Chapter One highlights the basic objectives and structure of the study. Chapter Two identifies what may result in an African human

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genital mutilation with breast augmentation surgeries. She calls for a single standard applicable to all.

rights system and locates the study within the framework of Africa, focusing on the human rights instruments and mechanisms on the continent. The study draws on the history of the *Protocol* and examines its content in Chapter Three. As a document born of compromise, the shortcomings as well as the novel provisions of the *Protocol* are analysed while comparisons are made with the Women's Convention, where necessary. Chapter Four sets out the jurisprudential basis for the study of women's human rights grounded in feminist theories. The tension between universalism and cultural relativism as it affects women rights is examined. The study also attempts to develop an African jurisprudence on women's rights by taking a look at available domestic precedents on women's rights and its application. The women's movement in Canada has made giant strides in the development of women's rights jurisprudence and the protection of women's rights; and therefore the processes followed can serve as a model for African nations in relation to women's rights. Chapter Five examines the trend apparent in the protection of equality rights in Canada. Equality in sexual assault cases is used as a case study for comparing trends in Nigeria and South Africa. Chapter Six draws conclusion from the entire study, making recommendations where necessary.

CHAPTER TWO

Framework of the African Human Rights System

2.1 Introduction

The encroachment of the First World in the territories that make up Africa was consolidated by colonisation of most parts of the continent. African values that consisted of a rich blend of historical, social, cultural and religious practices were predominantly overridden by the colonising powers. Prior to this, African societies were mainly hierarchical and patriarchal in nature, with a few exceptions.[1] During the pre-colonial period, there were some disabilities attached to women; they often had little or no role to play in the administration of their societies, although in some societies, rich or old or single women achievers were fully integrated into both political and economic life.[2] Comparatively speaking, the colonizing cultures (British, French, German, and Belgian) had their own male hierarchical structures and assumptions in parallel to the African societies.

The end of the Second War World and the establishment of the United Nations[3] set the pace for the protection of human rights by the adoption of the *Universal Declaration of Human Rights* in 1948.[4] The UDHR, though hortatory in nature, laid the ground work and provided the impetus for regional protection of human rights such as the European, Inter-American and African regional human rights systems.[5] The UDHR

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[1] These were matrilineal societies such as the Chewa in Malawi and the Akan peoples of West Africa.

[2] U.O. Umozurike, The *African Charter on Human and People's Rights* (The Hague: Martinus Nihjoff Pubishers, 1997) at 17

[3] United Nations Organization established pursuant to the *Charter of the United Nations*, June 26, 1945, see the Preamble(hereinafter UN).

[4] *Universal Declaration of Human Rights* G.A.Res. 217, U.N. Doc. A/810 (1948) of December 10, 1948 (hereinafter *UDHR*)

[5] The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter *European Convention*), 1950, 213 U.N.T.S 222, 232 entered into force 8 September 1953; *American*

preceded the international instruments that gave it binding force, that is, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights, which together make up the International Bill of Rights.[6]

State parties to international human rights treaties agree to protect international human rights principles through their national courts and legislation. Despite the international and regional initiatives, violations of human rights persist in all regions of the world, thus raising questions about the commitment of nations and leaders to the protection of human rights. The protection of the rights of women best illustrates sustained doubt as to states' commitment to human rights protection. The African human right system is comprised of the political body of all African countries, African Union previously known as the Organisation of African Unity; the normative system made up of the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights[7]; African Charter on the Rights and Welfare of the Child[8]; and the Convention Governing the Specific Aspects of Refugees Problems in Africa[9]. And the main institutional body is the African Commission on Human and Peoples' Rights. This part of the work traces the history of the protection of women's rights in Africa and analyses the commitment of African states to the protection of rights guaranteed through the mechanisms available in Africa.

Convention on Human Rights 1969, OAS Treaty Series No.36 at 1, 9 I. L. M 673 (1979) entered into force June 1976.

[6] *The International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights (*ICESCR), both G.A. Res. 2200, U.N. Doc. A/ 6316(1967); 6 I. L. M. 360 of December 16, 1966.

[7] OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), entered into force 25 January 2004.

[8] OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

2.2 The Organisation of African Unity/ African Union

On the African continent, the Organisation of African Unity[10] (OAU) was established primarily to promote unity and solidarity among the peoples of Africa, to support the emancipation of African territories from colonial domination and to protect their newly acquired sovereignty and statehood.[11] Many criticisms have been leveled against the OAU. For instance, apart from financial incapacity, the member states hung tightly to the doctrine of reserve domain or domestic jurisdiction in a bid to protect newly won independence.[12] The national sovereignty and non-interference principles featured prominently in relations between African states. Member states of the OAU often failed to react to gross violations of the human rights of citizens by dictatorial regimes all over Africa, such as the emergence of Idi Amin in Uganda as Chairman of the OAU at the 1975 Summit held in Kampala, Uganda.[13] Such occurrence on the continent subsequent

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9 1001 U.N.T.S. 45, *entered into force* June 20, 1974.

10 *Charter of the Organization of African Unity* of May 25, 1963. 479 U.N.T.S.39, 3 I. L. M. (1964) 1116, [hereinafter OAU Charter].

11 For a historical overview of the creation of the OAU, see, R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004) (hereinafter *From OAU to the African Union*); T.O. Elias, "The Charter of the Organisation of African Unity," AJIL 59 (1965) 243-67; C. Nwankwo, "The Organisation of African Unity and Human Rights" Journal of Democracy 4 (1993) 50-4. The reconstitution of the OAU into the AU was not until 2001 and the transition process is still in progress, therefore a proper understanding of the African system may necessitate the use of both acronyms in some instances.

12 Article III (2) of the *OAU Charter* provides for non- interference in the internal affairs of states. See, Ian Brownlie, *Principle of Public International Law* 6th ed. (Oxford: Oxford University Press, 2003) at 545 for a discussion of the principle.

13 Idi Amin of Uganda is remembered for gross violation of the rights of his people. A few African States boycotted the Summit, they include Botswana, Mozambique, Tanzania and Zambia. See, Chris Maina Peter, *Human Rights in Africa. A Comparative Study of the African Human and People's Rights Charter and the New Tanzanian Bill of Rights* (New York: Greenwood Press, 1990) at 9; many African leaders violated the human rights of their people with impunity, both before and after the adoption of the *African Charter*. Others were Mobuto Sessi Seko of the Central African Republic (now known as the Democratic Republic of Congo), Sani Abacha of Nigeria and Charles Taylor of Liberia. The OAU generally maintained a non-interventionist stance and the term "dictators club" was an apt description for it within that context. See N.J. Udombana, Human Rights and Comtemporary Issues in Africa (Lagos: Malthouse Press Limited, 2003) 196-7

to establishment of the OAU revealed that the promotion of human rights was not one of its priorities at the time.

The *OAU Charter* made passing reference to the concept of human rights,[14] its Preamble reaffirmed adherence to the principles set out in the *United Nations Charter* and the *UDHR*.[15] No specific mention was, however, made of women or their rights in the OAU *Charter*. The first positive recognition of human rights in Africa was at the 16th Ordinary Session of the OAU Assembly of Heads of State and Government meeting in Liberia in 1979. The Secretary General of the OAU was requested to convene a meeting of governmental experts to prepare a preliminary draft of an African Charter on Human and Peoples' Rights. This was an attempt to establish an institutional structure to change the human rights practices on the continent hitherto characterised by widespread human rights violations.

The *African Charter* was adopted in 1981 and contains 68 articles made up of civil and political, economic, social and cultural rights, collective rights and individual duties.[16] Apart from the equality and non- discrimination clauses,[17] Article 18 (3) provides protection for women by requiring the elimination of all forms of discrimination against women. In spite of the above, it took time before the OAU showed concern for women's issues. According to Murray, greater attention was given to the position of women by the OAU for three reasons: first, the adoption of follow up resolutions relating

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[14] U.O. Umozurike, *supra* note 2 at 26-27 for a more detailed account of actions of the OAU that preceded the adoption of the *African Charter*.

[15] Para. 9 of the *OAU Charter* states that "[P]ersuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States."

[16] Adopted at the Conference of Heads of States and Government of the OAU, Nairobi, Kenya on 27 June 1981, entry into force 21 October 1986, O.A.U Doc. CAB/LEG/67/3 Rev.5, 21 I.L.M. 58 (1982). Ratified by all 53 member states of the OAU, available at http://www.achpr.org (hereinafter African Charter).

to the rights of women by the OAU as a result of participating at international conferences; secondly, the role played by women in the African liberation struggles; and thirdly, the activities and lobbying of a number of women's organisations with the OAU.[18]

The perceived failures or inadequacies of the OAU and the need to chart a new course for development of the African region in the field of human rights protection among other reasons, led to the dissolution of the OAU and its replacement with the African Union.[19] Mixed reactions have followed the establishment of the AU.[20] In terms of human rights protection, it is too early to determine whether the African Union will perform better than its predecessor; however, a brief assessment of the main content of the *Constitutive Act* is needed.

The Preamble to the *Constitutive Act of the African Union* alludes to the determination of the African Union to "promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law."[21] One of its objectives is to "promote and protect human and people's rights in accordance with the *African Charter on Human and People's Rights*," while the Union

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[17] Articles 2 and 3 of the *African Charter*.

[18] R. Murray, *supra* note 8 at 134-5

[19] *Constitutive Act of the African Union*, July 11, 2000. Entered into force 26 May 2001 (as amended by the *Protocol on Amendments to the Constitutive Act of the Africa Union,* July 11, 2003, available at http://www.africa-union.org. Article 33 (1) [Hereinafter AU]

[20] See, N. J. Udombana, "Can the Leopard Change its Spots? The African Union Treaty and Human Rights," in N. J. Udombana, Human Rights and Contemporary Issues in Africa (Lagos: Malthouse Press Ltd, 2003) (He expresses skepticism about the ability of the African Union to improve human rights culture in Africa); V. O. Nmehielle, "A Decade in Human Rights Law: Development of the African Human Rights System in the Last Decade" 11 Hum. Rts. Br. Spring 2004, at 12 (expresses greater optimism at the prospects of the AU).

[21] Article 31 of the *Vienna Convention on the Law of Treaties*, adopted on May 22, 1969, entered into force January 27, 1980, U.N. T. S. 331; 8 I. L. M. 679 [hereinafter Vienna Convention] (the importance of the preamble for the purpose of interpretation).

is to function in accord with the principle of promoting gender equality.[22] Moreover, the *Constitutive Act of the African Union* was amended within two years of its adoption, to add new objectives aimed at ensuring more effective participation of women in decision-making and to make the Act more gender sensitive. For example, the words "founding father" in the preamble was replaced with "founders", while a new subparagraph was added to Article 3(i) that reads: "ensure the effective participation of women in decision - making, particularly in the political, economic and socio- cultural areas." This shows a consciousness previously absent within the African regional body. However, whether these and other actions of the OAU/AU bring greater protection to women in African remain to be seen.[23]

The need for Africa's economic development is a paramount objective for the transition from the OAU to the AU. The New Partnership for Africa's Development initiative is one mechanism of the OAU/AU for achieving this goal.[24] The NEPAD initiative arises from a mandate of some heads of state of the OAU/AU. It was adopted by the 37th Summit of the OAU in July 2001 as a vision and strategic framework for Africa's renewal. The initiative contains a strong human rights component aimed at poverty eradication, sustainable development and acceleration of empowerment of women. The African Peer Review Mechanism was adopted at the 38th Ordinary session

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[22] *Ibid,* Art. 3 (h) and 4(l) respectively of the *Constitutive Act of the AU*

[23] *Protocol on Amendment to the Constitutive Act of the African Union*, adopted by the 1st Extraordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia on 3 February 2003 and the 2nd Ordinary Session of the Assembly of the AU in Maputo, Mozambique on 11 July, 2003. The Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds majority of member states. As at 08/03/2005, 8 out of 53 countries had ratified the amendment and deposited their instruments of ratification. These include, Tanzania, South Africa, Rwanda, Mozambique, Mali, Lesotho, Libya and Comoros. Available at http://africa-union.org/home/Welcome.htm. New paragraphs were included and others replaced.

[24] New Partnership for Africa's Development (hereinafter NEPAD) OAU NEPAD Doc. (2001) Available at www.nepad.org. The Millennium Partnership for Africa's Recovery Programme (MAP) and the Omega

of the Assembly of Heads of State and Government, as a self monitoring mechanism that will deal with human rights practices of member states.[25] The benchmarks adopted by the APRM review process indicate a number of 'key objectives for democracy and political governance,' which include reduction of conflicts, constitutional democracy, promotion of economic, social and cultural, civil and political rights, separation of powers, fighting corruption and the protection of the rights of women, children, the vulnerable and refugees.[26]

These steps taken so far by the AU show a greater commitment to protecting the rights of women. The question is whether these actions will in reality result in improvement for the status of women and the actualization of these rights.

2.3 *The African Charter on Human and Peoples' Rights*

The *African Charter* was adopted and opened for signature in 1981. It set the stage for protection of human rights in the region and created awareness of the existence of rights within the continent. The *African Charter*, ratified by all fifty-three member states of the AU, recognises a wide range of internationally accepted human rights norms, such as, civil, political and social, economic and cultural rights. However, duties of the individual to the state distinguish the *African Charter* from other regional instruments, by recognising that the individual has duties towards other individuals, his or her family, towards the community, towards the state, and towards the African and international

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Plan was merged to become the NEPAD document.

[25] The African Peer Review Mechanism (hereinafter APRM) adopted on July 8, 2002 in Durban, South Africa. AHG/235 (XXXIII) Annex II. The Review process requires that states submit to a base review after eight months and then reviews after three and five years The NEPAD and its review process are however voluntary.

[26] Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (APRM), NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 9 March, 2003 in R. Murray, *supra* note 8, at 40-1

community [27] While affirming the need for universality, the *African Charter* reflects the cultural context of Africa and seeks to protect all African peoples, men, women and children.[28]

The *African Charter* has been criticised for different reasons: its lack of a derogation clause for situations of emergency; and each claw-back clause which "seems to recognize the right in question only to the extent that such a right is not infringed upon by national law".[29]The adequacy of the *African Charter* to protect the rights of women has also been questioned by scholars, lawyers and activists alike,[30] despite non-discrimination and equality provisions[31] and particularly, Article 18(3). Article 2 of the *African Charter* provides that:

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

Article 3(1) Every individual shall be equal before the law.
(2) Every individual shall be entitled to equal protection of the law.

And Article 18 (3) provides that:

> The State shall ensure the elimination of every discrimination against women and ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

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[27] C. Heyn, "The African Regional Human Rights System: The African Charter" 108 Penn St. L. Rev. 679 at 686

[28] This is lauded as emphasizing the indivisibility of human rights and the importance of developmental issues to African nations. *Ibid.*, at 690; See also Articles 19 -29 of the African Charter. For example, Article 22 provides (1) All people shall have the right ti their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind; (20 States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

[29] For discussions on limitations imposed by the African Charter, see U.O. Umozurike, *supra* note 2 at 29 and C. Heyn, *supra* note 27 at 688

[30] U.O. Umozurike, ibid at 57 [contend that reference to women in the African Charter falls short of the *Inter- American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Convention of Belem do Para)]

[31] Articles 2 and 3 of the *African Charter* respectively.

Article 18 (3) has been subjected to a variety of interpretations. First, the provision does not adequately protect the rights of women as a result of its inclusion in a provision that deals with the family.[32] It guarantees protection to the woman, the child, the aged and the disabled, all disadvantaged groups; secondly, the inclusion of women's rights into the *African Charter* is by incorporation. The first interpretation is a narrow construction of Article 18(3) within the context of the family, to cover only rights contained in international instruments that have been implemented in the legal systems of the states parties. For example, a treaty like the *Convention on the Elimination of All Forms of Discrimination against Women*[33] is not applicable in any African country without prior ratification and accession. The subsection merely serves as a guide to member states, it has no binding authority. Furthermore, the lumping together of women and children within the article that deals primarily with the family is said to reinforce outdated stereotypes about the proper place and role of women in society. Compounded by the emphases of the *African Charter* on traditional values and customs, it is easy to read a limited protection for the rights of women.[34] The second interpretation is wider, considering the fact that the *African Charter* is saved from the process of listing the rights protected and confronting possible omission of some rights. Secondly, it provides for a

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[32] This position has been recognized by scholars: U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 1997) at 57 (He notes that the provision exemplify the maximal and general obligations imposed by the Charter in certain respects, rather than the specific ones that could be strictly enforce and observed.); F. Ouguergous, *The African Charter on Human and Peoples' Rights* (The Hague, Martius Nijohff Publishers, 2003) at 486 (The reference to other instruments for the protection of women and children from discrimination is regarded as ineffectual by this writer. He argues that the implementation of this article will require the adoption of specific domestic legislation by states parties. He gives the example of Nigeria and its enactment of the Child Rights Act 2003 to protect the rights of children) at 192.

[33] Adopted by United Nations General Assembly Resolution 34/180 of December 18, 1979. Entry into force 3 September 1981.Available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm

[34] C. Heyn, *supra* note 27 at 688; Customary practices such as female circumcision, forced and early

broad application of international human rights instruments for the protection of the rights of women.

The effect of the *African Charter* on the rights of women has not been encouraging. The mechanism established for implementing and monitoring compliance of member states to the *African Charter* is the African Commission on Human and Peoples' Rights,[35] which in the course of its mandate develops jurisprudence on human rights in Africa. However, its impact on women's rights remains limited.

2.4 The African Commission on Human and Peoples' Rights

The African Commission was established and constituted in 1987 pursuant to Article 30 of the *African Charter* to "promote human and peoples' rights and ensure their protection in Africa."[36] The African Commission consists of eleven members "chosen from amongst personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience."[37] The African Commission is a quasi- judicial body whose mandate includes both promotional and protective activities.[38] It employs the communication, complaint and reporting

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marriage and other practices that affect the status of women.

35 Hereinafter "African Commission"; For reasons adduced for the establishment of a Commission rather than a court, see, C. Heyn, *ibid.*

36 At the 23rd session of the Assembly of Heads of State and Government of the OAU in Addis Abba, Ethiopia.

37 Art. 31(1) of the *African Charter*

38 Art. 45 *ibid* .The African Commission's promotional activities include document collection, undertaking studies, researches, organizing seminars and workshops symposia and conferences and collaboration with national and international institutions concerned with human rights. While its protection activities include interpretation of communications from Member states, complaints from individuals and non governmental organizations.

mechanisms in the conduct of its duties and meets twice a year in regular sessions for a period of up to two weeks. [39]

Article 62 of the *African Charter* does not specifically mention the body entrusted to receive or consider the reports. The Assembly of Heads of State and Government subsequently assigned the African Commission with this mandate upon a recommendation put forward by it.[40] The African Commission has had to contend with numerous problems since its establishment; for instance, the eleven member Commission faces difficulties in the performance of its function due to limited human and financial resources available for its work; the effectiveness of the African Commission is limited due to the size of the continent and the number of countries the eleven members have to cover; and, in carrying out the task of interpreting the content of the *African Charter,* the African Commission is faced with obstacles, such as the claw-back clauses, which sets forth the "permissible state restriction on the exercise of the substantive right."[41] A good example of this is Article 9(2) which provides that:

> Every individual shall have the right to express and disseminate his opinions *within the law*[42]

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[39] See Article 62 of the *African Charter* for state reporting. The African Commission has also appointed a number of Special Rapporteurs though there is no obvious legal basis for these appointments under the *African Charter*. Examples include, the Special Rapporteur on Summary, Arbitrary, and Extrajudicial Executions; and the Special Rapporteur on the Conditions of Women in Africa.

[40] The AHSG approved the recommendation at it 24th Ordinary Session. Second Activity Report, para. 31 Documents at 175

[41] A Handbook of International Human Rights Terminology. (Lincoln and London: University of Nebraska Press, 1999) at 83.

[42] (Emphasis mine) It requires that such a clause should be interpreted in accordance or consistently with the principles and obligations of the *African Charter*. For instance, in its decision in *Communication 224/98, Media Rights Agenda v. Nigeria (2000)*, The African Commission stated that " [A]ccording to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions, this would make the protection of the right to express one's opinion ineffective. To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provision of the charter." Para 66 available at http://www1.umn.edu/humanrts/africa/comcases/224-98.html. visited 24/05/2005

A claw-back clause restricts the rights guaranteed in very broad sense. The African Commission, as exemplified in *Media Rights Agenda & Others v. Nigeria,* rightly limited the use of claw-back clauses by interpreting them in accordance or consistently with the principles and obligations of the *African Charter.*[43]

Faced with such problems, the issue of women's rights has not featured prominently in the work of the African Commission. Although some African traditions and customs support discrimination against women, for example, inheritance and property ownership, and women as victims of armed conflict that violate their rights, the African Commission has had little or no opportunity to pronounce on practices that specifically affect women. In fact, it was not until 1993 that a woman was elected to the African Commission.[44] The decision of the African Commission to organise a workshop on the status of women under the *African Charter* in relation to specific socio- economic problems may not be unrelated to the presence of a woman in the Commission.[45] In more than a decade of developing jurisprudence on human rights, the rights of women before the African Commission remain almost non-existent. Moreover, the African Commission makes no reference to women or the role to be played by women in its decisions. The under-representation of women in the African Commission has been attributed to the fact

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[43] Communication Nos. 105/93, 128/94, 130/94 and 152/96, Decision of the African Commission, 24th Ordinary Session, October 1998. See also *Communication 212/ 98, Amnesty International v. Zambia* (1999) on the right to life. Available at http://www1.umn.edu/humanrts/africa/comcases/212-98.html. visited 24/05/2005

[44] Mrs. Vera Valentina Duarte Martin was elected to the African Commission at the 29th Ordinary Session of the Assembly of Heads of State and Government of the OAU in Cairo, Egypt, 28-30 June 1993. See the Seventh Annual Activity Report of the African Commission of Human and Peoples' Rights 1993-1994, adopted on 27 April 1994. AHG/198 (XXX) REV.2 in R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (Oregon, Hart Publishing, 2001) at 312 (hereinafter Documents of the African Commission). See also E. A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedure.* (The Hague, Martinus Nihjoff Publisher, 1996) at 16

[45] Final Communiqué of the 14th Ordinary Session of the African commission on Human and Peoples'

that there has never been a female member of the Assembly of Heads of State and Government, who elect the members of the African Commission.[46]

Despite shortcomings of the African human rights system, Article 66 of the *African Charter* makes provision for the adoption of special protocols and agreements to supplement its provisions if necessary. The specific motive of the AU for adoption of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* is not clear. Was it an acknowledgement of the inadequacy of the *African Charter* to protect the rights of women? Was it a genuine and sincere concern to improve the rights of women in Africa, or was it a case of improving the profile of the new African Union that led to adoption of the *Protocol*? These questions are not answerable at this time. It is important therefore to examine the Protocol. Its history and content is the focus of the next chapter.

Rights in Documents of the African Commission, at 360

[46] A. K. Wing &T. M. Smith, " The New African Union and Women's Rights" 13 Transnat'l L.& Contemp. Probs. 33 at 62. (No African woman has held the office of head of state in Africa).

August 24, 2005

Dear Faculty of Graduate Studies:

Re: Marhi Kim's application for LLM program

I believe that it is of urgent significance, to the study of the subject matter as well to Marhi's personal plan, that she be able to proceed with her graduate studies plan this year.

There is growing interest and excitement in the academic literature and at the political level about the use of alternative incentives to the development of new drugs. The work Marhi has already done in the area is on the cutting edge. The work-in-progress we co-published is the first to expand the concept of "prize" incentives beyond patentable pharmaceuticals to areas such as the development of new uses for off-patent drugs, natural products and other medical innovations. How governments and non-profits respond to the concept of prize incentives could be considerably influenced by the work Marhi does in the year ahead; her innovative research may assist both fellow academics and policy markers in breaking out of the predominant thinking in the area, which is still tied to selectively replacing the patent system.

I know there is the potential for considerable interest in the work Marhi is doing; she and I met recently with a federal cabinet Minister on the topic and were invited to discuss the matter further this week.. I believe that if Marhi were forced to wait a year to proceed, an opportunity would likely be lost to make a substantial impact on the intellectual ferment and public policy making in the area. I am most enthusiastic about the opportunity to supervise Marhi's ongoing work in the area this year, and respectfully request that the committee look favourably on her request for admission.

Yours truly,

Bryan Schwartz
Asper Chair of Business and Trade Law

CHAPTER THREE

History and Features of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*

3.1 History of the *Protocol*

The *Protocol* attempts to enhance the substantive provision of the *African Charter* in relation to the rights of women. The idea of the *Protocol* was introduced at a seminar titled "the African Charter on Human and People's Rights and the Human Rights of Women in Africa" organised by the African Commission in collaboration with Women in Law and Development in Africa (WILDAF), held in Lome, Togo, in March 1995.[1]

Three main recommendations were submitted to the African Commission by delegates at the Seminar; one, that an additional protocol on the rights of women should be prepared; two, pending the adoption of the additional protocol, some interim measures should be taken by the state parties in order to allow women their rights; and three, the African Commission should recommend to the OAU the nomination of a special rapporteur to the Commission responsible for the protection of women's rights.[2] The African Commission approved the first two recommendations and subsequently submitted it to the Thirty-first Ordinary Session of the Organization of African Unity's Heads of State and Government for approval.[3] Upon approval, two Commissioners of the African Commission, Dr Duarte Martins and Professor Dankwa, and other members of

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[1] 8th Annual Activity report of the African Commission on Human and Peoples' Rights 1994 -1995. Adopted on 22 March 1995, ACHPR/COM.FIN/XVII/Rev. in Murray R. and Evans, M., *Documents of the African Commission on Human and Peoples' Rights* (Oxford: Hart Publishing, 2001) at 418. See also the Final Communiqué of the 17th Ordinary Session of the African Commission on Human and Peoples' Rights. (Hereinafter the Final Communiqué 17), available at http://www.achpr.org/english/communiques/communique17_en.html

[2] The recommendations were presented by Commissioner Vera Valentina B.S Duarte Martins at the 17th Ordinary Session of the African Commission, Lome, Togo, March 1995. Para.28 of the Final Communiqué 17

the civil society were appointed to draft the *Protocol*. The decision to appoint a Special Rapporteur on the Rights of Women in Africa was not adopted by the African Commission until later.

A draft protocol developed during the meeting of experts organised by the African Commission and the International Commission of Jurists (ICJ), held in Nouakchott, Mauritania, from 12-14 April 1997. This was submitted for consideration to the African Commission at its Twenty-Second Ordinary Session held in Banjul, Gambia, in October 1997. Commissioner Julienne Ondziel- Gnelenga, was mandated to elaborate the draft protocol. In 1998 at the Twenty-Third session of the African Commission, Commissioner Julienne Ondziel Gnelenga was appointed Special Rapporteur on the Rights of Women in Africa.[4] Thereafter, a Working Group on women's rights set to work on the draft protocol and met twice.[5] Despite the slow progress experienced by the Special Rapporteur in the conduct of her duties, due to lack of funds, the draft protocol was presented to the African Commission at its Twenty- Sixth Session in Kigali, Rwanda in November 1999. After a few amendments, the draft protocol was adopted and sent to the General Secretariat of the OAU for consideration and further action.

While the African Commission was in the process of drafting the *Protocol*, a non-governmental organisation, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Girls (IAC) had also prepared, initiated and submitted a draft convention on traditional practices affecting the fundamental rights of

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[3] Held in Addis Ababa, June 1995. Resolution AHG/Res.240 (XXXI)

[4] Final Communiqué of the 23rd Ordinary Session of the African Commission on Human and Peoples' Rights. Para. 11, available at http://www.achpr.org/english/communiques/communique23_en.html. The current Special Rapporteur on the Rights of Women in Africa is Mrs. Melo Angela from Mozambique, appointed in 2001.

[5] The first meeting of the working group was held in Banjul, The Gambia from 26-28 January 1998, while the second meeting held in Dakar, Senegal 14-15 June 1999.

women and girls to the Secretariat of the OAU.[6] The Secretariat of the OAU decided to merge the draft protocol and the draft convention into one document. The African Commission, IAC and the Women's Unit of the OAU were requested to harmonise the two texts. At a meeting held for that purpose, a merged document entitled "The Draft Protocol to the African Charter on the Human and Peoples' Rights on the Rights of Women in Africa" appeared.[7]

A meeting of experts was again held in Addis Ababa from 12-16 November 2000 to consider the draft protocol and ninety percent of its provisions were adopted. A few issues, such as polygamy and the monitoring and enforcement of the *Protocol*, remained contentious. The first OAU/AU Government Experts Meeting on the draft protocol was held in November 2001, in Addis Ababa, Ethiopia.[8] The experts amended the Draft Protocol and called on the OAU/AU to schedule a second OAU/AU expert meeting in 2002 to consider the draft again.[9]

The draft protocol experienced a lull, as expert meetings scheduled to resolve the issues were postponed by the OAU/AU. In January 2003, African women's organisations from across the continent met in Addis Ababa, Ethiopia, at a meeting convened by Equality Now, FEMNET and the Ethiopian Women Lawyers Association (EWLA), to come up with strategies to lobby the OAU/AU and individual governments to schedule

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[6] The draft convention was drafted in conjunction with the Women's Unit of the OAU but there was no coordination between the Women's Unit and the African Commission in the drafting of the two documents prior to the decision to merge the documents. See R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge: Cambridge University Press, 2004) (hereinafter *From OAU to the African Union*) at 151

[7] Briefing document to the parliamentary portfolio Committee by Ambassador J. Duarte:24 August 2004. Available at http://www.pmg.org.za/docs/2004/appendices/040824charter1.htm.

[8] The OAU had been reconstituted as the AU at this time. So for ease of reference the body will be regarded as the OAU/AU.

[9] See the Draft Protocol adopted on 16 November 2001 CAB/LEG/66.6/Rev.1, published on www.wildaf-ad.org on 22 November 2001

and attend the expert and ministerial meetings on the draft protocol. The organisations represented at the meeting lobbied for the convening of a second experts and ministerial meeting on the draft protocol in March 2003, in an effort to ensure that it was adopted by the AU Summit. The Second OAU/AU experts meeting took place in March 2003. The meeting amended and adopted the draft protocol and recommended it for adoption by the Executive Council and Assembly of the AU. The *Protocol* was finally adopted in July 2003. Throughout the drafting process, women's organisations and NGO's played a significant role in facilitating and attending the meetings as observers and lobbying for continuation of the drafting process. Though the drafting process and final adoption of the *Protocol* took some time, the process does not appear to be as consultative and comprehensive as it should be, because not many African states made significant input in the process.[10]

3.2 The Special Rapporteur on the Rights of Women in Africa

The appointment of the Special Rapporteur on the Rights of Women in Africa (SRRWA) as noted earlier was part of the recommendations put forward to the African Commission, as one of the outcomes of the 1995 Seminar on the rights of women in Africa. The mission of the occupant of the position is as follows:

- Carrying out studies on the situation of Women's Rights in Africa;
- Drawing up guidelines for the preparation and consideration of periodic reports of state parties on the situation of women's rights in Africa so as to enhance the monitoring of the implementation of the *African Charter* by the African Commission;

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[10] In comparison with the *Women's Convention*, see Lars Adam Rehof, *Guide to the Travaux Preparatoiries of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (London: Martinus Nijhoff Publishers, 1993)

- Assisting African governments in the preparation and implementation of policies for promotion of human rights and sensitising them on women's rights.

- Working in collaboration with NGO's and other organisations and bodies working for the protection of women's rights so as to harmonise initiatives on women's rights. In this regard, the SRRWA will have to collaborate with the other Special Rapporteurs from the UN and other regional systems;

- Working towards ratification by all member States of the *Protocol to the African Charter on the Rights of Women in Africa*;

- Reporting to the African Commission and making recommendations geared towards improving the situation of women"[11]

The first Special Rapporteur on the Rights of Women in Africa, Julienne Ondziel-Gnelenga, was actively involved in the drafting of the *Protocol*, and gave periodic reports of her activities to the African Commission.[12]

3.3 Main Features and Content of the *Protocol*

The authority of the *Protocol*, according to its Preamble, is derived from the *African Charter* which provides for adoption of special protocols or agreements to supplement its provisions, if necessary.[13] Other protocols had been adopted, such as the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.*[14] The content of the women's *Protocol*

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[11] "The basis for the creation of a post of the Special Rapporteur on the Rights of Women in Africa is stipulated under Article 45 (b) and 66 of the African Charter and in Chapter VI of the Rules of Procedure of the Commission, which governs establishment of subsidiary bodies of the Commission." Mandate and Resolution of the Special Rapporteur on Women's Rights. Available at http://www.acphpr.org/english/-infor/index_women_en.html Visited last 19/05/2005.

[12] Julienne Ondziel- Gnelenga continues to work on the rights of women in Africa. She is the chair of Femmes Africa Solitarite (FAS).

[13] Article 66 of the *African Charter*; see also para. 1 of the preamble to the Protocol.

[14] *Protocol to the African Court on Human and People's Right on the Establishment of an African Court on Human and People's Rights,* OAU/LEG/AFCHPR?PROT(iii) adopted by the Assembly of Heads of State and Government, Thirty- Fourth Session, Burkina Faso, 8-10 June 1998. Entered into force on 25 January 2004 (hereinafter *African Court Protocol*) The African Court Human and Peoples' Rights should not be confused with the African Court of Justice which is an organ of the AU.

in Africa will be analysed in order to identify the possibilities that it will afford once it enters into force.

The *Protocol* is made up of thirty-two articles which cannot be readily divided into parts. The thirteen paragraph Preamble to the *Protocol* recalls "that women's rights have been recognized and guaranteed in all human rights instruments" as being "inalienable, interdependent and indivisible human rights."[15] It further notes with affirmation that "women's rights and women's essential role in development" at various United Nations fora, while also highlighting the recent trend in Africa and "the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development." The Preamble expresses concern that "despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties," and the "solemn commitment to eliminate all forms of discrimination and harmful practices against women in Africa, women in Africa still continue to be victims of discrimination and harmful practices." It thus avows the determination to "ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights."

These are laudable pronouncements in spite of the failure of existing instruments, both regional and international, to adequately protect the rights of African women. The Preamble should serve as an interpretative tool for the implementation of the *Protocol* and should be used as such upon its entry into force. Like the *African Charter*, the *Protocol* reflects the interdependence, indivisibility and interrelatedness of rights by its

[15] Para. 5 of the Preamble to the *Protocol* notes these instruments to include; the *UDHR, ICCPR, ICESCR, CEDAW* and *its Optional Protocol* as well as the *African Charter on the Rights and Welfare of the*

admixture of civil and political rights, economic social and political rights on the one hand and collective and individual rights on the other hand, some of which are novel in a document of its kind. The drafting style of the *Protocol* does not reveal a pattern for the arrangement of the provisions; therefore, I have adopted a categorisation in this thesis that I imposed strictly for the purpose of analysis.

3.3.1 Setting out Rights

The *Protocol* contains a compendium of rights, difficult to categorise due to the fact that no discernible order can be ascertained in the list of rights guaranteed. Civil and political rights are interspersed with collective rights and economic social and cultural rights. The right to life, integrity and security of person, and the right to participate in the political decision-making processes are some of the civil and political rights contained in the *Protocol*. Collective rights guaranteed by the *Protocol* include the right to peace; protection of women in armed conflict; the right to a healthy environment and the right to development. The rights to education and training, health and reproductive rights, food security, economic and social welfare rights are protected by the *Protocol*. Other rights guaranteed include, special protection of elderly women, women with disabilities and women in distress. Implementation and other transitional provisions conclude the *Protocol*.

Article 1 of the *Protocol* defines some of the terms employed, such as "discrimination against women" and "violence against women." Following the definition provided by the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Protocol* defines discrimination against women as:

> ... any distinction, exclusion or restriction or *any differential treatment*

Child.

> based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.[16]

While the *Women's Convention* defines discrimination against women to mean:

> ... 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.

The inclusion of "any differential treatment" is the only difference between the two definitions. The *Protocol* recognises the systemic and stereotypical discrimination of women and the addition is an attempt to broaden the definition of discrimination against women. Nonetheless, the similarity of the two definitions is apparent.

The *Protocol* further defines "violence against women" to mean:

> All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;[17]

The *Protocol*'s definition goes beyond that of the *Declaration on the Elimination of Violence against Women*[18] and *Inter-American Convention on the Prevention,*

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[16] (Emphasis mine).

[17] Article 1 (j) of the *Protocol*. Violence against women is often used interchangeably with gender-based violence and sexual violence. "All three terms refer to violations of fundamental human rights that perpetuate sex-stereotyped roles, that deny human rights dignity and the self-determination of the individual and hamper human development. They refer to physical, sexual and psychological harm that reinforces female subordination and perpetuate male control" *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response.* (United Nations High Commissioner for Refugees, May 2003) available at http://www.rhrc.org/

[18] G.A. Res.48/104, U.N.Doc. A/48/49 (1994); 33 I.L.M. 1049, adopted on December 20, 1993; Article 1 defines violence against women to mean "any act of gender- based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

Punishment and Eradication of Violence against Women,[19] to include "economic harm" and "in peace time and during situations of armed conflict or of war." The Women's Convention does not define violence against women; but the General Recommendation Number 19 of the Committee on the Elimination of Discrimination reads the definition of discrimination to include gender-based violence.[20] The African experience of poverty and situations of armed conflicts and wars in some African states may have informed these additions to the definition of violence in the *Protocol*.

The overarching purpose of the *Protocol* is the elimination of discrimination against women. Article 2 therefore obligates state parties to take appropriate legislative, institutional and other measures to combat all forms of discrimination against women. The *Protocol* advocates that the "principle of equality between women and men" should be included in national constitutions and other legislative instruments, if not already done, to ensure its effective application.[21] Many constitutions of African states contain equality and non-discrimination provisions on the basis of sex. For example, Section 9 of the South African Constitution provides that:

> (3) The state may not unfairly discriminate directly or indirectly against one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[22]

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[19] (*Convention of Belem Do Para*) 33 I.L.M.1534. June 9, 1994. Article 1 defines violence against women to mean "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."

[20] U. N. Doc CEDAW/C/1992/L.1/Add.15 (1992) at para.7 The General Recommendation also recognizes some of the rights violated as a result of gender-based violence to include; the right to just and favorable conditions of work (similar to Article 3(g) of the Declaration on the Elimination of Violence against Women)and the right to equal protection of humanitarian norms in time of international or internal armed conflict. Para. 8.

[21] Article 2 (a) of the *Protocol*.

[22] *Constitution of the Republic of South Africa*, Act 108 of 1996, adopted on 8 May 1996 and amended on 11October 1996 by the Constitutional Assembly. See also Section 42 of the Constitution of the Federal Republic of Nigeria, 1999

On the other hand some African states have no constitutional protection from discrimination on the basis of sex or gender. For example, the Constitution of the Arab Republic of Egypt merely provides the following:

> All citizens are equal before the law. They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed.[23]

Non-recognition of gender discrimination by some states may have informed the requirement for the inclusion of the non- discrimination provision into constitutions and other legislative instruments.

Furthermore, state parties are to "enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women."[24] Harmful practices under the *Protocol* are defined to mean:

> All behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.[25]

Specifically, state parties to the *Protocol* are to prohibit and condemn all forms of harmful practices that negatively affect the human rights of women and which are contrary to international standards. These practices are listed to include "all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation."[26] Nowhere in the *Protocol* are any of these terms defined to give a clear meaning. Female genital mutilation refers to all form of female genital cutting or

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[23] *Constitution of the Arab Republic of Egypt*, (After Amendments Ratified on May 22 1980 Referendum- Partial Reproduction), available at http://www.uam.es/otroscentros/medina/egypt/egypolcon.htm.

[24] Article 2 (1) (b) of the *Protocol*

[25] Article 1 (g) *ibid.*

[26] Article 5 (b) *ibid.*

surgery, female circumcision, excision, or clitoridectomy.[27] It may range from the least to the most intrusive form. The *sunna* or tradition is an operation in which the prepuce of the clitoris is excised either totally or partially. The most extreme form of FGM is the pharaonic circumcision; this includes infibulation in which all the external genitalia – the clitoris, the clitoral prepuce, the labia minora and all or part of the labia majora – are excised.[28]

The use of the phrase FGM rather than cutting or surgery in the first place shows the *Protocol*'s outright condemnation of the practice. Medicalisation implies treating FGM as a medical concern rather than a social problem. FGM is not practiced in all parts of Africa, nor performed only in Africa.[29] The attention focused on FGM has been generally sensationalised to the point of insensitivity, disregarding cases where the practice is a critical rite of passage for females.[30]

The *Protocol* adopts a non-legal approach to complement its provisions. State parties are obligated to "integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and all other spheres of life" and to "support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women."[31] Information, education and communication are strategies advocated for modifying social and cultural patterns of conduct for women and men, for the purpose of achieving the elimination of harmful

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[27] D. Green, *Gender Violence in Africa: African Women's Responses* (New York: St. Martin's Press, 1999) at 95

[28] *ibid*

[29] The practice is found in other parts of the world including the United States of America and Sweden.

[30] In Somalia for example, it marks initiation into traditional associations for women. See, D. Green, *supra* note 27 at 46

[31] Art. 2 (c) and (e) of the *Protocol*.

cultural and traditional practices based on the idea of the inferiority or superiority of one sex or on stereotyped roles of women.[32]

3.3.2 Civil and Political Rights of Women

Civil and political rights are sometimes referred to as negative rights that require no action by the state, while economic, social and cultural rights are regarded as positive rights that require legislative measures and resource allocation by states. The compartmentalisation of rights in these terms may not correctly apply in all cases, since some civil and political rights, for example the right to vote, requires the state to invest in the electoral process. However, the fact that civil and political rights are more often formulated in precise and concrete language in international instruments and national constitutions makes them more easily enforceable in law courts.

The *Protocol* recognises civil and political rights to include the right to dignity; the rights to life, integrity and security of the person; access to justice and equal protection before the law; and the right to participation in the political and decision-making process of one's state.

Article 3(1) provides that:

> Every woman shall have the right to dignity inherent in a human being and to the recognition of her human and legal rights;

States parties are to adopt and implement appropriate measures to prohibit exploitation or degradation of women, respect every woman's right to dignity and protect women from all forms of violence, particularly sexual and verbal.[33] Trafficking in women and the sexual exploitation of women and girls are examples of acts that deprive women

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[32] Art. 2 (2) *ibid.*
[33] Art. 3(3) and (4) *ibid.*

of their dignity.[34] The *Protocol* classifies trafficking as forms of exploitation, cruel, inhuman and degrading punishment and treatment that should be prohibited which deprives women of their entitlement to respect for life, integrity and security.[35] State parties are required to take appropriate and effective measures to "prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk."[36] Rape, including marital rape, wife battery, and female genital cutting are forms of violence against women prevalent in some parts of Africa with physical or psychological effects which may have lasting consequences on the victims. Violence against women has negative implications for development; it prevents women from exercising their full potential and limits their ability to participate as fully functioning human beings within their communities.[37]

In Africa, the concern for the right to life focuses predominantly on extra-judicial and summary executions as a result of the disregard for life exhibited by some African leaders.[38] Apart from the negative obligation of the state neither to infringe nor to prevent the infringement of the right to life by a third party, in the case of women, more often than not the positive obligation of the state is to ensure that the individual has an adequate

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[34] Trafficking in women and girls which may be inter or intra country involves their procurement and transportation for the purpose of prostitution, forced labor, pornography, or forced marriage. Reasons for trafficking in Africa are manifold and varied; they include poverty economic hardship, corrupt government, social disruption, political instability, natural disasters, armed conflicts, social customs, and other familial pressures. Trafficking is the third multi- billion dollar illicit industry, behind trafficking in drugs and arms.

[35] Article 4 (1) of the *Protocol*

[36] Article 4(2) (g) *ibid.*; Efforts to eliminate trafficking at the international level include the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A.Res.55/25, annex II, 55 U.N.GOAR Supp. (No 49) at 60, U.N.Doc A/45/49 (Vol.1) (2001).

[37] D. Green, *Gender Violence in Africa, supra* note 27 at 1.

[38] The African Commission's decisions are illustrative of this fact. See *Amnesty International v. Malawi* Communication 68/92; Communication 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation/ Nigeria, Twelfth Annual Activity Report of the African Commission 1998-1999.

standard of living, as being more immediate to a woman. This means, among other things, provision of adequate food and medical care.[39]

The *Protocol* combines the right to life, integrity and security with prohibition of exploitation, cruel, inhuman or degrading punishment and treatment.[40] Until recently domestic violence and other gender-based violence were not interpreted to violate the right to life, bodily integrity, and freedom from torture or cruel and degrading treatment.[41] The problem of violence against women received considerable international and regional attention prior to the *Protocol*.[42] General Recommendation Number 19 of the Committee on the Elimination of Discrimination against women recognises that gender-based violence is a form of discrimination which seriously inhibits women's abilities to enjoy rights and freedoms on a basis of equality with men.[43] The right to life, right not to be subjected to torture or to cruel, inhuman or degrading

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[39] Maternal mortality rates remain high in Sub-Saharan Africa. It is estimated that there will be up to 2.5 million maternal deaths in the region in the next ten years if States do not increase health budgets. At present between 1% and 3.7% of the GDP (Gross Domestic Product) of these countries are devoted to health in annual budgets. "Reducing Maternal and Newborn Mortality" The South African Humanitarian Information Network for a Coordinated Disaster Response (SAHIMS) Available at http://www.sahims.net/regional/exec-review/2004/02_feb'/reg_review_04_02_20.htm

[40] Art. 4 (1) of the *Protocol*, this is a deviation from the words of the African Charter which groups dignity with slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment. Art. 5

[41] For example, the UN Special Raporteur on Violence Against Women recommended that "domestic violence should be understood and treated as a form of torture and, where less severe, ill- treatment..." UN Doc. E/CN.4/1996/53, para. 50; See also General Recommendation 19 U.N .Doc CEDAW/C/1992/L.1/Add.15 of 29 January 1992. Reprinted in *Instrument of Change* at 353.

[42] The Commission on Human Rights in 1994 appointed a Special Rapporteur on Violence Against Women, Its Causes and Consequences after a call by the World Conference on Human Rights in Vienna in 1993. See United Nations Commission on Human Rights: Preliminary Report Submitted by the United Nations Special Rapporteur on Violence against Women its Causes and Consequences, UN. Doc. E/CN.4/1994/42 of November 22,1994; The Committee on the Elimination of Discrimination Against Women: General Recommendation Number 19, supra note 41 (filled the gap that existed in the *Women's Convention*, which had previously failed to explicitly mention or address violence against women); the *Declaration on the Elimination of Violence Against Women*, G. A. Res. 48/104, U. N. Doc. A/48/49 (1994); 33 I.L.M.1049, adopted on December 20,1993; and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para)* 33 I. L. M 1534, adopted by the Organization of American States on June 9, 1994.

[43] See background to General Recommendation No.19 *supra* note 41.

treatment or punishment and the right to liberty and security of person are some of the rights violated as a result of violence against women.[44]

The 2000 draft protocol to the African Charter on Human and Peoples Rights on the Right of Women in Africa provided in Article 4 that states parties shall not "pronounce or carry out death sentence on pregnant women."[45] Amendment to the draft protocol contained in Article 4 (j) of the *Protocol* provides that states parties shall "ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women." In some African countries, such as Nigeria, stricter evidentiary rules are imposed on women than on men under the Sharia criminal legal system. In some parts of northern Nigeria, the Sharia criminal code imposes death sentences by stoning on women convicted of adultery, even where the accused is a nursing mother.[46]

South Africa made a verbal reservation to this provision, contending that the provision of Article 30 (e) of the *African Charter on the Rights and Welfare of the Child*,[47] conflict with that of Article 4(j). Article 30(e) of this Charter provides that:

> 1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

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[44] Paragraph 8 of the General Recommendation 19, *ibid;* Available statistics in Nigeria shows that an estimated 20 percent of adult relationship experience spousal abuse. The Penal Code applicable in the Northern parts of Nigeria permit husbands to chastise wives physically as long as grievous harm does not result- grievous harm is defined as loss of sight, hearing , power of speech, facial disfigurement or other life threatening injuries.

[45] Dated 13 September, 2000. (Hereinafter 2000 draft protocol) Available at http://www.hrea.org/erc/library/display.php?doc_id=806&category_id=31&category_type=3

[46] See the Zamfara State Sharia'h Penal Code Law. 2000. The Sharia Court in Gwadabawa, Sokoto State in Northern Nigeria convicted Safiya Hussaini of adultery on 9 October 2001. While a man require four witnesses to prove adultery, pregnancy is a confirmation of the crime of adultery in the case of a woman.

[47] Doc. CAB/LEG/24.9/49 (1990) entered into force, 29 November 1999 available at http://www1.umn.edu/humanrts/africa/afchild.htm

...

(e) ensure that a death sentence shall not be imposed on such mothers;

The *Protocol* is in conflict with the above provision as it allows the imposition of the sentence but provides that the sentence should not be carried out on pregnant or nursing women. In agreement with South Africa, the death penalty should not be imposed on pregnant and nursing women in the first place; and therefore the issue of carrying out the sentence should not arise.[48] State parties are obligated to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or public.[49] State parties are obligated to adopt legislative, administrative, social and economic measures necessary to ensure the prevention, punishment and eradication of all forms of violence against women.[50]

Women's subordination in the private sphere has always been the subject of commentary among feminist scholars and activists alike. In Africa, the family is seen as the foundation of society, though the rights of women and men are usually not the same within the family. Recognition of the problems that women face in marriage came early in the international human rights arena. The *Convention on the Nationality of Married Women* was adopted by the UN as early as 1957.[51] The *Convention* provides that neither the celebration nor the dissolution of marriage should automatically affect the nationality

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[48] Briefing Document to the Parliamentary portfolio Committee (hereinafter Briefing Document) Available at www.pmg.org.za/docs/2004/appendices/042824duarte.htm Botswana also entered a reservation to the provision on the notion of nursing mother. See Draft Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa adopted by the Meeting of Ministers held at Addis Ababa, Ethiopia on 28 March 2003. MIN/WOM.RTS/DRAFT.PROT (11)Rev.s (Hereinafter 2003 Draft Protocol)

[49] Article 4 (2) of the *Protocol*; see also Article 3 of the *Convention of Belem do Para, ibid.*

[50] Article 4 (2) (b) of the *Protocol*

[51] G.A Res. 1040 (XI); 309 U.N.T.S 65 of 20 February 1957

of a wife.[52] In many African countries, early or forced marriage, polygamy and marital rape, complicated by the pandemic proportions of HIV/AIDS, are some of the issues that arise with respect to marriage. The *Protocol* makes extensive provisions for the protection of rights of women within marriage, during separation, divorce and annulment proceedings.

Article 6 of the *Protocol* provides that: "State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage." Appropriate national legislative measures are to be enacted by state parties to guarantee, full and free consent in marriage, 18 years as the minimum age of marriage, and protection of the rights of the woman in marriage and the family, polygamous marriages inclusive. Article 6 of the *Protocol* goes beyond similar international instruments that protect women within the family and in marriage by recognising peculiarities in African society. For instance, in some parts of Africa, children are betrothed from birth or before puberty, giving them no choice with regard to consent to such a marriage. The *Protocol* specifies the minimum age of marriage as 18 years, so it seeks to eliminate the practice whereby young children who attain puberty at an early age are forced into early marriage.[53]

Within the African context, marriage represents an essential relationship. At least three types of marriages are recognized: customary marriage, Mohammedan marriage and marriage under the Marriage Ordinance (or formal marriage). Customary marriages are most often informal in nature, "recorded through the witness of the community rather

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[52] Article 1 *ibid.*

[53] Reservation was entered to this provision by Tunisia and Sudan. See the 2003 draft protocol.

than a system of licensing or registration."[54] Customary and Mohammedan marriages are potentially polygamous and remain popular forms of marriage in many parts of Africa.[55]

Polygamy is the practice of having more than one spouse, while polygyny refers to the practiced of having more than one wife at a time and polyandry means more than one husband. Polygamy is a common form of marriage in most parts of Africa. For example, in Ghana, over one third of married women are in formally polygamous marriages.[56] The *Protocol* provides that "monogamy is encouraged as the preferred form of marriage."[57] This appears to be a consensus provision, because an outright rejection or disapproval of polygamy may not gain acceptance where polygamy is either a religious or customary practice.[58] Some perceived disadvantages to the practice of polygamy include the belief that it reduces women to commodities, available to men at their whims and caprices; it leaves less property to divide at the death of the husband, in terms of inheritance and child support; there is the problem of disagreements among the wives and ill-feeling within families; in some cases, the burden placed on each woman to train and

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[54] Jeanmarie Fenrich and Tracy E. Higgins, "Special Report: contemporary African Legal Issues: Law, Culture, and Women's Inheritance Rights in Ghana" (December, 2001) 25 Fordham Int'l. L. J. 259 at 275 (hereinafter Special Report)

[55] Polygamy is used to mean polygyny. In Ghana, 80 % of married women are in customary law marriages. See Akua Kuenyehia and Ofei - Aboagye, "Family Law in Ghana and its Implications for Women, in Akua Kuenyehia (ed), *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (1998) at 25

[56] The National Population Commission, Nigeria Demograhic and Health Survey 1999 (2000) at 74 reported 36% of women and 26% of men as being in polygamous unions; John Hodiak Addai-Sundiata, "Family Dynamics and Residential Arrangements in Ghana," in Elizabeth Ardayfio-Schandorf (ed), *The Changing Family in Ghana* (1996) cited in Jeanmarie Fenrich and Tracy E. Higgins, "Special Report" *supra* note 119 (they assert that this does not reflect the incidence of informal polygamous unions in which married men establish long term relationships, often called concubinage, with other women outside of the formal polygamous unions)

[57] Article 6(c) of the *Protocol*

[58] This is not to say that polygamy is not prohibited or restricted in some countries in Africa. For example, Article 18 of the *Personal Status Code 1956* of Tunisia prohibited polygamy and imposes penal sanctions for any one that violate the law; Article 8 of the *Family Code* in Algeria permits polygamy within the limits of the Shariah, if justified and if fairness and the intention to guarantee fairness are present, and after informing current and future wives in advance. Note that the 2000 draft protocol provides that "polygamy shall be prohibited."

support her own children is a result of the meager financial situation of the husband; and, the issue of multiple sex partners and the problem of HIV/AIDS. The rights of women in both monogamous and polygamous marriages and families are guaranteed by the *Protocol*.[59] This is an appropriate compromise, given that the practice is deeply ingrained within many countries and will be difficult to eliminate; to ignore the prevalence of the practice would serve more harm than good to women in such relationships.

The requirement that marriages should be recorded and registered for the purpose of legal recognition poses a problem, especially in societies where illiteracy, ignorance and unwillingness to register marriages are high.[60] The implication for unrecorded and unregistered marriages is non- recognition of marriage which will deprive women and children in such marriages of their rights.[61] Most African marriages are still conducted under customary or Islamic law that tends to be informal, with record and recognition of the marriage only through witness of the community, rather than a system of licensing or registration.

Article 6 (e) of the *Protocol* states that the husband and wife shall, by mutual agreement, choose their matrimonial regime and the place of residence. The provision is based on the assumption that marriage is a union of choice. Mutual agreement by the husband and the wife may in fact be the decision of the husband, especially in customary

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[59] Article 6 ©

[60] Article 6 (d) of the Protocol. For example, the Customary Marriage and Divorce (Registration)Law, 1985 (P.N.D.C.) Law 112 of Ghana creates an official record keeping for customary law marriages to facilitate the application of the inheritance law in Ghana, but this failed to achieve the purpose. See, Jeanmarie Fenrich and Tracy E. Higgins, Special Report, *supra,* note 54, at 293. Kenya , Namibia and South Africa entered reservations to this provision under the 2003 draft protocol.

[61] This position was raised during the final drafting of the Protocol by South Africa. South Africa made a verbal reservation by proposing adding the following to the provision: " However, non-registration shall not be considered a reason for non- recognition." See Briefing Document, *supra* note 48.

and Islamic marriages.[62] The power imbalance that exists between spouses of the marriage is not recognised or acknowledged.

The nationality of married women and their children has been the subject of concern early in modern international human rights law.[63] Article 9 of the Women's Convention provides *inter alia*:

> States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband.
>
> 1. States Parties shall grant women equal rights with men with respect to the nationality of their children.

The *Women's Convention* explicitly provides for full equality with men in nationality issues and mandates equality with respect to the nationality of children.

Three forms of discrimination are identified with respect to nationality of women.[64] First, a woman may be deprived of her nationality upon marriage to a foreigner or a change in her husband's nationality. Secondly, states frequently make special provision for naturalisation of foreign spouses of nationals; but often they either offer these provisions only to spouses of men and not to spouses of women, or may impose more stringent requirements for male foreign spouses. Thirdly, some countries

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[62] The customary practice that treats the woman like a chattel, with no decision making power in the family, is common in many parts of Africa. Also taking into consideration child betrothals and forced marriages, and the economic and social powerlessness of the woman, mutual agreement is in many instances absent.

[63] Article 6 (g) and (h) *ibid. Convention on the Nationality of Married Women*, G. A. Res. 1040 (XI); 309 U.N.T.S.65 of February, 1957. [*The Convention* provides that neither the celebration or dissolution of marriage shall automatically affect the nationality of a woman]. The ICCPR and its Optional Protocol through the Human Rights Committee have been employed to challenge sex discrimination in nationality and related laws in *Aumeeruddy Cziffra v. Mauritius*, Communication No. R.9/35 (2 May 1978) U. N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), though the ICCPR does not recognise a general right to nationality; other rights such as the right to marry and to form a family may be argued.

[64] Lisa C. Stratton, "Note: The Right to Have Rights: Gender Discrimination in Nationality Laws". 77 Minn. L. Rev.195 at 203

discriminate against a woman's capacity to pass nationality to the child, even if born in the mother's country of origin.[65] The domestic benefit of citizenship is determined by the nationality of a person, including the right to vote, the right to participate in the political processes of ones country, the right to hold public office, to public education, to permanent residency, to own land, the right to movement across countries and eligibility of employment.[66] *Unity Dow v. Attorney General* illustrates a combination of these types of discrimination in the area of nationality.[67] By virtue of Botswana's *Citizenship Act*, citizenship is granted by descent only through their father. Children of a Botswana woman who marries a foreigner will have only the citizenship of their father; while a Botswana woman married to a refugee or stateless person will have no nationality or the above rights.

Article 6 (h) provides that "a woman and a man shall have equal rights, with respect to the nationality of their children, except where this is contrary to a provision in national legislation or is contrary to national security interest."[68] The provision subjects the right to "national law" and "national security interest." The limitation in this provision is reminiscent of the claw-back clauses in the *African Charter*. The onus will be on the African Commission and subsequently the African Court to interpret this limitation to the advancement of women's rights.

With regards to separation, divorce and annulment of marriage, the *Protocol* provides that states parties shall enact appropriate legislation to ensure that women and

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[65] Ibid., at 203-5 (This is called the *jus sanguinis* approach, where nationality passes lineally rather than territorially upon birth within a nation's borders)

[66] Nationality is described as a reciprocal relationship entitling one to the rights, and subjecting one to the burdens, of citizenship. *Ibid.*, citing P. Weis, *Nationality and Statelessness in International Law* (2d ed. 1979)

[67] 1994 6 BCLR (Botswana)

[68] South Africa and Zambia entered reservations to this provision under the 2003 draft protocol.

men enjoy the same rights.[69] Contrary to Islamic and customary law, such separation or divorce is to be effected by judicial order.[70] Under Islamic law a man is allowed to divorce his wife verbally, while under customary law the return of the bride-price or dowry symbolises divorce. Difficulties may therefore arise in an effort to implement this provision. The same problem may arise with a provision that requires equitable sharing of joint property derived from the marriage, in cases of separation, divorce and annulment of marriage.[71]

The *Protocol* recognises that women and men shall have reciprocal rights and responsibilities towards their children in the event of separation, divorce and annulment of marriage.[72] As in other international and regional protections for the child, the interest of the child is the paramount consideration with regards to the rights and responsibilities of the parents.[73]

Equality before the law, and the right to equal protection and benefit of the law between women and men, is recognised by the *Protocol.*[74] Equal treatment does not always amount to equal results. The past disadvantage experienced by African women places them at an unequal position; therefore, positive action is often needed to achieve an equality of results. Women's access to judicial and legal services in Africa is limited, due to low economic status, poverty and high levels of illiteracy. In fact, many women

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[69] Article 7 of the *Protocol*

[70] Article 7 (a) *ibid.,* provides that "separation, divorce or annulment of a marriage shall be effected by judicial order." Egypt, Libya and Sudan entered reservations to the provision.

[71] Article 7 (d) *ibid.;* Egypt entered a reservation to this provision under the 2003 draft protocol.

[72] Article 7 (c) *ibid.*

[73] Instruments protecting the rights of the child include the Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989, entry into force 3 September 1990. Available at http://www.unhchr.ch/html/menu3/b/k2crc.htm; and the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), enter into force November, 1999

[74] Article 8 of the *Protocol*

are reluctant to access judicial and other law enforcement mechanisms, such as the courts and the police due to the lack of trust and doubt, both as to the legitimacy of these institutions to resolve their domestic affairs and the effectiveness of the adversarial approach to maintain peace within the family. The *Protocol* recognises legal aid services and gender responsive law enforcement as important mechanisms for women to access this right.

The *Protocol* provides for affirmative action for women to participate in the political life, decision-making and governance of their countries.[75] The Committee of the *Women's Convention* interprets affirmative action to mean temporary special measures.[76] These measures are not to be understood as discriminatory, as privileging women over men, but to have the effect of establishing a state of greater equality between the sexes. Many African countries have undertaken such measures but women still face various constraints, such as financial and the low levels of education. For example, during the 2003 elections in Nigeria, the registration fee for women contesting for various seats in the election was waived by the ruling party (Peoples Democratic Party) in order to encourage the participation of women; but the number of women who participated in the elections only increased marginally.[77] In Uganda, constitutionally based affirmative action policy was introduced into the 1995 *Ugandan Constitution.*[78] This resulted in

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[75] Article 9 *ibid.*

[76] General Recommendations 5, 8, 23, 25 of the Committee on the Elimination of All Forms of Discrimination against Women. Available at the Division for the Advancement of Women. http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html. Visited 04/07/05.

[77] During the 2003 elections in Nigeria, 21 women as opposed to 12 in 1999 secured seats to the 360 member House of Representative. 3 women were elected senators as in 1999 and 2 women speakers of the House of Assembly in 2 States of the Federation (Ogun and Anambra)were elected in 2003. No woman governor was elected as in 1999. See, A. Akiyode- Afolabi, and L. Arogundade, (eds.), *Gender Audit- 2003 Election and Issues in Women's Political Participation in Nigeria.* (Women Advocates Research and Documentation Center (WARDC), 2003) at 75-6

[78] Article 33(5) of the *Ugandan Constitution* provides in part that "... Women shall have the right to

quantitative increases in the participation of women, but qualitative progress was slower.[79] In effect, the recognition, promotion and protection of civil and political rights of African women without regard for their economic, social and cultural rights will not achieve desired goals.[80]

3.3.3 Economic, Social and Cultural Rights

Economic, social and cultural rights are important rights which are often contingent upon the enjoyment of other fundamental rights. Numerous international human rights instruments recognise these rights. For example, Article 25 of the *UDHR* provides that:

> Everyone has the right to a standard of living adequate for the health and well- being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness disability, old age or other lack of livelihood...."[81]

These rights determine the extent and quality of life of women in Africa. According to the National Democratic Health Survey 2003 for Nigeria, a direct relationship exists between women's educational status, economic disposition and access to nutritional diet or micro-nutrient supplements to their fertility rates, their access to clean drinking water, ante-natal and post-natal care. The *Protocol* guarantees the right to education and training, employment and social welfare rights, health and reproductive rights, right to food security, right to adequate housing, and the right to a positive cultural context.

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affirmative action for the purpose of redressing the imbalances created by History, traditions and customs."

[79] In 2003, out of the 304 parliamentary seats 75 were held by women, a total of 24.7%.However, concerns and the interest of women from the poorest sections of the Ugandan society were not addresses in the political agenda. See Global Database of Quotas for women, Institute of Democracy and Electoral Assistance (IDEA) February 2003.

[80] D. Gierycz, "Human Rights of Women at the Fiftieth Anniversary of the United Nations" in W. Benedek, E. M. Kisaakye and G. Oberleitner (eds.), *The Human Rights of Women: International Instruments and African Experiences* (London: Zeb Books, 2002).

The right to education and training is guaranteed to women in Article 12 of the *Protocol*. The right is arguably one of the most important rights contained in the *Protocol*, because without this right most women cannot effectively access rights in other areas of life.[82] The *Protocol* acknowledges that schools are often sites of some of the worst physical and sexual abuse perpetrated against girls and young women. State parties are to take appropriate measures to "protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against perpetrators of such practices."[83] The *Protocol* follows the pattern laid down by the *Women's Convention* for positive actions that state parties have an obligation to take.[84] The aim is to improve the status of women through policies such as eliminating stereotypes in textbooks and promoting education and training of women in all disciplines, particularly in the field of science and technology. [85]

Although the *Protocol* does not directly provide for the right to work, it provides that:

> States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities....[86]

Basically, no laws prevent women from particular fields of employment in many parts of Africa, however, women experience discrimination both in the public and private sectors,

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[81] See also Article 11 of the *ICESCR*; Beijing Declaration, para. 36.

[82] Rebecca M. M. Wallace, *International Human Rights Text and Materials* (2nd ed.) (London: Sweet and Maxwell, 2001) at 28; Right to education is an enabling right, it has a bearing on our ability to exercise other rights – it unlocks economic potential, drives improvements in health and nutrition and fosters political participation and empowerment. See Education in Africa: Responding to a Human Rights Violation. Action Aid UK. Available at http://www.actionaid.org.uk/wps/content/documents/educationinafrica_2003.pdf

[83] Article 12 (1) © of the *Protocol*.

[84] Article 10 of the *Women's Convention*.

[85] Article 12 (1) (b) and 12 (2) (b) of the *Protocol*.

[86] Article 13 *ibid.*

as well as in the formal and informal sectors of the economy.[87] Issues of equal remuneration for jobs of equal value, transparency in recruitment, occupational choice, promotion and dismissal of women, sexual harassment, protection during maternity, taxation of women, and pornography are all protected under what the *Protocol*, termed as economic and social welfare rights. Moreover, Article 13(h) obligates state parties to "take the necessary measures to recognize the economic value of the work of women at home." The *Protocol* does not expand on how this will be achieved.

The right to health, including sexual and reproductive health, remains one of the most controversial rights that women seek. African women in many cases are not expected to control their fertility[88] or decide to procreate or the number of children and spacing,[89] or to get involved in contraception.[90] Patriarchal systems exist in many parts of Africa to ensure that women have no right to control their fertility. Male child preference encourages multiple deliveries in quick succession, while poor nutrition and nutritional taboos all contribute to deprive women of their sexual and reproductive rights and even their right to life in some cases. Indeed, health and reproductive rights have attained a position of special importance in Africa, due to the pandemic proportion of Acquired Immuno- Deficiency Syndrome (AIDS). The lack of control of women over reproductive

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[87] Access to employment due to low levels of education, slower promotion to higher professional position and salary inequity are some of the discriminatory actions that women face. For example, in Nigeria, some business operate a "get pregnant, get fired policy" Women form a considerable percentage of the informal sector whose labor is undervalued. Women also have limited access to commercial credit and face other hindrances.

[88] Article 14 (a) of the *Protocol* guarantees the right of women to control their fertility. Sudan entered a reservation to this provision in the 2003 draft Protocol.

[89] Article 14 (b) of the *Protocol* provides for "the right to decide whether to have children, the number of children and the spacing of children." Burundi, Senegal and Sudan entered reservations to this Provision in the 2003 draft protocol.

[90] Article 14(c) provides for the right to choose any method of contraception. Sudan entered a reservation to this provision in the 2003 draft protocol.

choices is of grave concern, given the prevalence of HIV.[91] Poverty, low social and economic status of women, combined with unequal economic rights and educational opportunities fuel women's vulnerability to HIV infection. Power imbalances favor men, physical violence, and the fear of violence, abandonment, and destitution. These interact with gender-based economic and social inequalities to place women in the position to be unable to negotiate safe sex. Compounded by increasing incidence of rape, especially in areas experiencing military conflicts in Africa, the importance of guaranteeing health and reproductive rights cannot be over-emphasised.

State parties under the *Protocol* are to take appropriate measures to provide health services, adequate and affordable, especially to women in the rural areas and to provide services for pregnant women and nursing mothers.[92] The issue of authorising medical abortion in cases of sexual assault, rape, incest and danger to health and life of the mother or the foetus also remain controversial in many parts of the world, not least in Africa.[93] This provision is both novel and controversial because, not only is this the first international human rights instrument that authorises medical abortion, but also most African countries criminalise abortion. In Africa alone, about five million unsafe abortions take place each year.[94]

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[91] Approximately 25.4 million people in Sub-Saharan Africa are HIV positive. Women account for 13.3 million, a total of 57% of adults infected. See Executive Summary: 2004 Report on the Global AIDS Epidemic. Joint United Nations Programme on HIV/AIDS (UNAIDS/04, June 2004)

[92] Article 14 (2) (a) and (b) of the *Protocol*. High maternal mortality rates experienced in Sub-Saharan Africa are attributed to inadequate pre and post natal care among other causes. World Health Organization (WHO) Media Centre: Making Pregnancy Safer. Fact Sheet No. 276, February 2004.

[93] *The Choice on Termination of Pregnancy Act of South Africa*, Act 92 of 1996 represents a milestone in the reform of abortion laws in Africa For the first time in Africa, the Act sets forth the reproductive right to medical abortion when pregnancy results from rape or incest or when the continuation of the pregnancy endangers the health or life of the mother. See also, Charles Ngwena, "Access to Legal Abortion: Developments in Africa from a Reproductive and Sexual Health Rights Perspective.

[94] WHO: Unsafe abortion 1992. The breakdown of the numbers of abortions are as follows: 1,900 000 for East Africa, 600 000 for Middle Africa, 600 000 for North Africa, 1,600 000 for West Africa and 200 000 for Southern Africa.

Related to the right to health is the right to food and food security. The *Protocol* requires states parties to ensure that "women have the right to nutritious and adequate food."[95] State parties are to take appropriate measures to:

a. provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food;
b. establish adequate systems of supply and storage to ensure food security.

Although the right to food may be taken for granted, especially by people in the developed world, in places where poverty is rife, compounded by armed conflict, the right to food assumes even greater importance. In Sub-Saharan Africa, even though women contribute roughly 60 to 80 percent of labor in food production, both for household consumption and for sale, they are not guaranteed food security. In some cases, social and gender taboos deprive women, particularly pregnant women, of much needed nutrition. The *Protocol* recognises that lack of access to clean drinking water, sources of domestic fuel, arable land, means of producing nutritious food and inadequate supply and storage create obstacles to food security. The *Protocol* grants women the right to equal access to adequate housing and acceptable living conditions in a healthy environment, notwithstanding marital status.[96] The increasing number of single mothers as result of armed conflicts and HIV/AIDS, and the limited access to adequate housing for such women, may have informed the inclusion of the "notwithstanding marital status" clause.

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[95] Article 15 of the *Protocol*.
[96] *Ibid.*

3.3.4 Collective or Group Rights

The *Protocol*, like the *African Charter*, recognises some rights that accrue to women as a group within the society, including the right to peace,[97] protection of women in armed conflicts,[98] the right to a positive cultural context,[99] the right to a healthy and sustainable environment,[100] and the right to sustainable development.[101]

Article 10 of the *Protocol* provides that:

> Women have the right to a peaceful existence and the right to participate in the promotion of peace.

The right to a peaceful existence may also be regarded as freedom from conflict, and this right is particularly appropriate to the situation of women in Africa presently. The high incidences of ethnic and internal conflicts within the continent may have informed the inclusion of this provision. For instance, focus on the right to dignity and security of the person in a situation of conflict may be meaningless, as in the case of Liberia or Darfur in The Sudan. The United Nations recognises the important role of women to the peace process by its Security Council Resolution "Women, Peace and Security."[102] The Resolution urges member states "to ensure increased representation of women at all decision making level, in national, regional and international institutions and mechanisms for the prevention management and resolution of conflicts."[103]

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[97] Article 10 of the *Protocol*.
[98] Article11 ibid.
[99] Article 17 ibid.
[100] Article 18 ibid.
[101] Article 19 ibid.
[102] United Nations Security Council Resolution 4213th Meeting, U.N Security Council, U.N Doc. S/RES/1325/(2000)2. Available at http://www.un.org/events/res-1325pdf See also the Declaration on the Right to Peace. G. A. Res. 39/11 of 12 November, 1984
[103] The arguments in support of the resolution are that women and girls are particularly affected by the consequences of armed conflict. Women play a critical role as activists, care takers, providers and survivors in times of conflict, therefore women have made great contributions to the peace process as peace educators and bridge builders.

In the same vein, Article 10 (2) of the *Protocol* imposes a positive duty on state parties to take all appropriate measures to ensure increased participation of women:

a. in programmes of education for peace and a culture of peace;
b. in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
c. in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women.

The right to peace may be linked to the protection of women in armed conflict as contained in the *Protocol.*[104] Rape and other forms of gender violence are used as weapons of war. Though both women and men are raped during armed conflict, the incidence among women is higher and often women and girls are disproportionately and deliberately affected by conflict. Murder, rape, sexual attack, mutilation and humiliation are used as deliberate military strategies. According to Christine Chinkin: "Women are raped in all forms of armed conflict, international and internal, whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all these. They are raped by men from all sides- both enemy and 'friendly' forces."[105] Disparaging a woman's sexuality and the destruction of her physical integrity is used as a weapon of war to terrorise, punish, intimidate and humiliate women.[106]

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[104] Since independence from colonial domination many African states have witnessed one form of armed conflict or the other. For example, civil wars in Nigeria and Liberia

[105] Christine Chinkin, "Rape and Sexual Abuse of Women in International Law" 5 European Journal of International Law 326

[106] Amnesty International, Right to Decide: Virtual Workplace on Reproductive Rights. Available at http://web.amnesty.org/library/index/engafi340172004 visited 17/1/2005; Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Report Pursuant to Commission Resolution 1992/S-1/1 of August 1992, E/CN.4/1993/50(10Feburary 1993)

In Africa, the incidences of women raped during armed conflict are many. In Rwanda, sexual violence was used as a means to promote genocide.[107] In Darfur, atrocities against women have been horrendous and continue despite international pressure. In the Democratic Republic of Congo, thousands of women and girls have been raped and sexually assaulted during the conflict that has continued since 1996. The same situation has been witnessed in Liberia, Sierra Leone and other parts of Africa. The consequences of rape and sexual violence in armed conflicts are numerous and women suffer particular after-effects that are not shared by men.[108]

The international legal system, through international humanitarian law, has responded to this situation in a number of ways: the *Geneva Conventions* of 1949,[109] the 1977 supplementary Protocols,[110] the *Statute of the International Criminal Court*,[111] and other international human rights instruments make provision for protecting of women during armed conflicts.[112] On the African Continent, the OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa was adopted in 1969.[113] The adequacy and effectiveness of these legal norms in protection the rights of women in armed conflict

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[107] *Ibid.*

[108] Fear, both by those raped and other women in the community, unwanted pregnancies and the illegality of procuring an abortion even in cases of rape, social stigma and ostracization by the community, husband and family, inability of young girls to find husbands as a result of loss of virginity. See Human Rights Watch, "Women and Armed Conflict: International Justice" Available at http://www.hrw.org/women/conflict.html last visited 18/08/2005

[109] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31: *Geneva Convention for the Amelioration of the Condition of the Wounded, to the Treatment of Prisoners of War*, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* 75 UNTS 287, 12 August 1949.

[110] *Protocol Additional to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflicts* (*Protocol I*) of 12 August 1949; *Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* Geneva, 8 June 1977.

[111] *Rome Statute* A/CONF.183/9 of 17 July 1998, corrected by procès verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002. Entered into force on 1 July 2002.

[112] See Article 13 of the UDHR; Article 13 of the *ICCPR*; General Assembly Declaration on Territorial Asylum (Resolution 2312 (XXII)) December14, 1967

can be questioned, since impunity has remained. For the first time at the World Conference on Human Rights in Vienna in 1993, rape in armed conflict was explicitly rejected, "violations of the human rights of women in armed conflict are violations of the humanitarian principles of international human rights and humanitarian law."[114] Rape has featured minimally in the trial of war crimes in the international human rights law. This reveals a general culture of silence, both at the international and the regional levels regarding rape in armed conflict.[115]

For the first time at the regional level, at the International Criminal Tribunal for Rwanda,[116] an indictment before its Chamber was amended to include allegations of sexual violence in *The Prosecutor v. Jean Paul Akayesu.*[117] Akayesu, a *bourgmestre*, responsible for maintaining law and public order in his commune was indicted for failing to prevent the killing of Tutsi tribal persons in his commune and refusing requests for assistance to quell violence. He was charged with murder and sexual violence of civilians who sought refuge at the bureau commune under his authority. According to the indictment,

> "many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death

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[113] 10 September 1969, AHSG, CAB/LEG/24.3 (hereinafter *OAU Refugee Convention*)

[114] Declaration and Programme of Action of the Fourth World Conference on Human Rights; Note that Article 4(D) of the 2000 draft protocol in line with this position provided that State Parties shall "ensure that in times of conflict and /or war, rape, sexual abuse and violence against girls and women are considered as war crime and punishable as such." The present *Protocol* however makes no such categorical statement.

[115] Christine Chinkin, *supra* note 105 at 334, for a discussion of the silence of the international law to rape in armed conflict.

[116] Established by the UN Security Council Resolution 955 of 1994. UN.Doc. S/RES/ 955 of 8 November, 1994

[117] Case No. ICTR- 94-4-T; other international tribunals such as that of Yugoslavia have tried cases of rape such as in . Opinion and Judgment, *Prosecutor v. Tadic*, Case No. IT-94-1-T (May 7, 1997), http://www.un.org/icty/Tadic/trialc2/judgment-e/tad-tj970507e.htm [hereinafter Tadic Judgment] and Judgment, *Prosecutor v. Delalic*, Case No. IT-96-21-T (Nov. 16, 1998), http:// www.un.org/icty/celebici/trialc2/judgment/main.htm [hereinafter Celebici Judgment].

> or bodily harm. The female displaced civilian lived in constant fear and their physical and physiological health deteriorated as a result of sexual violence and beatings and killings."

The Tribunal found that rape and other inhuman acts were committed as a part of an attack and found the accused guilty of rape as crime against humanity. Although according to *Human Rights Watch*, the investigation of sexual violence at the level of the Tribunal on Rwanda fell short of expectation in the *Akayesu case*, the action taken by the Rwandan Tribunal on the African continent signals possibilities available to African women.[118]

According to the United Nations High Commissioner for Refugees, 80 percent of refugees and displaced persons in Africa and worldwide are women and children. The fastest growing categories of refugees in Africa are women displaced by armed conflicts.[119] Female refugees are particularly vulnerable because they are faced with multiple problems such as rape, abduction, sexual harassment, physical violence and obligation to grant sexual favors in return for documentation, relief or to escape repatriation.[120] State parties are not only required to protect civilians, including women, in accordance with international humanitarian law, but also "undertake to protect asylum seeking women, refugees, returnees and internally displaced persons against all forms of violence...."[121] The *Protocol*, therefore, requires state parties not only to reduce military expenditure but also undertake to protect women in conflict situations and bring to justice

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[118] Human Rights Watch/ Africa "Shattered Lives: Sexual Violence During the Rwanda Genocide and its Aftermath (1996) cited in Beth Stephen, "Humanitarian Law and Gender Violence: An End To Centuries of Neglect?" 3 Hofstra L. and Policy Symp. 87 (1999) at 108 (conditions for investigation to make women testify was not available, for example, mechanisms to protect rape victims must be guaranteed)

[119] D. Green, *Gender Violence in Africa: African Women's Responses* (New York: St. Martin's Press, 1999) at 95

[120] *Ibid.*, (she gives the example that refugees from Liberia and Sierra Leone reported that some Guinean soldiers demanded sex in exchange for entry into Guinea)

perpetrators of related crimes.[122]Child soldiers and particularly girls are prohibited by the *Protocol.*[123]

The *Protocol* recognises that women have a right to a positive cultural context.[124] The *African Charter* affirms the importance of culture and traditional values within the African context.[125] The recognition of African culture within the *African Charter* has been criticised and applied variously by different groups to achieve different goals. For example, culture may be distorted by unscrupulous groups to entrench themselves in positions of dominance or to undermine or evade human rights obligations.[126] The right to live in a positive cultural context encompasses the right to demand application of one's cultural practices. The recognition that the right to engage in culturally sanctioned practices may sometimes conflict with constitutional guarantees of equality and non-discrimination may have informed the provision of Article 17 of the *Protocol.* The Article provides that "[W]omen shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural practices." The provision seeks to preserve the positive African culture that does not depersonalise or oppress women.

The degradation of the environment through dumping of toxic waste, oil spillage and other forms of pollution in many part of Africa has raised questions of sustainable environment. Articles 18 and 19 of the *Protocol* provides for the right to a healthy and sustainable environment and rights to sustainable development, respectively. The UN

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[121] Article 11 (2) and (3) of the *Protocol*
[122] See generally Articles 10 and 11 *ibid.*
[123] Article 11 (4) *ibid.*
[124] Article 17 *ibid.*
[125] Article 17 and 18 of the *African Charter.*
[126] Many times culture is used as a shield to entrench discrimination against women. See *Magaya v. Magaya* [1999] 3LRC 35(Zimb).

Millennium Summit held in 2000 adopted the Millennium Declaration with which 191 countries committed themselves to achieving certain key objectives in the 21st century.[127] One key objective is ensuring environmental sustainability as a follow up to Agenda 21.[128] Environmental sustainability involves improving the living conditions of slum dwellers, providing sustainable access to drinking water, among other things. Related to this is the right to sustainable human development. According to Oloka-Onyango, the right to sustainable human development refers to freedom from want, deprivation and marginalisation.[129] To him, it is "futile to speak of the right to participation in conditions where the basic human necessities, such as food, shelter, and water are beyond the reach of the majority of the population."[130] Women are often the poorest within the population and sometimes excluded from enjoying rights. Article 8 of the UN Declaration on the Right to Development recognises the role of women in development.[131] The Article states that:

> States shall undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia,* equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustice.

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[127] UN Millennium Development Goals (MDG), UN Millennium Declaration, General Assembly Resolution 55/2 of September 2000. These goals are to be achieved by the year 2015. Available at http://www.un.org/millennium/declaration/ares552e.pdf

[128] Part IV of the UN Millennium Declaration. Agenda 21 was agreed upon at the UN Conference on Environment and Development. Report of the UN Conference on Environment and Development Rio de Janeiro 3 – 14 June 1992 (UN publication Sale No. E 93.I.8 and corrigenda), vol.I: Resolutions adopted by Conference, resolution 1, annex II.

[129] Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizon?" 6 Buff. Hum. Rts. L. Rev. 39 at 44

[130] *Ibid.*

[131] UN General Assembly Resolution 41/128 of 4 December 1986. Available at http://www.unhchr.ch/html/menu3/b/74.htm.

The foregoing shows that civil, political, economic, social and cultural rights are all indivisible for the effective protection of the rights of women

3.3.5 Other Rights Protected

The *Protocol* guarantees the rights of women in certain situations which make them even more vulnerable. Widows are subject to unfavorable conditions as a result of discriminatory traditional customs and economic deprivation in many parts of Africa. Discriminatory customs faced by widows include confinement for up to a year after the demise of her husband; shaving the head; dressing in black and sometimes being considered part of the deceased husband's property to be "inherited." The *Protocol* recognises the need for the protection of widows and provides that state parties are to ensure "that widows are not subjected to inhuman, humiliating or degrading treatment."[132] Such treatment also includes being stripped of their land and other possessions; eviction from their matrimonial home by relatives of the deceased husband; and in some cases, widow dis-inheritance. A widow can also be given to a member of the deceased's family as his customary wife if such a person will indicate acceptance of the arrangement; and if the widow refuses to adhere to the practice, she loses all rights in the deceased husband's family. In cases where the widow is infected by HIV/AIDS, she is left unable to cope with the virus and therefore become more economically vulnerable.[133] Article 20 (b) of the *Protocol* provides that, unless it is contrary to the interest and

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[132] Article 20 (a) of the *Protocol.*

[133] The State of the World Population 2003 UNFPA. Available at http://www.unfpa.org/swp/2003/pdf/english/swp2003_engpdf

welfare of the children, the widow shall automatically become the guardian and custodian of her children.[134]The custodial right of a widow to her children is thereby protected.

Inequalities in the right to inheritance limit access of women to land and property, especially widows. Under customary law, a widow in some African countries is not entitled to a share of the property held by the couple; she may only have a right to be supported by the family of the deceased. The right to inheritance is protected in Article 21 of the *Protocol* as follows:

> 1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
> 2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

Like marriage, rules of inheritance are often governed by personal or customary law, often discriminatory against women.[135] In some countries women have no right to inherit from either husband or father. For instance, in the Tanzanian case of *Ephrohim v. Pastory,*[136] Holaria Pastory brought a challenge against Section 20 of the Declaration of Customary Law of Tanzania, which prohibited the sale of clan land under the Haya customary law. She had inherited the land from her father through his will; when she tried to sell her land, her nephew applied to have the sale voided under the provision of the Customary Law. It provides that "women can inherit, except clan land, which they

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[134] Egypt and Sudan entered reservation to this provision. See the 2003 draft protocol.

[135] For instance, in Kenya, the amended constitution of 1997 includes discrimination based on sex, but reserves the right to discriminate in certain matters such as marriage, divorce, devolution of property at death, and personal and customary law. Egypt entered a reservation to Article 21(1) of the Protocol, see the 2003 Draft Protocol.

[136] 8 I.L.R.106; [1990] LRC(Const.) 757.

may receive in usufruct but may not sell." She argued that the constraint on women's property rights violated the Tanzanian Constitution's Bill of Rights. The Tanzanian High court relied on the fact that the Tanzanian government had ratified CEDAW and other international treaties and covenants; therefore, women were constitutionally protected from discrimination. Contending that "the principles enunciated in the above named documents are standards below which any civilized nation will be ashamed to fall," the court held that rule of inheritance in the Declaration of Customary Law as unconstitutional; therefore the rights and restrictions around the sale of clan land are the same for women and men.

Another group of women specifically protected by the *Protocol* are elderly women. The UN recognises the need to appreciate the contributions of older persons to their society.[137] The United Nations Principles for Older Persons recognises "that opportunities must be provided for willing and capable older persons to participate in and contribute to the ongoing activities of society."[138] Older women are often in a more vulnerable position for age and gender discrimination. Article 22 of the *Protocol* obligates state parties to undertake to:

> a. provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training.

The basic needs of the majority of people in many African countries, such as income and housing, are difficult to obtain. In many situations, employment opportunities are difficult for even younger people. Jobs are scarce, where they exist, with limited or inadequate social security. Retirement for those in formal employment is often based on an arbitrary

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[137] United Nations Principles for Older Persons General Assembly Resolution 46/91 of 16 December 1991, para. 1 of the Preamble.

age related cut-off point. While the majority of women work in the informal sector, with no retirement benefits, they have to work until they are unable to do so. The possibility of having adequate living facilities, such as nursing homes and other health needs for older people, especially elderly women, is still far from attainable. The Article further provides that elderly women should be treated with dignity, protected from violence, including sexual violence and discrimination based on age.[139] With the breakdown of the traditional family system and obligation, there is increasing need to care and provide for elderly people, especially the women who are usually the care-givers, themselves receiving no care in return. The rights of women with disabilities are similarly protected under the *Protocol* in line with international standards.[140]

Article 24 which provides *inter alia*:

> The States Parties undertake to:
> a. ensure the protection of poor women and heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs;
> b. ensure the right of pregnant or nursing women or women in detention by providing them with environment which is suitable to their condition and their right to be treated with dignity.

The rights of the aged and the disabled are recognised in the *African Charter.*[141] The double discrimination experienced by women in these groups justifies their further protection by the *Protocol.* The needs of persons with disabilities are not usually taken into consideration in development and planning in Africa. Ramps, elevators, Braille and other measures to ensure the integration and equality of opportunity for persons with

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[138] Para. 8, *ibid.*

[139] Article 22 (b) of the *Protocol.* This is similar to the protection afforded women with disabilities under Article 23 (b) of the *Protocol.*

[140] Article 23 *ibid.*; See for instance, *Declaration on the Rights of Mentally Retarded Persons.* G.A. Res 2856 (XXVI) of 20 December 1971; and *Declaration on the Rights of Disabled Persons.* G. A. Res.

disabilities into the society are often neglected, most glaringly in the employment, education and health care sectors. Like older women, women with disabilities face double jeopardy: sex discrimination and discrimination based on disability. The First OAU Ministerial Conference on Human Rights in Africa, held in Grand Bay (Mauritius), noted that the rights of people with disabilities, in particular women and children, are not always observed and urged " all African States to work towards ensuring the full respect of these rights."[142]

3.3.6 Implementation and Monitoring of the *Protocol*

State Parties are to provide remedies to any woman whose rights or freedoms have been violated.[143] The remedies are to be determined by competent judicial, administrative or legislative authorities, or other competent authority provided by law.[144] The role of national authorities in the implementation of the *Protocol* is explicitly stated. The judicial, administrative and legislative mechanisms within national jurisdictions of African states therefore have to be able to perform this function. Implementation at the regional level is to be undertaken through the submission of periodic reports in accordance with article 62 of the African Charter.[145] A policy approach is adopted in Article 26 (2) which obligates state parties to undertake to adopt all necessary "budgetary and other resources" for the full and effective implementation of the rights recognised. Budgetary allocations available for economic and social development in many African nations are usually inadequate for the needs in these areas.

3447 (XXX) of 9 December 1975.

[141] Article 18 (4) of the *African Charter*.

[142] Grand Bay (Mauritius) Declaration and Plan of Action OAU DOC CONF/ HRA/ DECL (1) para. 7.

[143] Article 25 (a) of the *Protocol*

[144] Article 25 (b) *ibid.*

[145] Article 26 *ibid.*

Unlike the Women's Convention, the Protocol does not create a specific Committee to monitor and implement its provisions.[146] First, the approach has the advantage of eliminating the possibility of isolating women's rights issues in the African system[147]; secondly, it prevents the relegation of women's issues to a less influential or poorly funded mechanism. On the other hand, the approach may result in less attention being focused on women's rights due to competing rights that arise within the province of the African Commission. The question that continues is whether women's human rights issues will be ranked high and given priority attention by the regional human rights bodies? The effect of lack of a separate monitoring mechanism, like that of the *Women's Convention*, may or may not have an impact on developing human rights jurisprudence for women.

3.4 Evaluation

The whole idea of a *Protocol* to promote and protect the rights of women may, at first instance, seem antithetical to African culture. The position has been similarly expressed that "[t]he whole prospect of change is made even less attractive by the fear that reforms to benefit women will undermine the very foundation of African society and bring the edifice crashing down."[148] The reservations already made to some provisions of the *Protocol* even before its adoption best illustrate the desire of many African nations to maintain the status quo regarding the status of women. The *Vienna Convention on the Law of Treaties*[149] defines reservations as:

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[146] The Committee on the Elimination of Discrimination against Women was established pursuant to Article 17 of the *Women's Convention* to monitor the implementation of the *Women's Convention.*

[147] Isolating implies the marginalisation of women's issues from "mainstream" human rights issues.

[148] Felicity Kaganas and Christina Murray (ed.), "Law and Women's Rights in South Africa: An Overview" in Christina Murray (ed.), *Gender and the New South African Legal Order* (Cape: Juta Co. Ltd., 1994) at 19

[149] *Vienna Convention on the Law of Treaties*, 23 May 1969 8 I. L. M. 79 entered into force 27 January

> a unilateral statement, however phrased or named , made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application by the state.[150]

A reservation is an indication made by a state upon ratification of a multilateral treaty that it does not intend to be bound by a particular provision of the treaty.[151] According to the *Vienna Convention*, reservations that are not compatible with the object and purpose of the Convention are not permissible. The *Women's Convention* permits ratification subject to reservations, provided that the reservations are not incompatible with its object and purpose.[152] Although the *Protocol* makes no provision for reservation, during the process of drafting several countries indicated an intention of placing reservations to particular provisions. The reservations entered to the 2003 draft protocol show that states seek to preserve various national and religious institutions and practices that are in conflict with the *Protocol.*

Adoption of the *Protocol*, however, reveals a level of agreement by African leaders on the importance of women's rights to development of the continent. It indicates a clear commitment on the part of African States to take the actual promotion of rights of women in Africa seriously. The *Protocol* provides a broad working consensus document creating minimum standards intended to serve as a guide to governmental action in respect of women's rights. The *Protocol* will provide a framework for scrutinising and influencing governmental policies and how they affect women.

1980. (Hereinafter *Vienna Convention*)

[150] Article 2 (1)(d) *ibid.*

[151] Article 20(2) *ibid.*

[152] Article 28(2) of the *Women's Convention*; see also Article 19 (c) of the *Vienna Convention.* Reservations to the *Women's Convention* by state parties have limited the effectiveness of the rights guaranteed, therefore State Parties are urged to withdraw the reservations that are contrary to the object and purpose of the Convention are which are incompatible with international treaty law. See the Vienna Declaration and Programme of Action, U.N. Doc. A/Conf.157/23., Art.II para.39 (1993). Many state

The limitations experienced by the *Women's Convention* in the implementation of its mandate include the fact that women's rights are sometimes marginalised from "main stream" human rights: the weaker implementation obligations and procedures, and the fragile structures and institutions, the under-resourcing of the institution designed to draft and monitor it, and the wide-spread practice of making reservations to the fundamental provision of the instrument.

Unlike the *Women's Convention*, the *Protocol* does not take cognisance of the role of parties other than state parties in the violation of women's rights. Article 2(e) of the *Women's Convention* for example provides that state parties are to "take all appropriate measures to eliminate discrimination against women by any, person, organization or enterprise." This has been interpreted to mean that states may be "responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation."[153] For a wider coverage, the *Protocol* may be interpreted in a similar manner. According to Christine Chinkin, the adoption of "add women and stir" approach to international human rights persists, where the system provides the form but not the substance of inclusive democratic decision-making for women.[154] The *Protocol* seeks to provide not only the form but also the substance for improving the participation of women in all spheres of Africa's development.

The *Protocol* requires states parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.[155] It however

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parties have subsequently withdrawn their reservations.

[153] General Recommendation 19, *supra* note 41 at Para. 9

[154] C. Chinkin, "Feminist Intervention into International Law," 19 Adelaide Law Review 13 at 23

[155] Art. 2 (1) of the *Protocol.*

includes other non- legal actions such as "integrating a gender perspective" and "support [for] the local...initiatives...."[156] The deliberate use of imprecise and indeterminate language, with no legal obligation or national or institutional financial commitment, gives ample discretion to states with respect to implementation.[157] Even though the *Protocol* does not permit individuals, groups and NGOs to submit petitions and complaints, as a supplement to the *African Charter*, complaints may be brought under the *African Charter*'s individual complaint mechanism to cover groups that were omitted.[158]

What can we do with the *Protocol*? How can we make it work for African women? The *Protocol* can be used to define norms for the constitutional guarantees of women's human rights, to mandate proactive, pro- women policies and to dismantle discrimination. But how can it be used to its full potential? The *Protocol* has immense potential for women on the African continent, which should be exploited in order to accelerate the realisation of women's rights. From the drafting style, it is apparent that the mandate is to achieve substantive equality for women, not just formal equality but equality of results in real terms through active policy and planning.

Compliance with human rights instruments at the national level will serve as a measuring tool for assessing member states' commitment to upholding the *African Charter* and any other regional instrument. Therefore, it is important to gauge the progress made by these national institutions.

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[156] See for example Article 8(b) *ibid.*

[157] This attitude has been criticized in the outcomes of the conferences that were held in the1990's, such as, the Beijing Platform of Action. See, C. Chinkin, supra note 154 at 17.

[158] Under the U.N. system, the Commission on Human Rights, the 1503 procedure focused on human rights abuses through an individual complaint mechanism; the *Optional Protocol* to the *Women's Convention* also provides a similar mechanism. See also Article 55 of the *African Charter.*

CHAPTER FOUR

African Women's Rights Jurisprudence: Myth or Reality

4.1 Introduction

Human rights refer to rights applicable to "all persons," "every human being" and "all members of the human family," without distinction.[1] Women are by definition members of the human family and therefore entitled to rights both individually and collectively. In recognition of this, women are accorded protection under relevant international and regional instruments.[2] Though, logically, there should be no separate grouping for women's rights, in reality the marginalisation of women within societies, and in particular the human rights systems, have resulted in such separation. Women are treated differently both in law and in fact.

The General Assembly of the United Nations set the tone for the modern notion of human rights by proclaiming the *Universal Declaration of Human Rights*:

> as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.[3]

In broadening this "common standard" and making such standards enforceable, the *International Covenant on Civil and Political Rights* and the *International Covenant*

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[1] W. E. Langley, *Women's Rights in International Documents: A Source Book with Commentary* (Jefferson: McFarland &Co. Inc., 1999) at ix.

[2] Para 5 of the Preamble to the *Protocol* recalls that "... women's rights have been recognized and guaranteed in all international human rights instruments, notably the *Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child*, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights"; W. E. Langley, *ibid* at ix.

[3] The last paragraph of the Preamble to the *UDHR*.

on Economic Social and Cultural Rights were adopted. The civil and political rights guaranteed are recognised as having immediate implementation and enforcement, while economic, social and cultural rights require progressive implementation.[4] This interpretation has its origins in the liberal western thought which consistently narrows and distorts the international human rights agenda.[5] The distortion is further aggravated when international human rights are declared universal, dismissing as irrelevant the cultural diversity of those whom the rights affect in the human rights discourse.[6] Some scholars have drawn a distinction between human rights and human dignity, contending that many societies, such as Africa, had conceptions of human dignity and not of rights.[7] Pityana expresses a similar position in relation to the UDHR when he asserts that "[H]uman rights may not have been understood or accepted in all cultures in exactly that terminology or in the absoluteness of its application but a consciousness of those

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[4] Classification into generations of rights has been maintained by human rights scholars. Civil and political rights; economic, social and cultural rights; and group rights forming the first, second and third generations of rights respectively. The first generation rights are regarded as justiciable - enforceable within domestic courts- while the second generation rights are seen as non-justiciable rights. Article 2 (1) of the ICESCR states that " [T]he States Parties to the present Covenant undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[5] Civil and political rights are often prioritised over economic, social and cultural rights as a result of growing individualisation and capitalism. Although economic, social and cultural rights most greatly affect women's status in society, especially in Africa, not enough attention is given to these rights. See J. Oloka- Onyango, "Modern-day Missionaries or Misguided Miscreants? NGOs, The Women's Movement and the Promotion of Human Rights in Africa" in W. Benedek *et al*, *The Human Rights of Women: International instruments and African Experiences* (London: Zeb Books, 2002).

[6] Scholars who hold a universalistic view include: Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca,, NY: Cornell University Press, 2003); Henkins, L., *The Age of Rights* (New York: Columbia University Press, 1990). While scholars of the relativist bent include; B.O. Okere "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 Hum. Rts.Q.141; Louis Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," (1982) 32 Am. U. L.Rev. 60, at 82.

[7] Rhoda E. Howard, "Dignity Community and Human Rights" in Abdullahi An Na'im, *Human Rights in Cross- Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1991) at 83- 84. (She contends that dignity is communal while human rights are individual and autonomous rights).

principles has a universal and cross- cultural ring to it."[8] The dichotomy between the western notion of human rights and that of the "others," that is non-western conception, is illustrated most explicitly in the universalism and cultural relativism debate.[9]

The above notwithstanding, the history of women's rights in Africa appears to have been structured by the west. Two propositions are observable when discussing human rights in Africa and particularly women's human rights. The application of international human rights law and its norms within African cultural contexts raises tension on the one hand and the complexity of implementing African women's rights as human rights on the other hand. Many scholars focus on the negative aspects of African cultural norms to the exclusion of the positive.[10] According to Lesley Amede Obiora, this approach is counter-productive.[11] The "culture" of developing countries is labeled and distorted in many cases. For instance, African cultural practices compared to practices in the West are considered unacceptable and anthropologically primitive.[12] The second part of the proposition is whether African women have rights that can be protected and promoted within the international human rights system, that is, whether there is a

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[8] N. Barney Pityana, " The Challenge of Culture For Human Rights in Africa: The African Charter in a Comparative Context," M.D. Evans and Rachel Murray eds., *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (UK: Cambridge University Press, 2002) at 220.

[9] Human rights scholars have taken up this debate, which finds its origin in the American Anthropology Associations' (AAA) statement relating to the *UDHR*. The statement written by Melville Herskovitz, rejecting the universality of international human rights norms contained in the *UDHR*, as having a western and Judeo- Christian bias. They claim that western countries that colonized two-thirds of the world, committed atrocities in the name of civilising missions, were the same countries that drafted and signed the *UDHR* and therefore hypocritical in supporting the claim for human rights.

[10] L. A Obiora, "How does the Universal Declaration of Human Rights Protect Women?" 26 Syracuse J. Int'l. L & Com. 195, spring 1999; C. A Odinkalu, "Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights" in Malcolm D. Evans and R. Murray (ed.), *The African Charter on Human and Peoples Rights: The System in Practice, 1986-2000* (UK: Cambridge University Press, 2002).

[11] *Ibid.*, at 207

[12] E. Grande, "Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Comparative Perspective", Global Jurist 4 [2004] 2 at 1 (The Berkeley Electronic Press (bepress)). http://www.bepree.com/gj) at 2.

recognizable, accepted human rights jurisprudence with regards to women in Africa. An exploration of this broader theoretical question will lay the foundation on which the *Protocol* can build.

This chapter aims to contextualise the jurisprudence of African women's human rights. The fact that women are disadvantaged, oppressed, subordinated and subjugated in part of Africa has long been the focus of human rights discourse relating to Africa. The chapter argues that, in spite of this negative picture, there is more to human rights from the perspective of women in Africa that can bring about an improvement in their status, both individually and collectively. The approach of domestic courts in interpreting issues of human rights of women will be examined. The basis for assumptions that view traditional African culture, in all its ramifications as negative, will be examined. It is argued that interpretations based on isolated western notions should be replaced with a more comparative and contextual approach. The aim is to find means to ensure that women's human rights are recognised and protected in Africa through appropriate interpretation by domestic courts. The effective implementation of the *Protocol* will depend on its application within domestic jurisdictions.

It is necessary at this point to highlight the development of women's rights as human rights within a historical context focusing on the development of these rights through the UN system and also the Sub-Saharan African regional systems.

4.2 Women's Rights in Historical Perspective

The concept of women's rights refers to both the rights of women as human beings as well as their rights as women. Many early international instruments recognised

women's rights prior to establishment of the United Nations. [13] One purpose of the UN as stated in its *Charter* is "...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...," based on principles of equality and self-determination.[14]

The UN has played a pivotal role in the advancement of the rights of women. Several of its general international human rights documents have principles of equality and non- discrimination enshrined in them.[15] The UN serves "as a catalyst for change, as a global standard setter for the eradication of gender discrimination; as a forum for debate; and as an unparalleled source of balanced, comprehensive data on the status of women worldwide."[16] The central organising principle of the work of the UN recognises that no enduring solution to society's most threatening social, economic and political problems can be found without the full participation and empowerment of the world's women.[17]

Creation of the Commission on the Status of Women marked official recognition of the rights of women by the UN.[18] *The Convention on the Political Rights of Women*[19]

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[13] A number of International Labor Organization instruments protect the rights of women to equal pay and maternity protections. For example, Convention Number 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (June 29, 1951): early United Nations instruments also recognise that women could have legal rights of women such as the Convention *on the Political Rights of Women* (31 March 1953).

[14] Article 1 (3) and Article 56 of the *Charter of the United Nations* , 1 U. N. T. S. xvi; Can T.S. 7 of June 1945 (hereinafter *UN Charter*).

[15] See for example Article 3 of the *ICCPR* and *ICESCR*.

[16] Statement by Boutros Boutros –Ghali in *The United Nations Human Rights 1945-1995.* UN Blue Book Series Vol.VII (New York: United Nations Department of Public Information, 1995) at 3

[17] The United Nations and the Advancement of Women 1945-1996. UN Blue Book Series Volume VI, (rev. ed.) (New York: UN Department of Public Information, 1996) at 7.

[18] The Commission on the Status of Women was first of all a Sub commission subordinate to the Commission on Human Rights before being upgraded to the status of a full commission after three months. It participated in the drafting of different UN documents including the Universal Declaration of Human Rights. (Hereinafter CSW).

[19] 193 U .N. T. S.135 (February 1952).

and the *Convention on the Nationality of Married Women*[20] are early UN instruments that identified specific rights of women. The activities of the CSW led to adoption of the *Declaration on the Elimination of Discrimination against Women.*[21] This was followed by a series of activities that culminated in adoption of the International Bill of Rights for women, the *Convention on the Elimination of all Forms of Discrimination against Women.*[22] The activities included various UN conferences which effectively focused attention on the status of women and put women on the international human rights agenda.[23] The conferences gradually arrived at the recognition that women's rights are human rights.[24] For example, the Declaration and Programme of Action adopted at the World Conference on Human Rights held in Vienna emphasised that "[t]he human rights of women and of the girl child are an inalienable, integral indivisible part of universal human rights."[25]

The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* was adopted by the UN General Assembly on 6 October

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[20] G.A. Res. 1040 (XI); 309 U. N. T. S 65 (1957).

[21] G.A Res. 2263, U.N. Doc. A/6716 (1967). The Declaration consolidated all the standards concerning the rights of women that had been developed until that point.

[22] UN General Assembly Resolution 34/ 180 of 18 December 1979, entered into force 3 September 1981. (hereinafter *Women's Convention*). Activities include the International Women's Year, 1975 and the adoption of the UN Decade for Women thereafter. As of 20 October 2004, 179 countries had ratified the *Women's Convention.*

[23] The Teheran World Conference on Human Rights 1968, followed by the World Conference on Women held in Mexico city in 1975, marked the beginning of the U.N Decade for Women; the 2nd World Conference on Women held in Copenhagen in 1980; the 3rd held in Nairobi in 1985 and the Beijing Conference in 1995 and more recently Beijing + 5 and Beijing + 10 in New York in 2000 and 2005 respectively.

[24] The activities of non-governmental organizations (NGO's) and women's groups cannot be under – estimated in the process. In 1975, over 6000 NGO's participated in the conference at Mexico city from 133 countries; over 7000 person participated in the NGO forum in Copenhagen and over 14000 representative from 150 countries participated in the parallel forum for NGO's in Nairobi. Thousands of NGO's mobilised in support of women's rights in their countries prior to the conferences.

[25] Vienna Declaration and Programme of Action of the World Conference on Human Rights, U.N.Doc.Aa/CONF.157/23 (1993); 32 I.L.M. 1661, Para. 18.

1999.[26] Two procedures are available under the *Optional Protocol*: complaint and inquiry.[27] States that ratify the *Optional Protocol* recognise the competence of the Committee on the Elimination of Discrimination against Women to consider petitions from individual women or groups of women who have exhausted all national remedies. The *Optional Protocol* also entitles the Committee to conduct inquiries into grave or systematic violations of the *Women's Convention.*

In recognition of the problem of violence against women, the Special Rapporteur on Violence against Women was appointed by the Commission on Human Rights in 1994.[28] Her mandate was to consider issues of violence against women and also to establish procedures to seek information from governments concerning specific cases of alleged violence. The activities of the UN had the effect of drawing attention to women within its human rights system.[29]

On the African regional front, the initial recognition of the rights of women is found in the *African Charter on Human and People's Rights*.[30] However, the admission that this provision does not adequately protect the rights of women on the continent led to appointment of the Special Rapporteur on the Rights of Women in Africa and the

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[26] A/RES/54/4. entered into force 22 December, 2000 (Hereinafter Optional Protocol) available at http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm.

[27] Articles 1 and 8 of the *Optional Protocol.*

[28] Resolution 1994/45 of the Commission on Human Rights, Ms Radhika Coomaraswamy from Sri Lanka was appointed in 1994, her mandate was renewed by Resolution 1997/44. Ms. Yakin Erturk has been the Special Rapporteur since August 2003.

[29] For example, the adoption of the *Inter American Convention on the Prevention, Punishment and Eradication of Violence Against Women* in 1995; the explicit inclusion of gender based and sexual violence as a crime against humanity in Article 7(1) of the *Statute of the International Criminal Court. The Rome Statute of the International Criminal Court* U.N. Doc. A/CONF. 183/9 (17 July 1998), reprinted in 37 I.L.M. 999 (1998) available at http://www.un.org/law/icc/statute/romefra.htm. Viewed 04/04/05.

[30] Article 18 (3) of the *African Charter.*

eventual drafting and adoption of the *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.*[31]

Women in Africa, as in other parts of the world, however continue to face discrimination and marginalisation in spite of the above. The need for concerted action to accelerate the practical improvement of the status of women cannot be over-emphasised. The effort of the women's movement has been and remains significant in the search for protection of women's rights. The philosophical basis of women's rights is traced in order to lay the foundation for African women's rights jurisprudence. Feminist theories of women's rights are explored, highlighting the relevance of these theories to the African societies and the conception of human rights of women in Africa. [32]

4.3 Philosophical Basis of Women's Rights

Women's search for equality and non-discrimination pre-dates modern conceptions of rights. Historically, women suffered deprivations that have no bearing to their social contribution or their capabilities. Women have responded to this deprivation and subordination by working collectively on women's rights. Although there is no universal definition, such collective action and belief is understood as feminism. No single definition can be ascribed to the term feminism. It takes on different meanings in different contexts, whether as an ideology or philosophy. Notwithstanding the problem associated with definition, feminism broadly describes all movements and activism that strive to end oppression of women and equalise their position with men.

Traditionally, law, by omission or commission, has discriminated against women, ignoring the realities of women's life experiences. Feminist jurisprudence has sought to

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[31] Mrs. Julienne Ondziel-Gnelenga was appointed Special Rapporteur on the Rights of Women.
[32] Article 1 (3) and Article 56 of the *Charter of the United Nations*, 1 U. N. T. S. xvi; Can T.S. 7 of June

address this problem. Feminist theorists share a view that much of women's experiences have been omitted in the standard legal scholarly and popular descriptions of the world.[33] Though there is no consensus regarding what constitutes feminist jurisprudence, the earliest writings on the situation of women recognised the systematic oppression of women.[34] An example of such writings is Mary Wollstonecraft's book, *A Vindication of the Rights of Women.*[35] According to Catharine MacKinnon, feminist jurisprudence is an "analysis of the law from the perspective of all women."[36] This definition is misleading, being too simplistic since there is no single monolithic women's view. To Patricia Smith, feminist jurisprudence is "the analysis and critique of the law as a patriarchal organization."[37] Patriarchy is a form of hierarchical structure that characterises many human societies. Under the hierarchical structure, women are subordinate to men. The nature and interests of women are formulated and determined by men.

Different strands of feminism have emerged to attempt to improve the status of women. The earliest feminist writings can be traced to the liberal tradition as exemplified by Mary Wollstonecraft's book.[38] Liberal feminist see all human beings as equal and deserving of equal treatment. Essentially, law to them is gender blind and equality may

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1945 (hereinafter, *UN Charter*).

[33] M.D.A. Freeman, *Lloyds Introduction to Jurisprudence* (London: Sweet Maxwell, 1996) at 1027.

[34] Writings by Abigail Adams and Mary Wollstonecraft.

[35] Mary Wollstonecraft, *A Vindication of the Rights of Women, with Strictures on Political and Moral Subjects* (London: John Johnson,1794) Cited in B. Baines, and R. Rubio-Marin, *The Gender of Constitutional Jurisprudence* (New York: Cambridge University Press, 2005) at 2. See also Mary Wollstonecraft, *A Vindication of the Rights of Woman, With Strictures on Moral and political Subjects,* iii-viii (Philadelphia: William Gibbons, 1792) in Carol E. Lockwood, D.B. Magraw, M.F. Spring, and S.I. Strong (eds.), *The International Human Rights of Women: Instruments of Change* (American Bar Association, 1998 In 1776, Abigail Adams had urged for the recognition of the rights of Women. "Letter from Abigail Adams to John Adams" (March 31, 1776), reprinted in *Adams Family Correspondence* 370 (L.H. Butterfield ed., 1963). (Hereinafter *Instrument of Change*).

[36] P. Smith, (ed), *Feminist Jurisprudence* (New York: Oxford University Press, 1993) at 3.

[37] Cited in P. Smith, *ibid.;* D. L. Rhode, *Feminist Critical Theories* (1990) 42 Stanford Law Review 617 (She argues that what unites feminist legal theorists is a belief that society and necessarily the legal order is patriarchal).

be achieved simply by removing all formal barriers to provide equal opportunity for all.[39] The removal of legal restrictions, however, in most cases has not led to equality ass envisioned by liberal notion of equal opportunity. Thus, more recently, modern liberal feminist attempts to resolve shortcomings by seeking to re-structure state institutions to be more supportive of family needs.[40]

Radical feminists on the other hand view patriarchy as molding our thoughts and attitudes; and the only way to change the position of women is to change the way we think about gender itself. The focus of radical feminism is on the domination of women by men through the social construction of gender within patriarchy.[41] For them the solution to the oppression of women is to reverse the institutional structures of domination and to reconstruct gender and eliminating patriarchy.[42]

The Marxist and Socialist feminist believes that the construction of gender is not the primary issue. To them, equality for women is not possible in a class- based society established on basic principles of private property and exploitation of the powerless. To the Marxist feminist, the oppression of women originated with the emergence of male control over wealth, that is, introduction of capitalism and private property which divided the world into private and public spheres of life, relegating women to the non-economic private sphere, devaluing that sphere and making it powerless. Thus, in order to relieve women from oppression, the capitalist system, whereby the non-economic private domain

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[38] P. Smith, *supra* note 36 at 98-102.

[39] This is the Aristotelian model of equality. It refers to the treatment of like persons alike and unlike persons unlike or the "similarly situated persons" approach. This model does not acknowledge the difference between the sexes. See, Ann C. Scales "The Emergence of Feminist Jurisprudence: An Essay" in P. Smith, *supra* note 34.

[40] P. Smith , *supra* note 36 at 5.

[41] *Ibid.* Social construction of gender refers to the division of gender into different roles for men and women.

[42] *Ibid.*

of women is devalued, must be replaced by a socialist system in which no class will be economically dependent or exploited by any other.

The post-modern feminists associated with the critical legal studies movement deny that categorical, abstract theories, derived through reason and assumptions about human nature, can serve as the foundation of knowledge. They claim there is no single answer or truth that will organise all issues and lead to a single reformative strategy. The post-modern feminists see no single answer to the oppression of women and require contextual judgments rather than abstract rules and generalisations to attack the oppression. According to Deborah Rhode, "[s]uch an approach demands that feminists shift self-consciously among needs to acknowledge both distinctiveness and commonality between sexes and unity and diversity among their members." Solution to the problems faced by women should be tailored towards the concrete experiences of actual people and not mere abstractions.[43]

Similarly, the pragmatic feminists follow the legal realist tradition. They focus on the function of the courts to analyze law and legal reasoning in a practical, personal and contextual manner that rejects traditional abstract categories, dichotomies, and the conceptual pretensions of the logical analysis of law.[44] According to Gilligan, women and men undergo different moral development. The predominant moral attitude of men she calls the ethic of justice, which concentrates on abstract rules, principles and rights; while the predominant moral attitude of women she calls the ethic of care.[45] The relational feminists, a strand of pragmatists, influenced by Carol Gilligan in her book, *In a Different*

[43] *Ibid.*, at 6.
[44] *Ibid.*, at 7.
[45] *Ibid.*

Voice, argue that women should not be fitted into the men's norm; rather, institutions should be changed to accommodate the value and values of women.[46]

Although Patricia Hill Collins agrees that there is a need to reject patriarchy, she identifies her type of feminism as black feminism, which she defines "as a process of self-conscious struggle that empowers women and men to actualize a humanist vision of community."[47] Reflective of her African-American background, she sets out to re-articulate and re-construct a feminist ideology that dismantles the conceptual apparatus of the dominant group and leads to equality for black women and men in relation to each other and to the dominant society.

On the African continent, the Women in Law in Southern Africa (WLSA) has challenged the modernist paradigm that confers 'superior' law status to modern law, while projecting customary law as unprogressive, the bane of women.[48] The WLSA sees the starting point of a legitimate women's law project in Africa to be customary law. They contend that most women in African communities accept it as the legitimate law over their lives, though feminists are not unmindful of the fact that customary law has been exploited for the subordination of women.[49]

Lesley Amede Obiora, an Associate Professor of Law at the University of Arizona, proposed an alternative discourse from the usual "inclination to frame inquiry in

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[46] Cited in P. Smith, *ibid.*, at 7.

[47] Patricia Hill Collins, *Black Feminist Thought: Knowledge Consciousness and the Politics of Empowerment.* Perspectives in Gender, Volume 2 (New York: Routledge, 1991) at 39.

[48] A. Armstrong, "Rethinking Customary Law in Southern Africa: What Relevance for Action," WLSA Newsletter, Vol. 7, No. 1 cited in Ayo V. Atsenuwa, *Feminist Jurisprudence: An Introduction*, (Florence and Lambard (Nig) Ltd, 2001) at 135.

[49] M. Mandani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996). This school of thought skeptical of not only customary law but also customs and traditions which are open to manipulation and distortion by those who desire to so use them, such as colonialism and apartheid regimes and manipulation by opportunistic powerful men seeking to entrench themselves in positions of dominance.

terms of women's powerlessness and patriarchal oppression."[50] According to her, "rather than merely denouncing culture as an invariably patriarchal institution, can we begin to refocus attention on the positive roles and potentialities of culture or rather on how to harness and cultivate indigenous resources and cultures for the purposes of advancing the statuses, roles and rights of women."

Furthermore, intersectionality of different factors on the lives women is recognised by African feminists. According to Ayo Atsenuwa:

> Women are hardly, just women. Age, religion, ethnicity, marital status, relation to the family are all factors which determine a woman's identity (ies) and status. Customary law does not relate to women indiscriminately to the extent that it does not relate to women simpliciter. Rather, it relates in particular contexts to one or more of the multiple identities women inhabit and often women's other identities eclipse their gender identity. Thus, the status and power of a woman as a mother-in- law or sister- in-law is not shared by a woman as a daughter-in-law. Also, a woman's status and power as a wife is often significantly affected by whether she has children and the age of her children.[51]

Despite the differences expressed by the strands of feminists ideas highlighted above, a unifying thread identifable among feminists is the attempt to represent the commonality of fundamental values without misrepresenting the plurality of experiences.[52] Open dialogue that allows the expression of diverse views and gives particular attention to views not usually heard, is encouraged. Feminist jurisprudence aims to represent women's side of things and agree on the rejection of patriarchy. Feminists argue against "oppression, disadvantage, domination and discrimination"[53]

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[50] L. A Obiora, *supra* note 10 at 213
[51] A. V. Atsenuwa, *ibid* at 137.
[52] Smith, P., *supra* note 36 at *5.*
[53] *Ibid.* at 5.

They reject the existence of a monolithic "women's experience" and acknowledge that different women's experiences affect gender differently.[54]

Women in Africa face struggles similar to other women elsewhere but compounded by ingrained cultural practices. Paradoxically, many African cultural practices are regarded as contrary to the principles of human rights. These practices are condemned and derided to the point of sensationalism by western interests, including feminists. This situation has had considerable repercussion on such practices. Contributions to feminist studies as exemplified above have raised the concern about "whose feminist agenda" is being promoted. This position was succinctly acknowledged by Mutua as follows:

> While the West is presented as the cradle of the feminist movement, countries in the South have been constructed as steeped in traditions and practices that are harmful to women. [55]

Attention to African culture has been sensational, patronising and many times insensitive, resulting in antagonism and reactionary defense and protection of these customs. Efforts aimed at eliminating these practices, perceived as negative by indigenous feminists of African extraction, are labeled as "anti African, Western imperialist and feminist inspired."[56] This attitude encourages a negative conception of feminism within many African societies. The different strands of feminism, however, remain invaluable not only in drawing attention to the oppression of women generally but in serving as a foundation upon which a theory for the protection of the rights of women in African can be built.

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[54] The interaction of other facets of experience such as race and class impact women differently. See for example, A. P. Harris, "Race and Essentialism in Legal Theory," at 382. (She criticizes the categorisation of all women as white women devoid of race or class as gender essentialism.)

[55] Mutua, M., *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 24.

4.4 African Women in Context

The history of Sub-Saharan Africa has been drawn mostly from foreigners and oral traditions; therefore a cautionary approach must be maintained in making generalisations. Indeed, the size of the continent, the diversity and complexity of the people and their distinct economies and historical cultures makes a uniform history impossible or futile. However, most African history can be divided into the pre-colonial, colonial and post-independence periods, all of which exhibit different features.

Two organizational paradigms featured prominently in pre-colonial African societies: the kingdoms or centralised societies, and the less centralised societies based on age-grade or kinship systems.[57] In many African societies during the pre-colonial era, women often had their roles set out, whether as mothers, wives, subsistence farmers or market women; and they made their contributions to the development of their societies individually and communally.

The colonial era and its "civilizing" mission brought with it the legal regime of the colonialists. Two methods of administration were evident during this period: the assimilation policy and the indirect rule. The former was employed in French colonies, while the British adopted the latter. In some places, the colonialist attempted to replace the indigenous laws and customs, while in others, legal dualism was maintained whereby African customs and laws were applied along with the received colonial or civil laws. The civil law was mainly applicable to the colonialists, while customary laws were

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[56] Green, D., *Gender Violence in Africa: African Women's Responses* (New York: St. Martin's Press, 1999) at 44.

[57] Examples of the centralised kingdoms include the Yoruba, Benin and Ashanti kingdoms of West Africa, while examples of the less centralised societies include the Akamba of East Africa and the Igbo of West Africa.

applicable to the "natives." Customary laws that did not conform to the received law were adjudged repugnant to natural justice, equity and good conscience by the courts.[58]

The role of women in these societies was mainly that of the mother and the wife, subordinated in political and social organisations, though a few exceptions existed where women assumed influential positions as a result of their economic or political prowess.[59] Women generally had no right to inheritance or to contract in their own names, and basically remained under the guardianship of a male member of the family. Though the modern notion of human rights as elaborated in international human rights instruments were not known in pre-colonial Africa, there existed strands of rights, even if not so called.[60] The fact that there existed at the time, practices inimical to human rights was not peculiar to Africa.

The colonial powers intensified the subordination of women by their policies.[61] The traditional political structures were completely abandoned or distorted, to sweep away any female participation in the handling of local power and administration.[62] Although in some parts of sub-Saharan Africa, such as Nigeria, women became

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[58] The repugnancy test was the official colonial government requirement in Nigeria that a customary law or tradition, to be enforced, must be neither repugnant to natural justice, equity and good conscience, nor contrary to any official law; and this remained the criteria for determining the applicability of customary law. For example in the Nigerian case of *Okonkwo v. Okagbue and 2 others,* 12 SCNJ 1994, 89, the issue was whether or not the 1st and 2nd defendant (sisters of the plaintiff's late father) could marry a wife for the plaintiff's late father after the father's death. The defendants claim that their custom entitled them to do so, but the Supreme Court of Nigeria declared the custom repugnant to natural justice and thus void.

[59] For example, Madam Tinubu of Lagos in the nineteenth century and Queen Amina of Zaria in the eighteenth century, both in West Africa.

[60] Makau Mutua, *supra* note 55 at cap. 3 (for a discussion of some pre-colonial African society's conception of human rights).

[61] For examples, the introduction of policies considered adverse to their welfare led to the Aba women's war of 1929. See, Paula C. Johnson and Leslye Amede Obiora, "Human Rights Symposium: Panel Discussion How Does the Universal Declaration of Human Rights Protect Africa Women?" (Spring, 1999) 26 Syracuse J. Int'l L. & Com. 195 at 208.

[62] M. Ogundipe-Leslie, "African Women, Culture and Another Development" in James, S.M, and Busia, A. P. A., *Theorizing Black Feminism: The Visionary Pragmatism of Black Women* (New York:

enfranchised, participation in public life and decision-making remained minimal, due to colonial policies.[63] Male dominated structures and attitudes of male superiority and female exclusion was entrenched by the colonialists.[64] Where customary laws governed family relations, the communal system provided safeguards and protection for women; but the break down of these systems lead to further subjugation of women. Neo-colonialism persists in post-colonial Africa, with many African states maintaining the colonial apparatus to a large extent.

Whether in the pre-colonial, colonial or post-colonial periods, customs, traditions and customary laws continue to feature substantially in the lives of African women. Customary law was administered along side the received law of the colonialists. Colonial law led to displacement of the communal system and stagnation of customary law leaving women without some of the supports that were traditionally part of the customary system. For example, the extended family system that held families together is now largely being abandoned. Traditional practices that evolved initially to preserve societal cohesion became stagnant and negatively permeate family law, inheritance law and property law. As earlier noted post-colonial governments in Africa held on tightly to their newly acquired power and paid minimum attention to human rights issues or violation of rights. Increasingly, human rights awareness began to build as a result of oppressive and repressive autocratic government in many parts of Africa; and many states witnessed a proliferation of non- governmental organizations (NGO) seeking to end human rights violations and institute democracy.

Routledge, 1993) at 108 -109.

[63] The education policy limited women to certain profession, such as nursing and teaching.

[64] M. Ogundipe-Leslie, *supra* note 62

International human rights law as contained in different instruments obliges governments to guarantee rights of citizens to participate in the cultural life of their communities.[65] Other instruments require states to modify or abolish through legislation, customs and practices which discriminate against women.[66] The apparent disparities in these two positions typify the tension between universality and relativity of human rights in Africa.

4.5 Redressing the Disparity: Universal or Relative Rights in the African Context

The most profound difference between the modern conception of human rights and the African perspective remain the quest for individual autonomy in the west and communitarian ideals prevalent in African societies. This is one of the areas that raise tension within the human rights discourse. At one end of the spectrum is the 'universalist" who asserts that the *UDHR* and related norms are truly universal and therefore subject to no debate.[67] At the other end, is the "relativist" who asserts that all human rights standards must be subjected to local conditions, culture and other contexts Both extremist views have had consequences on the promotion and protection of rights specifically within the context of human rights in Africa.[68]

The *African Charter,* for example, emphasises tradition and culture, and recognizes the international human rights norm at the same time. The Preamble to the

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[65] Article 15 (1) (a) of the *ICESCR* provides that States Parties to the Covenant recognize the rights of everyone to "take part in cultural life."

[66] Article 2 (f) of the *Women's Convention* obligates States to undertake "to take appropriate measures, including legislation, to modify or abolish existing laws, regulations , customs and practices which constitute discrimination against women.

[67] Part of this argument also asserts that human rights are individual rights only and not collective rights.

[68] The universalist approach seeks to impose rights without sensitivity to the culture of others; it fails to recognize the economic, social and cultural rights as well as group rights as "genuine" human rights. This approach arouses negative response to the rights discourse specifically from developing countries. The relativist approach, which is essentially posited to counter the former, tends to hide behind the veil of culture to perpetuate violations of human rights.

African Charter requires state parties to take into consideration "the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights." On the right to education the *African Charter* provides that "[E]very individual may freely take part in the cultural life of his community" and that the "promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."[69]On the other hand, the *African Charter* seeks to "eliminate discrimination against women and ensure their protection as stipulated in international declarations and conventions."[70]

Disparities exist between customary laws and cultural practices in Africa and international and regional instruments, national laws and constitutional guarantees. The weight of this tension has a bearing on women's rights in Africa. The retention of patriarchal dominance within the African society makes it difficult for women to exercise their rights. How do we reconcile culture with international human rights norms?[71]

Although gender is described as a social construct that cuts across cultures, it remains a basis for discrimination. According to Catharine MacKinnon, "[G]ender, cross-culturally, was found to be a learned quality, an acquired status, with qualities that vary independent of biology and an ideology that attributes them to nature."[72] Culture itself is a dynamic concept intertwined with many variables, such as history, religion, philosophy, language, politics, environmental factors and economics.[73] It encapsulates the totality of a people's way of life and is expressed as follows:

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[69] Article 17 (2) and (3) of the *African Charter* respectively.
[70] Article 18 (3) *ibid.*
[71] U.Oji Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 1997) [attest to the fact that some African traditions support discrimination which includes inheritance and property ownership.]
[72] Quoted in P. Smith *supra* note 36 at 6.
[73] M. Mutua, *supra* note 55 at 22.

> Culture represents the accumulation of a people's wisdom and thus their identity, it is real and without it a people is without a name, rudderless, and torn from its moorings. In this sense, culture is a set of local truths which serve as a guide for life's many pursuits in a society.[74]

Cultural norms are more important to many people than constitutional or national law. According to Radhika Coomaraswamy, any effort to improve the status of women must pay attention to the relationship between culture and gender equality.[75] Therefore, the one-dimensional and linear perception of culture by some feminists of western extraction misses the point and fails to realise that "it is virtually impossible to understand gender relations outside the context in which they occur,"[76]especially in Africa.

Women are subordinated in almost all societies of the world, but it is the severity of the repression that varies in time and space. The "reductionist documentations of African women's woes and litanies are common place,"[77] and many scholarly works tend to give the impression of an irredeemably savage existence in Africa where women cannot even conceive of rights.[78] The treatment of cultural differences with respect and sensitivity, openness and dialogue remains the only option for truly acceptable women's rights jurisprudence. According to Maluwa:

> We must be mindful of the pitfalls inherent in the blind universalization of the rights rhetoric of human rights and democracy that does not take account of the cultural sensitivities of particular communities. However, we should also be careful not to allow the deployment of culture as a shield against legitimate demands for the recognition of what

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[74] *Ibid.*

[75] Radhika Coomaraswamy, Critical Issues Confronting Commonwealth Women in the Area of Human Rights: A Commonwealth Secretariat Paper, 6th Commonwealth Ministerial Women's Affairs Meeting, New Delhi, India 2000, Para. 22.

[76] P. C. Johnson and L. A. Obiora, "Human Rights Symposium: Panel Discussion, How does the Universal Declaration of Human Rights Protect African Women? Spring, 1999, 26 Syracuse J. Int'l. L.& Com. 195 at 213.

[77] L. A Obiora, *supra* note 10 at 207

[78] *Ibid* at 207.

> are truly universalizable rights that reside in our shared experiences as members of the common human family, irrespective of differences in cultural or geographical localities.[79]

Critics of international human rights law express the view that the application of human rights thrive on the use of a double standard.[80] The present women's rights landscape is particularly characterised by value judgments and double standards. Whatever originates in the west is seen as good and acceptable, while the cultural practices of developing countries, such as Africa are regarded as backward and of no value.[81] For example, while female circumcision, common in the developing world, is condemned as a violation of human rights, breast augmentation is classified as a form of modification of a sexual organ that is acceptable.[82] Feminist jurisprudence should begin to take a non-prejudiced view of women's rights from the African woman's perspective. The prevailing tendency of demonisation of non-western cultures as being worthless has not served to change the culture. The point is to ensure that "cultural values are not interpreted and applied in ways that seek to justify discrimination against women or to prevent them from enjoying their rights equally with men."[83]

What is the effect of the attempt by the *African Charter* to balance cultural relativism with universalism of human rights? What does placing emphasis on communalism rather than individualism portend for African women?[84] For example, the

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[79] T. Maluwa, "Implementing the Principle of Gender Equality Through the Law: Some Lessons from Southern Africa" http://www.un1.ed/humanR/pubs/HRHD_maluwa.pdf. Last visited 10/06/05.

[80] *Ibid.* [Argued for the adoption of a single standard in the ethical and legal evaluation of cultural practices]. The tendency is for the west to focus on the human rights violations in developing countries while down playing violations within their countries.

[81] N. Barney Pityana "The Challenge of Culture For Human Rights in Africa: The African Charter in a Comparative Context" in M.D. Evans and R. Murray (eds.), *supra* note 10 at 225[he contends that no culture can sit in moral judgment over others, as not all cultures are uniformly good or bad].

[82] For a discussion of this view, see E. Grande, *supra* note 12.

[83] T. Maluwa, *supra* note 79.

[84] N. J Udombana, "Between Promise and Performance: Revisiting States' Obligations Under the African

African Charter imposes on the individual the duty "[T]o preserve and strengthen positive African cultural values in his relation with others...." The ambiguity of this and similar provisions is apparent since perimeters for determining which values are positive or negative are not given.[85]

Some writers have been radical in rejecting any form of culture that deviates from that of the west, while others suggest a cautionary approach to total rejection of non-western culture. Julie Dimauro, of the latter school of thought, argues that "international activists should adopt a weak cultural relativism, that both recognises as valid those universal human rights contained in widely accepted international instruments and permits limited local autonomy in the amelioration of human rights abuses."[86] Accordingly, rather than merely denouncing culture as an invariably patriarchal institution, it is suggested that we begin to re-focus attention on the positive roles and potentialities of culture or rather than on how to harness and cultivate indigenous resources and cultures for the purposes of advancing the status, roles and rights of women.[87]

The issue of female genital surgeries or cuttings is often used as an example of the tension between univeralism and relativism. Those who condemn these practices are regarded as ethnocentric. They are accused of unnecessary sensationalisation which further marginalises women and perpetuates the portrayal of non-western cultures as

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Human Rights Charter" 40 Stan. J. Int'l.L.105 at 112 [" A synthesis of universal and African elements"] at 112.

[85] *Ibid.* [Udombana gives a plausible interpretation to be "that the Charter favors African rights to the extent that they do not collide with universal principle."

[86] J. Dimauro, " Toward a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law" 17 Women's Rights L. Rep. 333 Summer 1996 at 335 (She advocates a multicultural dialogue and shared search for strategies that involves those affected by the culture).

82 P. C. Johnson and L. A. Obiora, *supra* note 76.

"uncivilized."[88] Attaining a mid-way position between the universalist and the relativist approach has been advocated by many African scholars. Accordingly, the search for a truly universal human rights must be grounded in the cultural legitimacy of the rights, through inclusion and cultural dialogue.[89] To support this position, Evelyn Ankumah posited that:

> ... while proponents of an African human rights jurisprudence ascribe to the universality of human rights it is important not to confuse universality with uniformity. Due regard should be given to different traditions and philosophical backgrounds which complement and enrich the notion of human rights.[90]

A sensitive approach should be maintained in order to achieve progress in women's rights protection. One cannot but agree with Bennett that:

> ... [human] [R]ights are adoptable. [They] must be moulded by the exigencies of local culture. [Culture] are even more amenable to compromise. Like bills of rights, they too are constantly changing, both in reaction to extrinsic forces and through the dynamics of cultural conflict.

Attempts have been made to resolve the problem of balancing international human rights law with traditional and cultural practices by courts at the national level. Two approaches are observable. Some countries attempt to incorporate culture into their domestic law and national constitutions, with the proviso that cultural claims do not have priority over the

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[88] D. Green, *supra* note 56 at 18.

[89] An 'Naim, "Towards a Cross-Cultural Approach", *supra* note 65 at 59 [He advocates the need to develop techniques for internal cultural discourse and cross-cultural dialogue, and to work toward establishing general conditions conducive to constructive discourse and dialogue. He argues that "unless international have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted, particularly at the domestic level, but also at the regional and international level"] .

[90] E. Ankumah, *The African Commission on Human and People' s Rights: Practice and Procedure,* (The Hague/London: Martinus Nijhoff Publishers, 1996) at 34.

claims of equality under international law.[91] Others immunise some traditional and cultural practices or aspects of customary law from constitutional review. [92]

4.6 Challenges to Developing Women's Human Rights Jurisprudence in Africa

The fact that international human rights norms set the standard for regional and domestic application is apparent. International and regional norms without domestic application are futile. African nations have acceded to international human rights norms and are obligated to enforce them within national jurisdictions. Women's rights are particularly susceptible to relativist contextualisation in Africa.[93] This part examines the impact of these international human rights norms on the interpretation of women's human rights within domestic or national courts in Africa. It focuses on judicial interpretation and response to women's rights by domestic courts and assesses the practice in domestic courts in order to determine the existing reality.

Domestic courts within Africa have adjudicated matters on inheritance, property rights, marriage and divorce, among others, but many times, the courts do not link such matters with the rights of women, discrimination and gender equality. Courts that recognise these issues sometimes uphold the rights of women while others uphold customary laws and traditional practices. The vastness of the African continent will not allow for a thorough study, country by country; therefore this part focuses predominantly

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[91] Section 30 and 31 of the Constitution of South Africa protects language and culture; cultural, religious and linguistic communities. See also Section 27 of the *Canadian Charter of Rights and Freedom*, which provides that the Charter shall "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[92] The Constitution of Kenya prohibits gender discrimination but these protections do not apply to laws relating to marriage, divorce, inheritance and other aspects of customary family law which cannot be challenged constitutionally even when the rights of women are violated. The Kenyan Constitution is presently under review.

[93] M. A. Adjami, "African Courts, International Law and Comparative Case: Chimera or Emerging Human Rights Jurisprudence," 24 Mich. J. Int'l L.103 (Fall 2002) at 165.

on cases decided by courts in Anglophone common law countries in sub-Saharan Africa, particularly in Southern Africa and Nigeria.

The development of women's human rights jurisprudence at the regional level has been almost non existent.[94] The reasons for this situation may include the high level of illiteracy among African women, lack of awareness of rights, inaccessibility of the regional system to women, in terms of the cost to exhaust domestic remedies before being eligible to proceed to the regional level. Though the African Commission has important role to play, until complaints are received by it, interpretation of the provisions relating to women and the development of regional jurisprudence on women's rights is impossible.

Growing jurisprudential support for applying international standards in the domestic jurisdiction of common law countries was illustrated by the judicial colloquia in Asia in 1988 and Africa in 1989.[95] The Bangalore Principles and the Harare Declaration on Human Rights advocate the use of international human rights norms to resolve ambiguities or uncertainties in national constitutions and legislation and to fill gaps in the common law. The Principles recognise the need for education of judges, lawyers and litigants to ensure their awareness of applicable international human rights standards

The relationship between international law and national law determines the level of applicability of international human rights law at the domestic level. The object and purpose of human rights law is essentially to bring the domestic laws of state parties to

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[94] E. A. Ankumah, *supra* note 90 at 154. The African Commission has not had an opportunity to decide on any communication or complaint that focus on women's rights. The only decisions that exist on the regional level involve war crimes such as those decided by the International Criminal Tribunal for Rwanda.

[95] The judicial colloquium held in Bangalore in 1988 and Harare in 1989. "The Bangalore Principles on the Domestic Application of International Human Rights Norms," 14 Commonwealth L. Bull. 1196.

the standards agreed upon at the international or regional level. International law may be made applicable within domestic jurisdictions, essentially through both formal and informal methods.

From the formal perspective, the application and interpretation of international law principles depend on the modes of implementation of treaties. Two theories, the monist and dualist theories are propounded to explain the relationship between international law and national law. According to the monist theory, international law automatically becomes part of the national law, thus a single legal order that includes international law is presumed superior to national law.[96] Under the dualist theory, there is a separation of international law and national law. For a national legal system to give effect to international law, such laws must be incorporated into domestic law by the legislature. The South African Constitution in Section 231(4), for example, provides that:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self- executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[97]

The South African Constitution however proceeds to provide in Section 233 that:

> When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The provisions read together encourage the active use of international law as a guide to interpretation of law within domestic courts.

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[96] Ian Brownlie, *Principles of Public International Law* 6th ed., (Oxford; England: Clarendon Press; New York: Oxford University Press, 2002).

[97] *Constitution of the Republic of South Africa1996*, Act 108 of 1996, adopted on 8 May 1999 and amended 11 October 1996 by the Constituent Assembly. Available at http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1 Last visited 11 April

Many African nations have incorporated international human rights norms into their constitutional and legislative framework; but the existence of a positive legal framework for women's rights does not automatically give effect to rights of women. It, however, legitimises women's claims for rights and makes possible "women's transformation from passive beneficiaries to active claimants."[98]

Informal application of international law occurs when an international norm has attained the status of customary international law. Although unwritten, it is reflected in state practice and the international community agrees that such practice is required by law. With relevance to Africa, the informal application of international law is important, due to the complacency of governments to incorporate international human rights law into their national legislation. Complacency has the effect of imposing limitations on the application of international law in domestic courts.

Nevertheless, enforcement of international human rights domestically has some advantages over the regional level. First, the domestic court is close to the parties geographically; secondly, the decision at the domestic court may be more readily accepted as a political matter than a ruling of an international court would be; and thirdly, domestic courts may be better known and more accessible than the various bodies charged with enforcing obligations under international treaties.[99] Only Nigeria has enacted legislation to incorporate the *African Charter* into its national law[100] and, as noted earlier, the South African Constitution mandates courts to take international law

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2005 (Hereinafter *South African Constitution*).

[98] L. Landsberg- Lewis, (ed.) *Bringing Equality Home: Implementing the Convention on the Elimination of Discrimination Against Women.* (United Nations Development Fund for Women (UNIFEM), 1998) at 9.

[99] C. E. Lockwood, *et al*, *Instrument of Change supra* note 35, at 324.

[100] African *Charter on Human and People's Rights (Ratification and Enforcement) Act* Cap. 10, Laws of the Federation of Nigeria 1990.

into consideration when interpreting its Bill of Rights. From decisions in some of the cases to be highlighted, some African courts have overcome the technical obstacle that non-incorporation would normally be expected to impose.[101]

International human rights norms have not been consistently applied in domestic courts in Africa. In most cases, the focus most often is on constitutional guarantees where they exist. In many Anglophone common law countries of Africa, the principles of non-discrimination and equality are enshrined in national constitutions and often times the domestic courts do not have to venture into the international arena in order to apply human rights norms. Due to the low number of women's human rights decisions within domestic courts, the trends observable in the developing jurisprudence in some countries of Africa will be highlighted.

4.6.1 Upholding Culture and Customary Law

The bifurcated judiciaries that characterise the legal system in most of Africa have had an impact on the way courts interpret women's rights within domestic courts. The civil courts exercise wide discretion on customary laws and customs about which they often have limited knowledge. They also have discretion over what legal norms they will apply. In some cases these courts directly exclude the application of international human rights norms and even constitutional guarantees of rights. Instructive in this regard is the decision of the Nigerian Court in *Akinubi v. Akinubi.* [102]

In that case, Mrs. Rufus, a widow with five children was married under customary law. Her husband died intestate and left a building which was let out to a bank.

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[101] For example, the transjudicial model of incorporation of international law and comparative case law in domestic courts regardless of the binding or non-binding status of their sources has been advocated. Anne –Marie Slaughter, "A Typology of Transjudicial Communication" 29 U. Rich. L. Rev. 99 (1994) [The founding proponent of this approach].

After his death, the deceased's brothers obtained letters of administration in respect of his estate. The widow attempted to obtain an injunction to stop the brothers from administering the estate. The High Court held that she had no *locus* to institute the action because by customary law she is part of her husband's estate and cannot be appointed to administer the estate. This decision was upheld by both the Court of Appeal and the Supreme Court of Nigeria.

The Supreme Court in arriving at its decision held that:

> It is a well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property. Indeed under the Yoruba customary law, a widow on intestacy is regarded as part of the estate of the deceased family. She should neither be entitled to apply for a grant of letters of administration nor appointment as a co administrator.

The Court made no reference to the constitutional protection of freedom from discrimination and equality contained in section 42 of the Nigerian Constitution but merely took judicial notice of outdated customary law that did not give consideration to modern day realities. The inherent flexibility and responsive nature of customary law are ignored in cases such as this where the courts create "rigid rules embedded in judicial decisions and statutes, which have lost the characteristics of dynamism and adaptability which distinguish the African custom."[103] This situation is made worse where a constitution gives preference to customary law over the Bill of Rights as was illustrated in the case of *Magaya v. Magaya.*[104]

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[102] (1997) NWLR at 144.
[103] T. Nhlapo, "Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously," Third World Legal Stud., 1994 -1995 at 53.
[104] [1999] 3LRC 35(Zimb.)

Mr Magaya, a Zimbabwean of African descent and practitioner of traditional Shona custom, died intestate. He left behind two wives and four children from a polygamous union, a house in Harare and some cattle at a communal home outside the city. Venia Magaya was the eldest child and the deceased's only daughter, born in 1941 of his first and senior wife. His three sons, Frank, Nakayi and Amidio, children of the second wife were born in 1942, 1946 and 1950, respectively. Following the demise of their father, Venia sought to be heir to the estate in the local community court. The eldest brother Frank declared that he would not seek to be heir since he could not take care of the family as was required. Venia received the appointment and title to the house and cattle. The second son, Nakayi applied to the court to cancel this designation claiming that he and other persons interested in the estate were not involved in the process of appointment, contrary to section 68(2) of the *Administration of Estates Act*. The appointment was cancelled and at a new hearing, Nakayi Magaya was declared the rightful heir under customary law.

On appeal to the Supreme Court of Zimbabwe, the issue was whether customary law rules on inheritance violate Section 23 of the Zimbabwean Constitution, which prohibit discriminatory laws and delineate what is considered discriminatory.[105] Justice Muchechetere of the Court affirmed the community court's decision. He noted that under customary law of succession of the Shona, males are preferred to females as heirs. Venia Magaya's argument that an inheritance preference for male offspring constitutes a *prima*

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[105] The Zimbabwean Constitution in Section 23 (3) excludes marriages, divorce and the application of African customary law in any case involving African from the scope of the provision, although the Constitution contains a provision that prohibits discrimination based on sex. See CEDAW Concluding Observations; Zimbabwe, 14 May 1998, para.132 says "[T]he Committee notes with satisfaction that the Constitution has been amended to prohibit any act of discrimination on the basis of sex. Available at http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/0/4604004647138562c1256695004e7393?OpenDocument.

facie discrimination against females, and therefore a *prima facie* breach of the constitution, was rejected. The court reasoned that Section 23(1) of the Zimbabwe Constitution does not forbid discrimination based on sex and that, even if the law were construed to prohibit sex discrimination on the ground of Zimbabwe's adherence to international human rights instruments, the present case still would not fall within the ambit of Section 23 (1) because, pursuant to section 23 (3), section 23 (1) is inapplicable to succession and the application of customary law. In essence section 23(3) of the constitution prevented the matter from falling under constitutional scrutiny. The Court upheld the customary law that favors men over women in matters of succession and inheritance, and held that Zimbabwe's adherence to international human rights instruments issubject to exceptions. The decision *in Magaya v. Magaya* drew the outrage of women's rights groups, human rights lawyers, academics and the media alike. It violates human rights treaties to which Zimbabwe is signatory.[106]

The above shows the disservice that can be done to women through application of rigid and outdated customary laws without regard to constitutional safeguards. In the Zimbabwean case, the customary law was raised above the entrenched Bill of Rights. Constitutional reforms were initiated by the Zimbabwean government in 1999, although this has yet to materialize into a new constitution.[107] Despite the above, some courts have moved beyond upholding outdated customary laws to giving positive interpretation of

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[106] Zimbabwe is signatory to a number of international human rights instruments such as the Women's Convention. ICCPR and ICESCR, to mention a few.

[107] A 400- person Constitutional commission was set up to review and rewrite the Constitution. The draft Constitution was submitted to the President in November 1999. Although the part that formerly raised customary law above the Bill of rights was eliminated, the draft did not state clearly that which will have precedent.

women's rights, with due reference to international regional or constitutional sources in support of their positions.

4.6.2 Upholding Women's Rights

Women's rights to inheritance are often under contention in many African countries and have been an area where the rights of women are violated as well as protected. In *Bernado Ephrahim v. Holaria Pastory and G. Kaizilege,*[108] the Tanzanian High Court had to determine the constitutionality of Section 20 of the Declaration of Customary Law of Tanzania, which prohibited the sale of clan land by women. Holaria Pastory had inherited clan land from her father and sold the land to a non-clan member. Her nephew sought a declaration that the sale of the land was void. Holaria challenged the Haya customary law which provides *inter alia*, that "women can inherit, except for clan land, which they may receive in usufruct but may not sell."[109] She argued that the constraint on women's property rights violated the Tanzanian Constitution's Bill of Rights.

The Court decided that the rules of inheritance in the Declaration of Customary Law were unconstitutional. In his judgment, Justice Mwalusanya stated that:

> I have found as a fact that section 20 of the rules of Inheritance GN No 436/1963 of the Declaration of Customary Law is discriminatory of females in that unlike their male counterparts, they are barred from selling clan land. That is inconsistent with Article13 (4) of the Bill of Rights of our Constitution on account of sex.

The court held further that the Tanzanian Constitution had incorporated the Bill of Rights and the *UDHR*, which prohibit discrimination on the ground of sex. It noted that Tanzania had ratified many international conventions pertaining to human rights and the

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[108] 8 I.L.R. 106; [1990]. http://www.law.nyu.edu/kingsburyb/spring04/indigenousPeoples/classmaterials/class5/5E.pdf.

elimination of discrimination against women. According to the court, it was clear that the customary law at issue was contrary to Tanzania's Constitution and to the international obligation of Tanzania.[110] The court held that the rights and restrictions around the sale of clan land are the same for women and men. In making reference to the universal standards of international human rights norms as contained in the *Women's Convention*, Mwalusanya J. held that the principles enunciated in the documents set a standard below which any civilised nation will be ashamed to fall. The judge in *Pastory* reviewed a number of past court decisions, both within and outside its jurisdiction, before reaching this decision; and the international standard of human rights prevailed over customary law to guarantee women's rights.

The Constitutional Court of South Africa in *Bha v. Magistrate, Khayelitsha and others*[111] was to determine whether Section 23 of the *Black Administration Act*,[112] on the rule of male primogeniture as applied to the customary law of succession, is constitutional. The rule of male primogeniture precludes widows, daughters, younger sons and children born outside a valid marriage from inheritance. The rule treats widows and daughters as minors and excludes women from inheritance. The court noted 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 perpetual minors under the tutelage of their fathers, husbands or the head of the extended family."[113]

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[109] *Ibid.*, at 108. Law of Inheritance of the Declaration of Customary Law GN No 436/1963 Para. 20.
[110] *Ibid.*, at 110.
[111] South Africa, Constitutional Court [2004] Case No. 49/03. 2004 SACLR LEXIS 22.
[112] Act 38 of 1927.
[113] Para. 78 *supra* note 108.

It entrenches patriarchal systems that violate the right of women to equal treatment and human dignity. The court noted further that the approach of interpreting customary law through the "prism of the common law" led in part to the "fossilization of codification of customary law which in turn led to its marginalization." Consequently, customary law was denied the opportunity to grow in its right and to adopt itself to changing circumstances. The court acknowledged that South Africa is a party to several international instruments.[114] It held that the rule of male primogeniture as applied by the *Black Administration Act* to the customary law of succession has the effect of ossifying customary law and cannot be reconciled with the current notions of equality and therefore violates constitutional guarantees to dignity and equality.

In *Mojekwu v. Ejikeme*,[115] the Nrachi Nwanyi custom in South Eastern Nigeria was tested. The custom enables a man to keep one of his daughters in his family to raise male issues to succeed him. Once the traditional custom is performed, the daughter is regarded as a wife or son of the man. The custom is performed by the presentation of a goat, four gallons of wine and eight kola nuts to his larger family by a man who has no male issue. Reuben Mojekwu performed this ceremony for his daughter, Comfort. Sarah and Reuben Mojekwu had three children; Samuel, Comfort and Virginia. Samuel predeceased his father in 1938. Reuben died in 1966. Comfort died in 1967, unmarried and childless. The remaining child Virginia, a female gave birth to Chinwe and Uzoamaka out of wedlock. Virginia later got married in 1957 to one Mr. Eze. When she got married, Chinwe and Uzoamaka remained with their grandparents until their death.

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[114] South Africa became party to the Women's Convention on 14 January 1996; ICERD on 9 January 1999; the African Charter on 9 July 1996 and the Protocol on 16 March 2004.

[115] (2000) 5 NWLR (Pt. 657) at 402; [1999] ICHRL 168 available at http://www.worldlii.org/int/cases/ICHRL/1999/168.htm accessed 07/04/05.

Chinwe was unmarried but gave birth to Izuchukwu Mojekwu, the 2nd appellant. Uzoamaka also while unmarried gave birth to the 1st appellant. Uzoamaka was the 3rd appellant. The respondents were distant cousins of the deceased, Reuben. They claimed that the lineage of the deceased became extinct due to the fact that he had no surviving male children. They argued that the Nrachi ceremony was not performed by the deceased for Virginia but on Comfort; who died childless; therefore, Virginia was not positioned to inherit as a man. Since Reuben had no male children, they being distant cousins were entitled under the Oli- Ekpe custom to inherit the properties of Reuben to the exclusion of his daughters. The Oli-Ekpe custom establishes succession to the deceased by primogeniture through the first born of the male line.[116] The High Court held that, since the Nrachi ceremony was performed on Comfort who died childless, the lineage of Reuben became extinct. The Court of Appeal, Enugu, Nigeria, held that the Nrachi custom discriminates against women because, without it, a woman as daughter cannot inherit her father's property; and this is inconsistent with public policy and repugnant to natural justice equity and good conscience. Niki Tobi J. noted that the custom subjects Virginia to disabilities or restrictions contrary to Section 42(1) of the *Nigerian Constitution* and Articles 2 and 5 of the *Women's Convention*. He pronounced both customs to be "anachronistic and sheer relics of modern times."[117]

Another area where courts in Africa have had to apply international and regional human rights instruments is as regards questions of nationality for married women and

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[116] See *Mojekwu v.Mojekwu* (1997) 7 NWLR 283 at 305 (Enugu Court of Appeal) where the court held that the Oli-Ekpe custom was discriminatory to women, unconstitutional and repugnant to natural justice. equity and good conscience.

[117] *Ibid.*, at 408.

their right to pass their nationality their children. In *Unity Dow v. Attorney General*[118] the *Botswana Citizenship Act* passed in 1984 was challenged by Unity Dow, a Botswana woman married to an American. Two of her children were born in Botswana after 1984 and required residence permits to stay in the country and could only leave the country on their father's passport. They would not be allowed to vote and would be denied free university education available to citizens. Dow argued that the *Citizenship Act* violated the constitutional guarantee of liberty, equal protection before the law, immunity from expulsion and the right to be free from degrading treatment. She argued further that the *Act* was discriminatory, although the constitution is silent on discrimination on the basis of sex.

Nevertheless, the High Court found that the *Constitution* should be interpreted as prohibiting sex discrimination. The court noted that "the time that women were treated as chattels or were there to obey the whims and wishes of males is long past, and it would be offensive to modern thinking and the spirit of the constitution that the constitution was framed deliberately to permit discrimination on the grounds of sex."[119] At the Court of Appeal, the government argued that the constitution was intended to discriminate against women in order to preserve traditional Tswana values. Justice Amissah, in arriving at his decision that the provision is unconstitutional, contended that the court's decision brings Botswana law in compliance with his country's international obligations under the *Universal Declaration of Human Rights* and the *African Charter on Human and People's Rights*. The *Citizenship Act* was subsequently amended by the legislature of Botswana to reflect the decision of the court.

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[118] (1992) 103 I. L. R. 128 (Bots. Ct. App.)
[119] *Ibid.*, at 623.

Other cases include *Longwe v. Intercontinental Hot*els, where the Zambian High Court held unconstitutional the acts of the Intercontinental Hotels in denying women access to the bar on the hotel premises. The court cited Articles 1-3 of the *African Charter* and Articles 1-3 of the *Women's Convention* to uphold the promise of the guarantee of the enjoyment of rights without distinction of any kind, including gender.

In *Brink v. Ritshoff,*[120] the Constitutional Court of South Africa was to determine whether Section 44 (1) and (2) of the *Insurance Act 27* of 1943 is in conflict with the provision of Chapter 3 of the *Constitution of the Republic of South Africa*, 200 of 1993 in that it discriminates against married women by depriving them in certain circumstances of all or some benefits of life insurance policies ceded to them or made in their favor by their husbands. Section 44 (1) and (2) was challenged on the ground that it constitute a breach of Section 8 of the Constitution which contained non-discrimination and equality provisions. The Court highlighted the fact that Section 35(1) of the *Constitution* required that due consideration be given to international law in interpreting the rights entrenched. With regards to the concepts of equality before the law and non-discrimination, the court highlighted international instruments such as Article 7 of the UDHR, Article 26 of the ICCPR, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Women's Convention*. The Court went further to note the equality and non-discrimination provisions contained in the constitutions of different countries, such as the Constitution of the United States, India and Canada. The court noted that:

> [T]his cursory consideration of the international conventions and the foreign jurisprudence makes it clear that prohibition of discrimination is an important goal of both national governments and the international community. However, it also illustrates that the various conventions and

[120] NO (CCT15/95) 1996 (4)SA 197; 1996 (6) BCLR 752 available at http://www.saflii.org/cgi-saflii/disp.pl/za/cases/ZACC/1996/9.html?query=%5e+discrimination accessed on 07/04/05

> national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concept of equality and non-discrimination. The different approaches adopted in the different national jurisdiction arise not only from different historical circumstances, but also from different jurisprudential and philosophical understanding of equality.

The court ruled that provisions which discriminate against married women are illegal and must be abolished.

From the cases highlighted above, it is apparent that there is a growing body of jurisprudence that can serve as precedent for courts all over Africa for the protection of women's rights. The admonition of Oloka- Onyango appears appropriate that:

> [J]udiciaries have a critical role to play as both mediators of tensions and conflicts that may emerge between the Executive arm of government and the population at large. They must also effectively and progressively translate international and regional instruments into domestic context, even where the constitutional regime may not be reflective of a progressive human rights approach[121]

4.7 Conclusion

I must reiterate in conclusion that the purpose of this discourse is not to engage in the debate on relativism or universality of human rights, which is mostly unproductive when insisting on a particular view point; rather, this thesis considers ways to move the rights of women forward without constrictions imposed by the constraint of philosophical debate. Examination of the cases reveals that jurisprudence in some African domestic courts increasingly acknowledges the need to protect the rights of women. Some decisions indicate growing acceptance or support for human rights norms. It is essential that courts are instructed on how to interpret and apply international women's human rights norms, and also to provide law practitioners with legal arguments to support the

[121] J. Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" (2000) 6 Buff. Hum. Rts. L. Rev. 39 at 74.

judicial recognition and protection of women's rights within domestic jurisdictions, in order to develop useful jurisprudence on women's rights.

Culture cannot be used as a shield against legitimate demands for the recognition of universal rights; neither can a state plead deficiencies in its law to evade its international legal obligations, nor plead the peculiarity in the culture of its peoples as a defense against the obligation to protect and observe human rights.[122] A balance must be reached whereby reform or eradication of perceived negative practices must be attained. In resolving conflicts that arise in the application of international human rights to traditional practices, individual rights, particularly women's rights must be adequately protected. The multi-dimensional effect of discrimination on women makes the personhood of women indivisible from racial, ethnic, cultural and other aspects of their identity.[123] This makes a simple solution to the problem faced by women impossible.

The importance of judicial education, training of lawyers and public education for the effective application of international human rights norms generally and women's rights has been recognised.[124] International and comparative sources of human rights have been applied to further the rights of women through the use of the vocabulary of

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[122] The relativist position has been recognised internationally, the European Convention of Human Rights developed doctrine of Margin of Appreciation to take into account the cultural specificity in applying human rights norms in the region. See, *Handyside v. U.K*, judgment, 7 December 1976, Series A No. 24 (1979-80) 1 EHRR 737 [where it was stated that "the doctrine of the margin of appreciation opens the way to a moderate relativist position by giving due weight to the local context]. The Principles Relating to the Status of National Institutions, UN General Assembly Resolution 48/134, adopted 20 December 1993 (hereinafter Paris Principles)[The Paris Principles demonstrates an awareness of the importance of the context –specific application of human rights norms]. See N. Barney Pityana, *supra* note 8 at 224.

[123] Adrien K. Wing, "Introduction: Global Critical Feminism for the Twenty-First Century" in A.K. Wing (ed.) *Global Critical Race Feminism International Reader* 7-12 , cited in A. K. Wing and T.M. Smith "The New African Union and Women's Rights" 13 Transnat'l. L & Contemp. Prob. 33 at 37 [She called this global multiplicative identity."]

[124] The judicial colloquia in common law countries on Domestic Application of International Human Rights Norms and on Government under the Law were held between 1988 and 1992. For example, the Judicial Colloquium held in Bangalore, India in 1988 resulted in the Bangalore Principles.

rights, the single most important outcome of the universalisation of human rights discussion. The language of rights provides a tool for action. The political climate of African states determines the role of the judiciary. Without democratic rule and the maintenance of the rule of law, human rights and particularly women's rights jurisprudence will be a mirage.

The relevance of international human rights generally, and women's human rights in particular, cannot be ignored in the African context. The myth is that international human rights are universally applicable without considering the cultural contexts or the unequal power relations existing between women and men in African society. The reality is that universality does not imply uniformity; and to ignore or to discount either of these issues will delay and further distort the protection and promotion of the rights of women in Africa and the development of its jurisprudence.

CHAPTER FIVE

Implementing Equality Rights under the *Protocol*, Compared with Equality and Sexual Assault in Canada

5.1 Introduction

Women's exposure to subordination and discrimination in Africa has not abated despite numerous international human rights agreements freely entered by national governments[1] and entrenched rights articulated in their constitutions.[2] Adoption of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,*[3] by the heads of states and governments of the African Union in Maputo, marks a new era in the protection and promotion of rights of women in Africa. By the adoption of the *Protocol,* African states "... ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights." [4]

Adoption of the *Protocol* by the African Union is an attempt to fill gaps created in, and enhance the substantive provisions of, the *African Charter* in relation to the rights of women. Some of these gaps include the inadequacy of the *African Charter* to improve the status of women in Africa by not enumerating the rights of women specifically; the *African Charter's* attention to traditional African values without addressing customary

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[1] These include the *Universal Declaration of Human Rights* (*UDHR*) G. A. Res. 217A (III) adopted 10 December 1948, *International Covenant on Civil and Political Rights* (*ICCPR*) and *International Covenant on Economic Social and Cultural Rights* (*ICESCR*) both G. A. Res. 200A (XXI), entry into force 23 March 1976, and the *Convention on the Elimination of all Forms of Discrimination against Women* (*Women's Convention*) UN General Assembly Resolution 34/180 of December 1979, to mention a few.

[2] For example Chapter IV of the *Constitution of the Federal Republic of Nigeria 1999* contains fundamental rights provisions. Available at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm, last visited 08/06/05

[3] Adopted on 10 July 2003. (Hereinafter *Protocol*) CAB/ LEG/ 66.6/ Rev.1.(2003), available at http://www.african-union.org. Decision on the *Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women* Assembly/AU/Dec.19 (II)

[4] Last paragraph of the preamble to the *Protocol.*

laws and practices that violate the rights of women;[5] no reference to the realities and the life experiences of African women; harmful practices such as female genital mutilation, forced and early marriages and other experiences that perpetuate the low status of women in Africa not explicitly protected; and the fact that Articles 2 and 3 appear to be mere repetitions of similar articles in other international human rights documents that prohibit discrimination and advocate equality.[6]

The high degree of specificity of the *Protocol* in recognising some realities of the African continent cannot be over-emphasised; the outcomes sought by it are clear with regard to women's enhanced status. The *Protocol* contains novel provisions aimed at addressing some of the problems identified within the African continent.[7] It has been variously lauded "as a feat in itself,"[8] "an innovative instrument that seeks to move towards the goal of securing the indivisibility of human rights"[9] and "its adoption signals a positive development in the African continent... a determination to break with traditional notions and conception of women."[10] Despite these glowing comments, criticisms as to the viability of the *Protocol* have also followed.

The *Protocol*, though seen as an "attempt to build on CEDAW in that it addresses gaps in CEDAW, and underlines the need to back up law with effective policy and other

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[5] The Preamble to the *African Charter* provides that "sure...the virtues of their historical traditions and the values of African civilization ... should inspire and characterize their reflection on the concept of human and peoples' rights."

[6] For example, Article 2 of the *UDHR*. Article 2(I) of the *ICCPR* and Article 3 of the *ICESCR*. These words are similar to that of the *Canadian Bill of Rights* that will be discussed subsequently.

[7] For example, the problem of female genital mutilation and harmful widowhood practices are addressed in Article 5 of the *Protocol*.

[8] Briefing Document to the Parliament Portfolio Committee by Ambassador .J Duarte: 24 August 2004. available at http://www.pmg.org.za/docs/2004/appendices/040824duarte.htm

[9] E. Delport, "The African Regional System of Human Rights – Why a Protocol on the Rights of Women? Available at www.up.ac.zr/chr at 5

[10] V.O. Nmehielle, "A Decade in Human Rights Law: Development of the African Human Rights System in the Last Decade." (Spring 2004) 11 Hum Rts Br. 6 at 9

measures," is criticised as being vague and appearing to be legally unenforceable.[11] Other scholars critise the *Protocol* for its poor drafting and inconsistencies.[12] Furthermore, it must be noted that even before its final adoption in July 2003, several countries had signified their disapproval to some of its provisions by entering reservations.[13] State parties to the *African Charter* who refuse to become parties to the *Protocol* could take refuge behind their non-participation in order to justify their failure to respect the rights guaranteed by the *Protocol*.[14] Such states would have found it more difficult to justify themselves on the basis of the liberal interpretation permitted by the wording of Article 18 of the *African Charter*.[15] Some scholars argue that emphasis should have been placed on implementation of norms already in existence, rather than on the adoption of more, even if extra effort is required by the African Commission to interpret them.[16] Accepting this position may imply that there are enough normative protections for women already within the African regional system. Although the *African Charter* serves as the foundation to the framework for protection of the rights of women, the *Protocol* builds upon this to give more substantive and specifically relevant protection for women.

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[11] E. Delport, *supra* note 9

[12] Rachael Murray, "Women's Rights and the Organistion of the African Unity and African Union: The *Protocol* on the Rights of Women in Africa" in D. Buss and A Manji, International Law: Modern Feminist Approaches (Oxford and Portland, Oregon: Hart Publishing, 2005) at 269. (She notes that the *Protocol* adopts a variety of approaches, in contrast to some degree of consistency displayed by instruments such as CEDAW).

[13] Sudan, Tunisia, Libya, Egypt, Burundi and Rwanda entered reservations to the draft Protocol which is largely the same as the final document. The reservations are in respect of issues ranging from separation, divorce and annulment of marriage to the acceptable age of marriage.

[14] F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff Publishers, 2003) at 192.

[15] *Ibid.*

[16] *Ibid.* Article 30 of the *African Charter* provides for the establishment of the African Commission of Human and Peoples' Rights as the mechanism for the protection and promotion of the rights contained therein.

The *Protocol* has been opened for signature and ratification for two years; it is therefore necessary to suggest ways to encourage immediate ratification of the *Protocol* to make a success upon its entry into force, upon the deposit of fifteen instruments of ratification by member countries. [17] Although the *Protocol* holds promise for women, its viability and acceptability among African nations remain uncertain. Out of fifty- three African members of the African Union, thirty-one have signed the *Protocol* and ten countries have since ratified and deposited their instrument of ratification as of March 2005.[18] The countries that have ratified the Protocol include Senegal, South Africa, Rwanda, Nigeria, Namibia, Mali, Lesotho, Djibouti, Libya and Comoros. Upon ratification, State parties to the *Protocol* will be required to incorporate its provisions into their domestic legislation. This may pose a challenge to African nations, particularly those who do not automatically incorporate treaties into domestic law and who have a slow pace for law reform.[19]

The *Canadian Charter of Rights and Freedoms* is a constitutional document that guarantees certain rights to Canadians.[20] Interactions between the state (different tiers of government) and individuals are regulated by the *Canadian Charter*. Since its enactment, litigation has been employed numerous times to challenge legislative provisions that violate the rights of individual citizens using the *Canadian Charter*. These "*Charter*

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[17] In order to enter into force Article 29(1) provides that "This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification." available at http://www.achpr.org/english/_info/women_en.html. last visited 08/06/05

[18] Available at http:/www.africa-union.org/home/Welcome.htm. (last visited 01/04/05)

[19] Nigeria for example, by virtue of Section 12(1) of the Constitution of the Federal Republic of Nigeria provides that " no treaty between the Federation and any country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly". Thus, unless the treaty is incorporated into the law by the National Assembly, it cannot be enforced in a court of law.

[20] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act 1982 (U.K) 1982, c. 11, came into force 17 April 1982 (hereinafter the *Canadian Charter*)

challenges" have had significant impacts on certain legislation and considerable impact on the protection and promotion of human rights in Canada.

The main thrust of this chapter is to examine how the equality provision of the *Canadian Charter* has been implemented and its impact on Canadian women, focusing on reforms to sexual assault laws. The object of this study is to draw on experiences from Canada in order to learn from their best practices. The impact of the *Canadian Charter* on the reform of sexual assault laws will be examined with the aim of drawing on positive lessons to be applied in the implementation of the *Protocol* within domestic jurisdictions in Africa.

5.2 Canadian Charter of Rights and Freedoms

The status of women in Canada prior to the twentieth century was no different from what obtained elsewhere in the English common law world, including British colonial Africa. Women were regarded as legally inferior to men; excluded from participation in the public sphere and unable to vote or be voted for; and married women in particular could not own or dispose of property in their own right.[21] Any discussion of efforts to protect the rights of women must of necessity begin with issues of equality and non - discrimination. Equality between the sexes essentially seeks to improve the status of women within the society. The concept of equality, however, defies a single acceptable definition. This chapter makes no attempt to define equality, but agree generally that "systematic inequality is so entrenched in our institutions, and in our ways of thinking, so deeply rooted and so complex, that it is difficult to imagine our way out of inequality."[22]

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[21] *Ibid.*

[22] D. Majury, "Women's (In) Equality before and after the Charter" in R. Jhappan, (ed.), *Women's Legal Strategies in Canada.* (Toronto, University of Toronto Press, 2002) at 104 – 5.

The complexity of inequality will be seen in the response of Canadian courts to equality guarantees as contained in the *Canadian Charter*.

Canada was not left out of the demand for positive legislative and constitutional change for better protection of rights that swept throughout the developed world after the Second World War.[23] The *Canadian Bill of Rights* [24]was the precursor to the *Canadian Charter*. The *Bill* was enacted as a statutory instrument after decades of debates and intense lobbying by Canadians to improve human rights protections. The *Bill* however was considered inadequate to protect the human rights of Canadians because, as a statutory instrument, it was subject to alterations and abrogation at any time by the federal parliament or the legislatures of the provinces, according their authority under the Constitution.[25] Though the *Bill* guaranteed equality and non-discrimination on the basis of sex, it achieved limited success in these areas. Section 1 of the *Bill* provided in part that:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,...
> (b) the right of the individual to equality before the law and the protection of the law.[26]

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[23] C. MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929 – 1960.* (Montreal & Kingston: McGill – Queen's University Press, 2003). (Gives a history of the *Canadian Bill of Rights*).

[24] *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, otherwise known as the *Canadian Bill of Rights 1960.* Bill 79 passed as Statutory Bill of Rights. (Hereinafter the *Bill*).

[25] The Court in *Attorney General of Canada v. Lavell* and *Isaac v. Bedard* (1973) 38 D.L.R (3d) 481 SCC; [1974] S.C.R. 1349 (*Lavell* and *Bedard*) stated that the Canadian Bill of Rights is not "effective to amend or in any way alter the terms of the British North America Act and it is clear from the third recital in the preamble that the Bill was intended to "reflect the respect of Parliament for its constitutional authority ...," so that wherever any question arises as to the effect of any of the provisions of the Bill, it is to be resolved within the framework of the *B.N.A. Act.*"

[26] It must be noted that the wordings of this provision is similar to that of Article 3 of the *African Charter.*

The Supreme Court of Canada interpreted the section to mean the treatment of like people alike. In two separate cases, *Lavell* and *Bedard*, First Nations women, Jeanette Lavell and Yvonne Bedard, brought appeals before the court to challenge section 12 (1) (b) of the *Indian Act.*[27] It was contended on their behalf that the provision of the section was rendered inoperative by section 1 (b) of the *Bill of Rights*, as denying equality before the law to them. Ritchie J. interpreted section 1 (b) of the *Bill* to mean "equality in the administration or application of the law by the enforcement authorities and the ordinary courts of the land."[28] And because all Indian women were treated the same there was not violation of their rights.

In *Bliss v. Attorney General of Canada*[29] the appellant, a pregnant woman, claimed that section 46 of the *Unemployment Insurance Act*, as amended, denied her the regular benefits enjoyed by all other capable and available claimants and it should thereby be declared inoperative as contravening section 1(b) of the *Canadian Bill of Rights*. She contended that the section constituted discrimination by reason of sex and resulted in denial of equality before the law to the particular restricted class of which the appellant was a member. In essence the section singled out pregnant women for differential treatment. The Court stated that the treatment was the same for all those in the identified group. That is, those to whom the law applied had to be treated equally without regard to the substantive content of the law generally.[30] Again, pregnant women were treated the same in this case.

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[27] RSC 1970 c 1-6; Section 12(1) (b) states that "a woman who is married to a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11" is not entitled to be a registered Indian and "Band" member.

[28] *Lavell* and *Bedard supra* note 25 at 1366, Abbott, J. (dissenting).

[29] [1979] 1 S.C.R. 183 *(Bliss).*

[30] This is regarded as formal equality as opposed to substantive equality. The Supreme Court of Canada distinguished *Drybone* from *Bliss* and *Lavell* and *Bedard.*

The Supreme Court of Canada in *R v. Drybones*,[31] however, rendered legislation inoperative due to its inconsistency with the *Bill.* The accused, a First Nation's man, was charged with being intoxicated off a reserve contrary to Section 94(b) of the *Indian Act.* The Court held that section 94(b) of the *Indian Act* infringed the equality provision of the *Bill of Rights.* The Court in *Lavell* and *Bedard* distinguished *Lavell* from *Drybones* by noting that *Lavell* was "concerned with the internal regulation of the lives of Indians *on* Reserves or their right to use and benefit of Crown land thereon," while *Drybones* dealt rather "exclusively with the effect of the Bill of Rights on a section of the Indian Act creating a crime with attendant penalties for the conduct by Indians *off* a Reserve in an area where non-Indians who were also governed by federal law, were not subject to any such restriction."[32]

The notion of differences between women and men underlie the application of the Section 1 (b) of the *Bill* in cases relating to equality of the sexes.[33] The desire to avoid narrow interpretation of equality created by the *Bill* and applied by the courts resulted in the activities of various women's groups who wanted "their vision of equality entrenched in the Constitution."[34] The *Canadian Charter* was enacted in 1982 and by virtue of its Section 32 (2), three years moratorium was place on Section 15, the equality provision,

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[31] (1969) 9 D.L.R 473 (SCC).

[32] *Lavell* and *Bedard, at* 1372.

[33] Prior to the passage of the Bill the then Minister of Justice, Davie Fulton, expressed the view that " I do feel that the expression... would not be interpreted by the court so as to say we are making men and women equal, because men and women are not equal: they are different" at the discussion of section 1(b). Quoted from Diana Majury, *supra* note 21 at 106

[34] For a history of women's action prior to the *Canadian Charter*, see, S. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991). Vigorous constitutional lobbying pre-dated the Charter and was undertaken by women's groups in Canada, such as, the Canadian Advisory Council on the Status of Women (CACSW), the National Action Committee on the Status of Women (NAC), Canadian Research Institute for the Advancement of Women (CRIAW) and the National Association of Women and the Law (NAWL) to influence the outcome of the equality provision of the proposed Charter.

ostensibly to allow federal and provincial governments time to bring existing legislation and policies in conformity with the *Canadian Charter*.

Section 15 of the *Canadian Charter* provides that:

> (1) Every individual is *equal before and under the law* and has the right to *equal protection and equal benefit* of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[35]
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individual or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Perhaps to avoid narrow interpretation of Section 1(b) of the *Bill of Rights*, the *Canadian Charter* infuses four aspects of equality, "equality before and under the law" and "equal protection and equal benefit," in an attempt to expand the scope of equality.

Against the background of the *Bill of Rights*, the women lobbied further for an additional equality provision included in Section 28 of the *Canadian Charter* to deal exclusively with gender equality. However, rarely has reference been made to this section in equality decisions. Section 28 states that:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The Supreme Court of Canada first interpreted Section 15 in *Andrews v. Law Society of British Columbia.*[36] Mark Andrews, a British citizen and Elisabeth Kinersly, a U.S citizen, both permanent residents in Canada, had met all requirements for admission to practice law except that of Canadian citizenship. Each claimed that the requirement of Canadian citizenship for admission to the bar of British Columbia contravened the

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[35] Emphasis mine.
[36] [1989] 1 S.C.R.143

equality guarantee of Section 15 of the *Charter*. The Supreme Court of Canada held that citizenship was a ground analogous to those prohibited under Section 15, and thus adopted a substantive approach to interpretation of equality under Section 15.

In *Andrews*, the purpose of equality guarantees in the *Charter* was interpreted to "ensure equality in the formation and application of the law."[37] They are meant to apply and support all other rights guaranteed by the *Charter.* In spite of this broad and extensive interpretation adopted by the Court in *Andrews*, equality under the *Charter* and interpreted by the court has been fraught with uncertainty. The women's groups, realizing from the onset that "rights on paper means nothing unless the courts interpret their scope and application," mobilized to engage in activities geared toward trying to "influence judicial interpretation".[38] In many cases the court fails to consider an equality analysis even when it seems expedient to do so.[39] The impact of equality under the *Charter* will be examined in the light of sexual assault reforms in Canada.

5.3 Equality in Sexual Assault in Canada

In Canada, as elsewhere in the world, myths and stereotypes about women's attitude to rape and sexual offences abound: "Women say 'no' when they really mean 'yes'"; "women often consent to sexual relations with a man and then claim that it was rape." The list is not exhaustive. Some prevailing myths and stereotypes are so deeply embedded that they sometimes influence the court and law enforcement agencies in their

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[37] *Ibid* at 171

[38] S. Razack,*supra* note 33 at 36 (These activities are called "Charterwatching") These activities among others resulted in the birth of Women's Legal Education and Action Fund (LEAF) in August 1984. The main features of LEAF were the direct sponsorship of (preferably winnable) cases, and a complementary strategy of education and lobbying. *Ibid.,* 46

[39] For example, *R. v. Seaboyer* [1991] 2 S.C.R. 577

application of the law. Based on the fundamental principle of sexual equality, however, rape, sexual assault and other sexual offences are not permissible in any society.

Most sexual assault cases are not reported.[40] Reasons for failure to report include the fear of retaliation and reprisal, feeling of shame, humiliation and embarrassment and the often negative attitude of the police or lack of access to police.[41] The process of adjudication and enforcement practices encourage support for the need to protect men from false accusations. On the other hand, the scope of protection is narrowed to certain women who have not infringed judicial and societal norms about what is appropriate behavior and lifestyle.[42] Therefore, rather than punish an accused person, in most cases, the victim most often is further victimized because of the questioning in court.

In Canada, some features of the law relating to sexual offences prior to 1983 included the recent complaint rule. The rule required evidence of immediate complaint to rebut the strong presumption of fabrication.[43] The victim was required to make the complaint at the first reasonable opportunity after the offence.[44] Moreover, the past sexual history of a complainant could be called in evidence at trial. A woman's credibility could be impugned by demeaning questioning of character. Warning the jury

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[40] Researches both in Canada and the United States show that rape is underreported, only one out of four rape victims reported to the Police. See, J. Brickman Briere, M. Ward, M. Kalef, and A. Lungen, "Preliminary Report of the Winnipeg Rape Incidence Report. Paper presented at the annual meeting of the Canadian Psychological Association, Quebec City. Canada. (1980); S. Brown, F. Esbense, and G. Geis, *Criminology: Explaining Crime and its Conduct.* (Cincinnati, OH: Anderson, 1991); Canadian Centre for Justice Statistics, Criminal Justice Processing of Sexual Assault Cases (Ottawa, Canada: Statistics Canada, 1994)

[41] D. Hubbard, "A Critical Discussion of the Law on Rape in Namibia" in Susan Bazilli (ed), *Putting Women on the Agenda* (Ravan Press Johanesburg, 1991) at 135.

[42] C. L. M. Boyle, *Sexual Assault.* (Toronto: Carswell, 1984) at 4.

[43] This rule was abrogated in S C 1980 – 81 – 82, c. 125.

[44] *R. v Osborne* [1905] 1 K B 557.

about the dangers of convicting on the uncorroborated evidence of the complainant was another requirement under the rule.[45]

One reason for repeals and amendments made to the rape laws of Canada, in its Criminal Code through *Bill C – 127*, was to bring existing legislation and policies into conformity with the *Canadian Charter.* [46] Parliamentary recognition and acknowledgement of the non-discrimination clause in the *Canadian Charter* resulted in creation of a gender-neutral offence of sexual assault. This change had the effect of removing the requirement of proof of penetration of the vagina by the penis, as with rape cases. Some scholars argue that the gender-neutral language changes are superficial and would work to the detriment of women by minimising the harm of rape.[47] Whether this change of words into a gender-neutral language will in practice shift the underlying understanding of rape as it affects women in reality is yet to be ascertained.

Another significant aspect of the amendment was removal of spousal immunity from sexual offences in criminal law. The new Section 246.8 at the time provided that:

> A husband or wife may be charged with an offence under section 246.1, 246.2 or 246.3 in respect of his or her spouse whether or not the spouses were living together at the time the activity that forms the subject matter of the charge occurred.[48]

New sexual assault offences were included, while others were removed. The range of assault offences contained in the law was now accompanied by equivalent sexual assault offences. The maximum sentence for the sexual assault range were,

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[45] Women were regarded as being morally undeveloped; therefore the testimony of a woman alone under oath could not be trusted to convict.

[46] The Criminal Law Amendment Act proclaimed into force on the 4th of January 1983. SC 1980 -81 – 82, c. 125.

[47] A. Cohen and C. Backhouse, "Desexualizing Rape: Dissent View on the Proposed Rape Amendments" Canadian Woman Studies, (1980) 2(4) 99-103; G. Chase, "An Analysis of the New Sexual Assault Laws" Canadian Woman Studies (1984) 4(4) 53-54

[48] Now, Section 278 *Criminal Code*, [R.S. 1985 c C.46] Available at http://www.canlii.org/ca/sta/c-46/?.

however, considerably higher than those for assault, with the maximum sentence being life imprisonment. The new sexual offences replaced the old crimes of rape, attempted rape, sexual intercourse with the feeble- minded, indecent assault on a female and indecent assault on a male. The effect was to shift emphasis from the sexual nature of the offences to its violent nature.[49]

As discussed above, the 1983 reforms effectively abolished some aspects of the enumerated discriminatory rules in Canadian rape laws. Some of these reforms were however, contested in the courts. For instance, the reforms restricted inquiries into the complainant's sexual conduct with other people.[50] In *Seaboyer* and *Gayme*,[51] Steven Seaboyer and Nigel Gayme, were accused of rape and successfully argued that the 'rape shield' laws violated their rights as accused person, to a fair trial. The Supreme Court of Canada raised serious concerns about the legal construction of sexual assault by striking down Section 276 of the *Criminal Code*, which limited the questioning of victims in sexual assault trials about their sexual history. The Court considered the constitutionality of Sections 276 and 277 of the *Criminal Code.*[52] The Supreme Court of Canada found that the blanket prohibition on the use of evidence of a complainant's sexual history was too restrictive and jeopardised the accused's right to a fair trial under the *Canadian Charter.* The court held that, while the provisions had a constitutionally valid purpose, they were not saved by Section 1 of the *Charter.*

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[49] A number of sexual offences were removed from Part IV, dealing with sexual offences, public morals and disorderly conduct, while new sexual assault offences were added to Part VI relating to offences against the person and reputation.

[50] This reform is regarded as the "rape shield laws"

[51] *R. v. Seaboyer; R.. v. Gayme* [1991] 2 S.C.R. 577

[52] R S C 1985 c. C -46.

In striking down Section 276, the Court resolved that the decision as to whether to admit or exclude evidence of past sexual history could no longer be strictly constrained by the *Criminal Code* but would instead be left largely to the discretion of individual trial judges. Justice L' Heureux-Dube dissenting, however, would have upheld the section for the following reason:

> Once the mythical bases of relevancy determinations in this area of the law are revealed... the relevance of most evidence of prior sexual history is clear... . Evidence that is excluded by these provisions is simply, in a myth-and-stereotype-free decision-making context, irrelevant.[53]

The equality rights of women were barely mentioned in *Seaboyer*. The decision has been criticised as "neglecting the constitutional value of sex equality"[54] The decision in *Seaboyer* generated immense public outcry and public pressures for the then Justice Minister Kim Campbell to act;[55]and this provided the political impetus for *Bill C-49*.[56] The Justice Minister initiated broad consultations with provincial and territorial justice ministers, bar associations and prominent women's groups soliciting advice on how to proceed.[57]

Within a year of the Court's decision in *Seaboyer,* new legislation amending the sexual assault provisions in the *Criminal Code* came into force.[58] The new Section 276 relating to evidence of complainant's sexual activity provides that:

> 276 (1) In proceeding in respect of an offence under section 151, 152 ...or 273, evidence that the complainant has engaged in

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[53] Writing for herself and Justice Gonthier in *R v. Seaboyer*, *supra* note 50 at 681-2.

[54] C. Boyle and M. MacCrimmon, "*R. v. Seaboyer*: A Lost Cause?" 7 C. R. (4th) 225.

[55] S. McIntyre, "Redefining Reformism: The Consultation that Shaped Bill C – 49" in Julian V. Roberts and Renate M. Mohr (eds.) *Confronting Sexual Assaults: A Decade of Legal and Social Change* (University of Toronto Press Inc., 1994) at 294.

[56] *An Act to Amend the Criminal Code (Sexual Assault)*, S.C 1992,c.38. Now Section 276 -276.5 of the *Criminal Code.*

[57] S. McIntyre, *supra* note 54 (gives a comprehensive history of the events that led to the adoption of *Bill C- 49*).

[58] *Bill C. 49* was adopted in August 1992.

sexual activity, whether with the accused or with any other person, is not admissible to support an inference that by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject – matter of the charge; or

(b) is less worthy of belief.

Subsection (1) does not attempt to delineate all the circumstances in which sexual activity would be admissible, but rather sets out the purpose for which the evidence is not admissible.[59] *Bill C. 49* provides the legal limits for determining the admissibility of a victim's past sexual history. It sets out a new test that judges will use to determine whether a complainant's sexual history may be admitted as evidence in sexual assault trials.[60] The new Section 273.1 of *Bill C-49* reads:

(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where (a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity by reason of intoxication or other condition;

(c) the complainant engages in the activity by reason of the accused's abuse of a position of trust or authority;

(d) the complainant expresses, by words or conduct, a revocation of agreement to engage in the activity; or

(e) the complainant expresses, by words or conduct, a revocation of agreement to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

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[59] E. L Greenspan and M. Rosenberg, *Martin's Annual Criminal Code 2005 with Annotations* (Canada Law Books Inc., 2005) at CC/555.

[60] See also Section 276 (2) and (3).

This section defines the concept of consent as it applies to sexual assault. It restricts the defense of mistaken belief in consent as it concerns sexual assault offences.

Although the active input of the women's movement to actualise equality in the new legislation was hardly recognised, the Preamble to the *Bill C- 49* does recognise the importance of equality analysis, in that "... the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*."

Despite the 1992 amendment, the court continued focus on the "fair trial of the accused" at the expense of an equality interpretation in sexual assault cases. In *R v. O'Connor*,[61] Herbert O'Connor, a Roman Catholic bishop, principal and priest at a Catholic residential school for Aboriginal students, was charged with sexual offences against four women who spent their lives at the school. The defence counsel obtained a pre-trial order requiring disclosure of the complainants' entire medical, counseling and school records and that the complainants authorised production of the records. The crown expressed interest at disputing the order when the records came into crown possession. The trial judge ordered release of the records.

The majority of the Supreme Court of Canada in *O'Connor* endorsed permitting defendants' access to complainants' personal records. The main reason why the records were sought by defence counsel in sexual violence cases is to attack complainants' credibility, motive and character.[62] The Court failed to pay attention to the issue of equality, their concern was with balancing the "competing claims of a constitutional right to privacy in the information on the one hand and the right to full answer and defence on

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[61] [1996] 2 W.W.R. 153 [S.C.C] (*O'Connor*)

[62] Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" CJWL Vol. 9 No. 1 1997 at 148.

the other," laying down the procedure to be followed in order to determine whether records in the possession of third parties are likely to be relevant.[63]

In her dissenting judgment, L' Heureux-Dube J. highlighted three constitutional rights implicated in the analysis of the case:[64] (1) the right of the accused to full answer and defence and right to fair trial; (2) the right of the complainant to privacy; and (3) the right of the complainant to equality without discrimination.[65] The majority failed to understand the negative effects of the production of records for women, especially on equality rights.[66]

After *O'Connor*, there appears to be a more concerted move to an equality driven analysis in the sexual assault. Subsequent amendments to the *Criminal Code* reflect the dissent in *O'Connor.*[67] The parliament, in giving recognition to equality, introduced a production process that incorporates a more challenging threshold for production to a judge than the majority in *O'Connor.* The Preamble to the amendment states that:

> Whereas the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;
>
> Whereas the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person; privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the Canadian Charter of Rights and Freedoms.

The trend appears to have caught on, as subsequent case law reflects the acceptance by the whole court of the relevance of an equality analysis to the process of

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[63] *O'Connor*, at 157
[64] L'Heureux – Dube J. with La Forest and Gonthier JJ. concurring.
[65] *Ibid.* at 158
[66] Karen Busby, *supra* note 61. According to L' Heureux-Dube, J., "the court must take care not to create a class of vulnerable victims who have to choose between accusing their attackers and maintaining their records' confidentiality". *O'Connor* at 158.
[67] *Criminal Code*, RSC 1985, c. *C- 46* as amended by S.C.1997.

trying sexual assault offences.[68] In *R v. Mills*,[69] the Supreme Court of Canada upheld *Bill C-46* which amended the *Criminal Code* to include Sections 278.1 to 278.91, as being constitutional. The full Court applied an equality analysis and included equality as a relevant constitutional right stating that:

> Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play. An appreciation of the equality dimension of record production in cases concerning sexual violence highlights the need to balance privacy and full answer and defence in a manner that fully respects the privacy interests of complainants. [70]

Dissenting in part also in *Mills*, with respect to records in the hands of the crown, Lamer CJC stated that the law" failed to protect the privacy and equality rights of complainants and witnesses in sexual assault trials in a manner that minimally impairs the right of the accused to make full answer and defence."[71]

It is apparent from the above, that sexual assault law in Canada has undergone challenges that have had significant impact on reform of the *Criminal Code*. Though the success achieved is limited with regards to the fact that records of the complainant are still accessible to the accused, the interaction between women's groups, parliament, the judiciary and the public at large is exemplary to the development of equality jurisprudence in sexual violence cases.

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[68] E. Sheehy, and C. Boyle, " Justice L' Heureux –Dube and Canadian Sexual Assault Law: Resisting the Privatization of Rape" in Elizabeth Sheehy (ed), *Adding Feminism to Law. The Contribution of Justice Claire L' Heureux - Dube.* (Canada, Irwin Law, 2004) at 249.

[69] [1999] 3 S.C.R.688

[70] *Ibid.*, at 672

[71] *Ibid.*, at 676

5.4 Relevance to the African Situation

Sexual offences, rape and indecent assault have often been used as a weapon in the hands of unscrupulous people to subjugate women.[72] This part of the chapter focuses on Nigeria and South Africa, to see how far equality has been guaranteed within these societies in sexual offence cases. A recent survey carried out in two semi-rural communities in the South Eastern part of Nigeria to determine the prevalence of rape, among other thing, reveals that four out of every ten women admitted to attempted or actual rape. [73] Many countries in Africa today experience civil unrest and wars, with sexual offences as weapon put to ample use. The attitude of law enforcement agencies and the law of evidence are similar to what existed in pre-1983 Canada with respect to sexual offences. Low reporting and high attrition rates typify the trend for sexual offences in many countries in Africa. [74]

The low rate of reporting of rape and sexual violence by victims is attributed to the social stigma attached to it: prejudice to the chances of marriage, attendant humiliation and shame, embarrassment caused by appearances and cross examination in the court, publicity in press, fear of being taunted by others, being considered promiscuous and perhaps being considered responsible for the incident, the risk of losing

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[72] For example, it was reported in Nigeria that soldiers deployed to a rural community called Choba to quell civil disturbances arising from the oil rich area of River State of Nigeria raped the women.

[73] J.E.N. Okwonkwo, and C.C. Ibeh, "Sexual assault in Nigeria" International Federation of Gynecology and Obstretics. (Elservier Science Ireland Ltd, 2003) Available at http://linkinghub.elsevier.com/retrieve/pii/.

[74] It must be mentioned here that there are few statistics to show this negative trend. In 1989, there were only 1,032 cases of rape reported to the Police in Nigeria. Attempted rape was not included. Date rape or rape of a wife by her husband is not a crime. Ebbe Obi, "World Fact book of Criminal Justice Systems... Nigeria." US Department of Justice, Office of Justice Program, Bureau of Justice Statistics, circa 1992. Available at www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnig.txt.

the love and respect of society, friends and probably that of her husband if she is married.[75]

5.4.1 Nigeria

The *Constitution of the Federal Republic of Nigeria*[76] prohibits discriminatory laws in the following sections:

> Section 17 (2) (a) Every citizen shall have equality of rights, obligation and opportunities before the law.
>
> Section 42 (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-
> (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities ethnic group, places of origin, sex, religions or political opinions are made subject.

Section 17 (2) falls under the fundamental objectives and directive principles of state policy and are adjudged non-justiciable.[77] Section 42 on the other hand falls under the fundamental rights protection afforded by the *Nigerian Constitution* and can be enforced in a court of law. Despite these constitutional guarantees of non-discrimination and equality, the protection of victims of sexual offences remains limited.

The Nigerian *Criminal* and *Penal Codes* create offences that infringe on constitutional protections.[78] Under the *Criminal Code*, the crime of rape is defined, but this definition is limited to the common law definition of rape. Marital or spousal rape is

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[75] J.E.N. Okwonkwo, and C.C. Ibeh, *supra.* note 72.

[76] *Constitution of the Federal Republic of Nigeria,* 1999. Available at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm. last visited 10/06/05. (hereinafter *Nigerian Constitution*)

[77] See Chapter II of the *Nigerian Constitution.*

[78] *Criminal Code Act* Cap 77 Laws of the Federation of Nigeria 1990, applicable in the Southern part of Nigeria (Hereinafter Criminal code) and *Penal Code* Cap 89 Laws of Northern Nigeria 1963, applicable to the Northern part of Nigeria.

excluded from this definition.[79]Traditionally, some African cultures believe that, upon payment of a bride-price, a man has unhindered access to the body of the woman who becomes his wife.[80] Other provisions are discriminatory on the basis of sex. For example, the offence of indecent assault under the *Criminal Code* imposes a more severe penalty for offences against the male as against the female. Section 353 provides that:

> Any person who unlawfully and indecently assaults any male person is guilty of a felony, and is liable to imprisonment for three years.

While Section 360 provides that:

> Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanor, and is liable to imprisonment for two years.

The differentiation in the penalty imposed for similar offences has negative implications for equality. The provision implies that the offence, when committed against a male, is of a more serious nature.

Furthermore, Section 55 (1) (d) states that:

> Nothing is an offence which does not amount to infliction of grievous Hurt upon any person and which is done by a husband for the purpose of correcting his wife, such husband or wife being subject to native law or custom in which such correction is recognized as lawful.

The *Penal Code* defines grievous harm to include emasculation, permanent deprivation of the [right] eye, of the hearing of an ear or the power of speech, deprivation of any member or joint, destruction or permanent impairing of the power of any member or joint, among other things. The *Penal Code* provides further in Section 282 that "Sexual intercourse by a man with his own wife is not rape if she has attained puberty."

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[79] The incidence of spousal rape is acknowledged to be a problem. U.S Department of State, Country Reports on Human Rights Practices – 2002: Nigeria; Bureau of Democracy, Human Rights and Labour. Available at http://www.stategov/g/drl/rls/hrrpt/2002/18220.htm.

[80] This view is held by many Nigerian ethnic groups including the Tiv of Benue State of Nigeria and the Ibos In the Eastern parts of Nigeria.

The combined effect of these provisions is devastating to women. Despite constitutional provisions espousing the principles of equality and non-discrimination, patently discriminatory customary law and outdated English common law still form part of Nigeria's criminal law on sexual offences, which are routinely upheld by the courts.[81] Not only is rape condoned within marriage, defilement of young girls under the age of sixteen is inadvertently allowed because the law does not define the age of puberty.

The situation is further compounded by technicalities of procedural and evidentiary rules applicable in rape and other sexual offence cases. Rape trials are often conducted with evidence that requires that the female victim is exposed to indignity. Section 211 of the *Evidence Act*[82] provides that:

> When a man is prosecuted for rape or for attempt to commit rape or for indecent assault, it may be shown that the woman against whom the offence is alleged to have been committed was of a generally immoral character, although she is not cross examined on the subject; the woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted and she may also be asked whether she has had connection on other occasions with the prisoner, if she denies it she may be contradicted.

A victim is more or less required to prove that she did not consent to sexual relation even where medical evidence shows that the victim was raped and failure to provide corroboration may jeopardise the prosecution's case.[83] Overall in Nigeria, many of those victimised in sexual violence do not have access to means of legal redress;[84] and not much has been done in terms of legal reforms to sexual violence laws in spite of the

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[81] U. U. Ewelukwa, "Post Colonialism, Gender, Customary Injustice: Widows in African Societies," Human Rights Quarterly 24.

[82] Cap 112 Laws of the Federation of Nigeria 1990.

[83] In *Jos Native Authority Police v. Gani* (1967)Northern Nigeria Law Report 107, the held that in charges of rape, the uncorroborated testimony of the complainant cannot lead to a conviction.

[84] In *Okonoyon v. State* [1973] Nigerian Monthly Law Report 1 (SC), in spite of available evidence the court held that penetration was not proved.

constitutional guarantees and the severe consequences that victims of sexual violence face.

5.4.2. South Africa

The Constitution of the Republic of South Africa entered into force in 1996.[85] It contains a *Bill of Rights* that guarantees equality. [86] The Preamble of the *Constitution* regards it as the supreme law that "lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law." The *South African Constitution* is consistent in is reference to equality as an important right.[87] When read with international instruments signed by that country, a duty is imposed on the state to address violence against women, including sexual assault. This includes the duty to enact appropriate legislation and proper implementation of the legislation.

South Africa has one of the highest rape statistics in the world, available to show that more than 50,000 cases of rape were reported in 1996; while it is estimated that only one in twenty rape cases are actually reported.[88] The trauma of rape in South Africa, as in other parts of Africa, has been increased by the life threatening possibility of transmission of the dreaded HIV/AIDS through sexual assault.

To meet this challenge, the South African government through its parliament initiated

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[85] Act 108 of 1996 (Hereinafter *South African Constitution*).

[86] Chapter 2 *ibid.*

[87] Sections 1, 7(1). 36, and 39 (1) (a) of the *South African Constitution*. See also *Hugo v. President of South Africa and Another.* 1996 (4) S.A. 1012 (D.)

[88] L. Vetten, "The Root of a Rape Crisis" Crime and Conflict, No 8 (Summer 1997) Available at http://www.csvr.org.za/papers/papvet2.htm. Last visited 10/06/05 (She notes that the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) calculates that only one in twenty rape cases are reported to the police based on this, a rape occurs in South Africa every 83 seconds. South African Police Service gives a higher figure estimating that only one in thirty-six cases is reported, or that a rape occurs every 35 seconds.

a draft *Criminal Law (Sexual Offences) Amendment Bill* in 2003.[89] Its Preamble acknowledges that "the South African common law and statutory law fail to deal effectively and in a non-discriminatory manner with activities associated with sexual offences, thereby failing to provide adequate protection against sexual exploitation to complainants of such activities."[90] While the purpose of the *Bill* is:

> [T]o afford complainants of sexual offences the maximum and least traumatizing protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this act and to fortify the state's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens.

The *Bill* seeks to amend the existing criminal law on sexual offences in many ways.[91] Sexual offence victims are defined in gender neutral terms,[92] while marital exemption is sought to be removed from sexual offences in the proposed section 3(4) as follows:

> A marital or other relationship, previous or existing, shall not be a defence to a charge under subsection (1).

Taking into consideration the HIV/ AIDS pandemic in South Africa, the *Bill* creates three new offences, namely: compelled rape, criminal non-disclosure of HIV or AIDS, and criminal non-disclosure of a sexually transmissible infection other than HIV. Furthermore

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[89] B 50 – 2003. Introduced in the National Assembly of The Republic of South Africa as a Section 75 Bill. http://www.pmg.org.za/docs/2004/appendices/040224sexoffbill.doc. (hereinafter draft Bill) See also the Human Rights Watch Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, On the *draft Criminal law (Sexual Offences). Amendment Bill*, 2003 from Amnesty International and Human Rights Watch. Available at http://hrw.org/press/2003/09/s.a_drafcrimelaw.htm.

[90] Preamble to the draft Bill.

[91] Many amendment was made particularly for the protection of children but this is not within the purview of this paper.

[92] Proposed Section 3 (1) which provides that "Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with another person ("B") without the consent of B, is guilty of the offence of rape."

the offence of indecent assault replaces sexual assault, with an additional offence of compelled sexual assault.[93]

The *Bill* also seeks to correct problems created by the common law rule and other evidentiary rules that discriminate against women. For instance, the trial court cannot draw inferences from the delay in reporting the crime by the complainant[94]; the court cannot treat the evidence of a complainant with caution and neither will such evidence require corroboration.[95] In *S v. J*, [96]a seventeen year old school girl complained that the appellant, a police officer, raped her. The trial court convicted the officer based on the available evidence. The accused appealed to the Provincial Court but his appeal failed. At the Supreme Court of Appeal, the officer claimed that the trial court failed to adhere to the cautionary rule of evidence which requires judges to give less weight to the testimony of a complainant in sexual assault cases. The court recognised that the cautionary rule of evidence in cases of sexual assault is premised on the myth that "women are habitually inclined to lie about being raped", which is outdated. The court concluded that the cautionary rule is inconsistent with the constitutional right to equality.

The *Bill* eliminates significant obstacles to proving sexual offences that permit the trial court to draw negative inferences about a complainant's credibility. The *Bill* also seeks to amend the *Criminal Procedure Act*[97] in regard to evidence of character and previous sexual history. Though the *Bill* is still subject to review, there is an obvious shift in the direction of promotion of equality by the processes that have been commenced. An

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[93] Proposed section 7 and 8 of the *draft Bill.*

[94] Proposed Section 36 *ibid.*

[95] Proposed section 18 *ibid.*
[96] [1998] (2) SA 984 (South Africa Supreme Court of Appeal).
[97] Act 51 of 1977, section 227.

assessment of the Canadian situation will be made to determine how to move forward in the quest for equality in Africa.

4.5 Assessment and Recommendations

The introduction of the *Canadian Charter* into the legal framework of Canadian society aims to entrench an effective regime of human rights protection.[98] The level of abstraction that characterises entrenched or constitutional rights makes their applications turn on interpretation, by the judiciary.[99] In Canada, any declaration of incompatibility of a constitutional right with legislation in force will, almost automatically, result in the repeal or amendment of the offending legislation, as observed in equality cases discussed previously.

In the Canadian experience, the "politics" of the *Canadian Charter* involves an apparent interaction among different groups. These interactions reveal that "there is no line between legal activity and political action."[100] Women's groups, such as LEAF, actively work in and out of courtrooms to promote and protect the equality rights of women. These groups consistently invite the parliament and the courts to take equality into consideration in the drafting and interpretation of legislation, by being granted intervener status in equality litigation, and writing considered factums that clearly articulate their position. They convey the importance of the equality guarantees in the *Canadian Charter* and in some case influence the opinion of judges in deciding such cases.[101] Outside the court, the women's groups educate and effectively lobby the

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[98] Any declaration by the Supreme Court of Canada of incompatibility of legislation to the *Charter* provision, almost automatically results in repeal or amendment of the offending legislation, as seen in *Seaboyer supra* note 38.

[99] A. McColgan, *Women Under the Law: The False Promise of Human Rights* (Harlow, Pearson Education Ltd, 2000) at 2.

[100] S. Razack, *supra* note 33 at 130.

[101] LEAF for example has intervened in numerous cases and influenced the dissenting judgement of

government (ministers of justice and the legislatures) to ensure that reforms made to legislation conform to their vision of equality.

Even though equality potentials may not be very obvious within the judgment of a court, as observed in sexual assault cases, the role of the judiciary in the protection of women's rights cannot be over-emphasised.[102] Though the courts in Canada appear to be skeptical in applying equality analysis in the interpretation of legislation, even when it seems realistic to do so,[103] this has not detracted from the overall role played by the judiciary in the development of equality jurisprudence. Some amendments to the *Criminal Code* with particular reference to sexual offences have continued to take place in response to judicial interpretation of the provisions by the courts and lobbying by women's groups.[104]

Specifically, the judgments of Madame Justice Claire L'Heureux -Dube at the Supreme Court of Canada exemplify the perspective that the judiciary can apply to develop jurisprudence that will have positive impact on the lives of women. "Her analyses, even when written in dissent, have ultimately reshaped the common law and instigate new legislation."[105]

The role of the Canadian parliament in providing some protection to women must also be mentioned. Over time, parliament in Canada made explicit its intention to incorporate equality analysis into sexual violence legislation by enacting amendments to

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Madame Justice L'Heureux –Dube in *Seaboyer supra* note 38.

[102] For example, Justice L'Heureux –Dube "consistently relied upon equality rights as an implicit if not explicit interpretative framework informing the law of sexual assault." See E. Sheehy, and C. Boyle, "Justice L'Heureux- Dube and Canadian Sexual Assault : Resisting the Privatization of Rape" in Sheehy, E., (ed.), *supra* note 67 at 249.

[103] *Seaboyer* and *Gayme, supra* note 84 ; *O'Connor.*

[104] For example, the 1992 reform of sexual assault cases after the Supreme Court of Canada decision in *Seaboyer* and *Gayme, supra* note 38.

[105] E. Sheehy and C. Boyle *supra* note 67 at 247.

the *Criminal Code*.[106] According to Diana Majury, the preambles "explain the gendered social context that gives rise to sexual assault and the gender issues that need to be taken into consideration in applying the new legislation,"[107] and are evidence of a true commitment.

Canada is also a classic example of how the law can be limiting. Law alone cannot achieve the objective of improving the status of women and protecting their rights. For example, instances abound where the courts fail to take equality into consideration. It therefore takes the joint effort of all concerned to realise effective social change. The fact remains that women and children make up the highest percentage of victims of sexual offences. For many African countries, Nigeria and South Africa inclusive, equality is guaranteed more on paper than in practice. From the example of sexual violence, to a large extent, the barriers created by the common law and other evidentiary and procedural rules are yet to be removed. Even though sexual offences take a more serious dimension in Africa, the pace of implementing constitutionally guaranteed equality and non-discrimination has been slow.[108] The use of rape as an instrument of suppression in situations of armed conflicts and in peace times, compounded by the problem of HIV/AIDS, has not quickened the pace for reform.

Prior to patriation of the *Constitution* of Canada, women were actively involved in activities geared towards securing an effective equality provision and continued active participation to ensure materialisation of their vision of equality. In Africa the *Protocol* is

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[106] See example of the Preamble on page 18 of this work.

[107] D. Majury, "The Charter, Equality Rights and Women: Equivocation and Celebration." (2002) 40 Osgoode Hall L J 297 at 316

[108] This is true considering that many parts of Africa presently experience war or civil unrest. These countries include Sudan, Sierra Leone, and Uganda, to mention just a few.

self-evident in terms of revealing a commitment on the part of African women to secure the promotion and protection of their rights. African women must therefore not rest on their oars, but must work effectively through national and regional networks and coalitions to campaign for the immediate ratification of the *Protocol* by their countries.

These groups should work with the governments, the parliaments, the courts, the media and the public at large to further the goals of the *Protocol*, both for the purpose of ratification as well as for implementation. Upon entry into force of the *Protocol*, efforts should be channeled towards law reform and appropriate interpretation to promote the rights of women, both in theory and in practice.

The use of Canadian examples on equality and sexual offences illustrates that they have come a long way in promoting equality rights of women. The *Canadian Charter* has been used as an effective tool for interpreting existing legislation and in following up by amending the laws to be made consistent to its provision. The effort of women's group's shows what can be achieved when women organise and are committed to defend and promote their rights. The limitation of women's access to courts should not serve as hindrance. The *Canadian Charter* challenges through litigation have helped develop women's rights in Canada. Relevant equality provisions contained in the *Protocol* could therefore be merged into constitutional documents and made effective and implemented.

Although many women in Africa are unaware of their rights and live in poverty, there remains the need to put existing laws to the test in order to determine their effectiveness. The *Protocol* can serve this purpose with proper effort publicise protections available for the rights of women, as well as for education of women

themselves, to be empowered to seek to enforce these rights. Related to this, legal aid services must be made available to women who require such services.

4. 6. Conclusion

As earlier noted, though the successes achieved in Canada in the quest for equality have been rather constrained, the example of constant interaction and active participation of various actors in the unfolding scenario is a useful model or example for securing immediate ratification and effective implementation of the *Protocol* by African nations. The Canadian rape law reforms stand out as the one example that indicates the substantial influence women can have in the legal process. Women must be active participants in the processes that affect them. Social change must take place within the context of education of all sectors of African society. With the joint effort of all, women's effective participation in the development of the continent can be secured through the protection and promotion of their human rights.

Chapter Six

Conclusion

This thesis has examined the position of women's rights within the African system. It has shown that recent developments in the African regional human rights system may be an indication that protection of the human rights of women on the continent is increasingly featuring in its agenda. Support for legislation against discrimination has continued to grow especially with the adoption of the *Protocol.* However, there is no doubt that a serious gap still exists between *de jure* and *de facto* recognition of women's rights. The examination of the content and the processes available under the *Protocol* reveals a sense of a legal and policy approach which recognizes that law alone cannot make the desired change in status of women in Africa. Discrimination against women will not be abolished by modifying laws alone.

However law plays an important part along with commitment of states and civil society, particularly women's groups to implement the law. The commitment of African States must include not only legal but financial investment in providing health care, education and work skills for improving the status of women. The law must be complemented with positive attitudinal change on the part of everyone, women, judges, legislative bodies, law enforcement agents and all segments of society to the issue of women's rights. The *Protocol* will serve as a legal instrument containing minimum standards for education, health care and other protections for African women and their rights.

A reoccurring theme in the study of women's human rights in Africa is the impact and effect of patriarchal structures and institutions on the ability of women to obtain and

enjoy rights. This combined with harmful or negative cultural practices creates an obstacle to effective implementation of human rights of women in Africa. The issue of how culture relates to the human rights of women cannot be swept aside. The need for a thorough and fair assessment of human rights violations and particularly women's rights violations by all concerned cannot be overemphasized. The issue of cultural legitimacy of international human rights cannot be ignored or else the rights being promoted will ultimately be resisted based on the impression that it is another form of imperialism. The usurpation of accepted cultural norms of the people without an objective and sensitive assessment may lead to resistance, even when there is evidence of the negative impact of the norm.

Solutions propounded for this problem by legal scholars include education and dialogue rather than formal, abstract, and legalistic approaches. Such approaches involve mutual respect, understanding, dialogue and sensitivity, and equality among parties.[1] Others include application of local solutions and empowerment of indigenous people.[2] Local non-governmental organisations often have the basic understanding of the issue in their society and can provide necessary impetus for action. The fact that NGOs face fewer bureaucratic obstacles and political constraints than official bodies grants them the opportunity to be effective in advancing the rights of women. NGOs in the grassroots have access to information and local sources unavailable to government and can

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[1] Some of the scholars that advocates these views include; Robert Kwame Ameh, "Reconciling Human Rights and Traditional Practices: The Anti-Trokosi Campaign in Ghana. Canadian Journal of Law and Society (2004) Vol. 19, No.2 [He advocates the application of local solutions aand the empowerment of the indigenous people]; J. Oloka- Onyango, " Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizon? (2000) 6 Buff. Hum. Rts. L. Rev. 39 [He is of the view that inclusion and dialogue are the most fundamental tenets on which a truly human rights must be grounded].

[2] J. Oloka-Onyango, "Modern-day Missionaries or Misguided Miscreants? NGOs, the Women's Movement and the Promotion of Human Rights in Africa, in W. Benedek *et al* (eds.) *The Human Rights of Women: International Instruments and African Experiences.* (London: Zeb books, 2002) at 291.

positively act in collaboration with local communities to provide services that can enhance and empower women, such as, family planning and education, health care, credit and income-generating activities.

Women's NGOs have the collective ability to work together to serve as pressure groups to ensure governments fulfill their obligations under international and regional human rights treaties. For example, the women's NGO network has been effective in bringing international pressure to bear in exposing the systematic violence and rape now used as a weapon of warfare in many parts of the world, including Africa. Women NGO groups all over Africa were instrumental to the resolution to draft and adopt the *Protocol.* It has become a voice through which the work of these NGO's can work more effectively.

Outdated laws which have long been amended within the jurisdiction in which they were originally developed need to be repealed or amended, taking a cue from jurisdictions where positive improvements have been achieved in terms of human rights. Understandably, some scholars would regard the adoption of the *Protocol* as unnecessary and "another level to a confusing number of instruments and organs."[3] The weakness of the enforcement provisions, poor drafting and inconsistencies of the *Protocol* and the decision to draft and adopt an "African" *Protocol* for the rights of women are other areas of criticism.[4] All these notwithstanding the positive aspects of the *Protocol* cannot be ignored.

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[3] R. Murray, "Women's Rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa" in Doris Buss and A. Manji, *International Law: Modern Feminist Approaches* (Oxford and Portland, Oregon: Hart Publication, 2005) at 271

[4] Ibid at 254 and 271.

The *Protocol* has advantages as a symbolic instrument and in real terms. The actual existence of the *Protocol* gives the sense that women's rights really exist for African women. Though couched in general terms, the *Protocol* can serve as a uniform guide to the implementation of equality rights on the African continent. The level of agreement that had to be reached before the adoption of the *Protocol* may attest to the fact that African states have shown a clear commitment to take action promoting the human rights of women. The *Protocol* serves to focus public attention and opinion on the continued existence of some undesirable practices and the need to eliminate them. It has the potential of generating further debates, discussions that will cast light on the scope and nature of women's rights problems, obstacles to their solution and means of attacking the problems. The *Protocol* provides a broad framework of general norms and standards intended to guide government action affecting women's rights in Africa. If effectively utilized, the *Protocol* will serve as a basis for scrutinizing and influencing government policies.

Nigeria and South Africa have recently ratified the *Protocol.*[5] The fact that the *Protocol* reflects the peculiar needs and situation in the African Continent with respect to rights of women will help develop a uniform approach to the protection of these rights. Since the *African Charter* enjoys "almost universal acceptance in participant and non-participant signatories"[6]and states parties have made attempts to incorporate its provisions into national legislation, as in Nigeria,[7] we can hope that states will accord the

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[5] Nigeria ratified the *Protocol* on 18/02/2005; South Africa ratified the *Protocol* on 14/01/2005

[6] N. J Udombana, "Between Promise and Performance: Revisiting States' Obligation under the African Human Rights Charter" (winter, 2004) 40 Stan. J.Int'l L 105 at 110.

[7] The *African Charter* was incorporated in to the law in Nigeria by virtue of the *African Charter on Human and Peoples Rights' (Ratification and Enforcement) Act.* Cap. 10, Laws of the Federation of Nigeria 1990.

Protocol the same treatment upon its entry into force. States parties to the *Protocol* should incorporate its provision as a supplement that elaborates the provision of the *African Charter.*

The *Protocol* defines norms for the protection of the human rights of African Women and can serve as a framework and guide for the definition of constitutional guarantees of women's rights. The *Protocol* mandates proactive and pro-women policies aimed at dismantling discrimination. It seeks to achieve substantive equality for women, not only formal legal equality but also equality of results in real terms. The potential of the *Protocol* is immense and should be exploited in order to accelerate the realization of women's rights in Africa.

From the foregoing, it is apparent that a great deal of work is still required in order to full view of the rights of women within the African human rights system. The recent transition of the OAU to AU has brought about changes that can make a difference to the rights of women. The discussions and debates and the key actors and their roles in the adoption of the *Constitutive Act of the African Union* and the amendments concerning gender; the key actors and NGO's that participated in the process of developing the *Protocol* and their vision or reason behind their actions; the role of the African Commission in the promotion and protection of women's rights are works in progress which will require more in depth research to discover the roles they play in promoting women's rights in Africa. My future work will build upon the broad base of this present piece to address some of these questions all with a view to examining how, concretely, the law can make a difference in the daily lives of African women.

Appendix 1

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The States Parties to this Protocol,

CONSIDERING that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

CONSIDERING that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

FURTHER CONSIDERING that Article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

NOTING that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

NOTING that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

RECALLING ALSO United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security;

REAFFIRMING the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development;

FURTHER NOTING that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

RECOGNISING the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men;

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated;

DETERMINED to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights;

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

For the purpose of the present Protocol:

a) "African Charter" means the African Charter on Human and Peoples' Rights;

b) "African Commission" means the African Commission on Human and Peoples' Rights;

c) "Assembly" means the Assembly of Heads of State and Government of the African Union;

d) "AU" means the African Union;

e) "Constitutive Act" means the Constitutive Act of the African Union;

f) "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;

g) "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;

h) "NEPAD" means the New Partnership for Africa's Development established by the Assembly;

i) "States Parties" means the States Parties to this Protocol;

j) "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;

k) "Women" means persons of female gender, including girls.

Article 2

Elimination of Discrimination Against Women

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Article 3

Right to Dignity

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.

2. Every woman shall have the right to respect as a person and to the free development of her personality.

3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.

4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

Article 4

The Rights to Life, Integrity and Security of the Person

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

2. States Parties shall take appropriate and effective measures to:

a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;

b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;

c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;

d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;

e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;

f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;

g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;

h) prohibit all medical or scientific experiments on women without their informed consent;

i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;

j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;

k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

Article 5

Elimination of Harmful Practices

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

Article 6

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

a) no marriage shall take place without the free and full consent of both parties;

b) the minimum age of marriage for women shall be 18 years;

c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;

d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;

e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;

f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;

g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;

i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;

j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Article 7

Separation, Divorce and Annulment of Marriage

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this re gard, they shall ensure that:

a) separation, divorce or annulment of a marriage shall be effected by judicial order;

b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;

c) in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;

d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 8

Access to Justice and Equal Protection before the Law

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

a) effective access by women to judicial and legal services, including legal aid;

b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;

c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;

d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;

e) that women are represented equally in the judiciary and law enforcement organs;

f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

Article 9

Right to Participation in the Political and Decision-Making Process

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:

a) women participate without any discrimination in all elections;

b) women are represented equally at all levels with men in all electoral processes;

c) women are equal partners with men at all levels of development and implementation of State policies and development programmes .

2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

Article 10

Right to Peace

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.

2. States Parties shall take all appropriate measures to ensure the increased participation of women:

a) in programmes of education for peace and a culture of peace;

b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;

c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;

d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;

e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.

3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Article 11

Protection of Women in Armed Conflicts

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.

2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.

3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

Article 12

Right to Education and Training

1. States Parties shall take all appropriate measures to:

a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;

b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;

c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;

d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;

e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.

2. States Parties shall take specific positive action to:

a) promote literacy among women;

b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;

c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

Article 13

Economic and Social Welfare Rights

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

a) promote equality of access to employment;

b) promote the right to equal remuneration for jobs of equal value for women and men;

c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;

d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;

e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;

f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;

g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;

h) take the necessary measures to recognise the economic value of the work of women in the home;

i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;

j) ensure the equal application of taxation laws to women and men;

k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;

l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;

m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

Article 14

Health and Reproductive Rights

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

a) the right to control their fertility;

b) the right to decide whether to have children, the number of children and the spacing of children;

c) the right to choose any method of contraception;

d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;

g) the right to have family planning education.

2. States Parties shall take all appropriate measures to:

a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;

b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;

c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Article 15

Right to Food Security

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;

b) establish adequate systems of supply and storage to ensure food security.

Article 16

Right to Adequate Housing

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

Article 17

Right to Positive Cultural Context

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

Article 18

Right to a Healthy and Sustainable Environment

1. Women shall have the right to live in a healthy and sustainable environment.

2. States Parties shall take all appropriate measures to:

a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;

b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;

c) protect and enable the development of women's indigenous knowledge systems;

c) regulate the management, processing, storage and disposal of domestic waste;

d) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

Article 19

Right to Sustainable Development

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

a) introduce the gender perspective in the national development planning procedures;

b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;

c) promote women's access to and control over productive resources such as land and guarantee their right to property;

d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;

e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and

f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

Article 20

Widows' Rights

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

a) that widows are not subjected to inhuman, humiliating or degrading treatment;

b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;

c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

Article 21

Right to Inheritance

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

Article 22

Special Protection of Elderly Women

The States Parties undertake to:

a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;

b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

Article 23

Special Protection of Women with Disabilities

The States Parties undertake to:

a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;

b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

Article 24

Special Protection of Women in Distress

The States Parties undertake to:

a) ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs;

b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

Article 25

Remedies

States Parties shall undertake to:

a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;

b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

Article 26

Implementation and Monitoring

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.

2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

Article 27

Interpretation

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Article 28

Signature, Ratification and Accession

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.

2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

Article 29

Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.

2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.

3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

Article 30

Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.

2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.

3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.

4. Amendments or revision shall be adopted by the Assembly by a simple majority.

5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

Article 31

Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

Article 32

Transitional Provisions

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.

Adopted by the 2nd Ordinary Session of the Assembly of the Union –Maputo, 11 July 2003

Appendix 2

African Charter on Human and Peoples' Rights

(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations. and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular

attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex. language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Article 2

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

Article 3

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.

Article 18

1. The family shall be the natural unit and basis of society. It 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 or 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 the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Adopted by the eighteenth Assembly of Heads of State and Government June 1981 – Nairobi, Kenya

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