

THE MULE OF THE WORLD: RACE, CULTURE AND ESSENTIALISM IN
FEMINIST APPROACHES TO INTERNATIONAL HUMAN RIGHTS LAW - AN
AFRICAN PERSPECTIVE

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ABSTRACT

As a critical theory, feminisms and feminist legal theory challenge existing norms. Of necessity, the values behind this methodology must in turn be critiqued. Feminist methodology, essentialism is dependent on the experience of women, distilled into a particular type of woman for academic ease. Gender is only one of the defining traits of a woman. Depending on the specificities of the context, other traits will impact on the life experiences of a woman and how she experiences discriminatory practices.

In a context where a particular racial group do not form the dominant culture, race will be an important defining trait. Therefore to be a Black woman in the Western world will shape a woman's experience of discrimination. To be a Black African woman in the West will also further determine the types of discrimination suffered in addition to gender discrimination which must be differentiated from the experiences of Black Western women and White Western woman. These experiences affect the realisation of women's human rights.

Discrimination suffered by an African woman as a woman in Africa is contextually specific. It is identified as culturally specific. Yet, culturally identified or determined gender discrimination is arguably no more than the location of institutionalised gender discrimination in the private sphere. It is considered a cultural problem because the positionality of the dominant theory of feminism, which is Western, locates alien cultures as other and separates the experiences of women in that culture. The location of such gender based institutional discrimination primarily within a cultural sphere places it firmly within the cultural relativist paradigm which challenges the universality of human rights, including women's human rights, and further detaches gender based discrimination from the rights discourse.

Therefore, not only is race peripheral to feminisms, culture, or the manifestation of culturally identified gender discrimination, is also marginalised. The separation of women from each other based on factors such as race, class and ethnicity limits the potential of feminist legal approaches to the promotion and protection of women's human rights. Feminist legal theory can promote, protect and assure *all* women's human rights if it is inclusive and if it is representative. To be representative, the manifestations of racial and cultural discrimination must form an integral part of the theory.

CONTENTS

CHAPTER 1

INTRODUCTION 15

CHAPTER 2

THE AFRICAN REGIONAL SYSTEM OF RIGHTS PROTECTION:A REPLICATION OF THE EXISTING INTERNATIONAL ORDER

INTRODUCTION 26

PART I. CULTURAL RELATIVITY OR CROSS-CULTURAL FERTILISATION?

1. Universalism vs Cultural Relativity 32

PART II A.REGIONAL PROMULGATIONS ON RIGHTS PROTECTION

1. The African Charter on Human and Peoples' Rights . 46
 1.1 The Organization of African Unity (OAU) . . . 47
 1.2 An African Concept of Human Rights? 56
2. African Charter on the Rights and Welfare of the Child
 69
3. Draft Protocol to the African Charter on Human and
 Peoples' Rights on the Rights of Women 71

B. ENFORCEMENT MECHANISMS

1.The African Commission on Human and Peoples' Rights
 74
2. An African Court of Human Rights 84

PART III AN AFRICAN APPROACH TO REGIONAL PROTECTION

1. Regional Institutions 87
2. A New Approach to Regional Problems? 97

CONCLUSIONS -

AFRICAN VALUES OR A REPLICATION OF EXISTING MODELS?.....101

CHAPTER 3

SELF-DETERMINATION AND THE RIGHT TO DEVELOPMENT: THE EXCLUSION OF WOMEN

PART I SELF-DETERMINATION 106

1.Possibilities of Self-Determination for Women 118

PART II THE RIGHT TO DEVELOPMENT

1. The New International Economic Order and Development 122

2.The Right to Development 126

3. The Right to Development and Human Rights 131

4. Monitoring Human Rights Aspects of Development 137

5. Women and Development 140

CONCLUSION 148

CHAPTER 4

WOMEN'S RIGHTS AS HUMAN RIGHTS : THE OMISSION OF RACE AND CULTURE INTRODUCTION 150

PART I. WOMEN'S RIGHTS AS HUMAN RIGHTS

1. The Concept(s) of Women's Rights 156

2. Formal Guarantees of Women's Rights 171

3. Inadequacies with formal guarantees for the protection of women's human rights - the Convention on the Elimination of All Forms of Discrimination Against Women and the use of Reservations. 176

PART II. *EVERYWOMAN'S HUMAN RIGHTS?*

1. Race and Essentialism - A Feminist Oversight 187

2. Theorizing Black Feminisms 196

3. Differences within commonalities:African vs African-American experience. 198

Part III. GENDERED RELATIVITY 203

CONCLUSION	214
CHAPTER 5	
THE REALITIES OF CULTURE:THE STATUS OF EGBA YORUBA WOMEN WITHIN THE STRUCTURE OF YORUBA SOCIETY	
INTRODUCTION	216
PART I HISTORICAL BACKGROUND	
1.Political Organisation	217
1.1 The role of women in politics	219
2.Social Organisation	224
3.Dispute Resolution and Administration of Justice	224
4. Colonialism and its impact	227
4.1 Historical Development of British and Native Courts	231
5. Women and Colonialism	235
5.1 Political Activity	238
PART II PRESENT CONFLICTS:WOMEN'S RIGHTS	
1.Empowerment vs Traditional Roles.	248
2.Personal status laws	
2.1 Marriage	251
2.2 Dissolution	260
2.3 Custody	261
2.4 Inheritance and Property Rights	262
CONCLUSION	278
PART III FEMINIST CRITIQUE OF CULTURAL RELATIVISM	282
CHAPTER 6	
CONCLUSIONS	286
APPENDIX	294

ABBREVIATIONS

AJIL - American Journal of International Law
All NLR - All Nigeria Law Reports
ASICL Pro - Proceedings of the African Society of International
and Comparative Law
BYBIL - British Yearbook of International Law
EHRR - European Human Rights Reports
EJIL - European Journal of International Law
FSC - selected judgements of the Federal Supreme Court of Nigeria
HRLJ - Human Rights Law Journal
HRQ - Human Rights Quarterly
ICLQ - International and Comparative Law Quarterly
ILM - International Legal Materials
JHRLP - Journal of Human Rights Law & Practice
NLR - Nigeria Law Reports
NWL/N.W.L.R. - Nigerian Weekly Law Reports
RADIC - Revue Africaine de Droit International et Compare
(African Society of International and Comparative Law)
SCNLR - Supreme Court Of Nigeria Law Reports
UNTS - United Nations Treaty Series
VJIL - Virginia Journal of International Law
WLR - Weekly Law Report
WRNLR - Western Region of Nigeria Law Reports/Western Nigeria Law
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Convention for the Protection of Human Rights and Fundamental Freedoms and relevant protocols (European Convention), signed 4th November, 1950, entered into force 3rd September, 1953, 213 UNTS, 221

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Universal Declaration of Human Rights, adopted 10th December, 1948, General Assembly Res. 217A(III), UN Doc A/811, 1948

Vienna Convention on the Law of Treaties, 1969, UKTS (1980)Cmd 7984

Vienna Declaration and Programme of Action A/Conf.157/23, 1993, reprinted in 32 ILM 1661, 1993

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Omo aiye logun, omo idere logbon, omo aiye ki yeni, ki idere madeni, omo aiye re, ti oun de, omo gbonu, omo odumare, omo oke idera, bodoju aiye won a ni oku dandan, osa idere ni a gbani la, omo aiye re, omo erin folami, omo o fi bara pile ola, Abdul Razaak Olajide, sun re o.

For Mami, who continues to endure

"De nigger woman is de mule uh de world so fur as Ah can see."

Their Eyes Were Watching God

Zora Neale Hurston

Virago Press, 1986

1st published, 1937

CHAPTER 1

INTRODUCTION

This thesis suggests that feminist approaches to international human rights law fail African women in the reconceptualisation of the international legal order. It is a theoretical hypothesis concerned with the omission of race, culture and with the reliance on essentialism in feminist theory within the context of human rights law. This omission is important for a number of reasons. Firstly, feminism seeks to change at the most and influence at the least, the structures of societal organisation to achieve a gender sensitive perspective and approach. Secondly, it seeks to ensure a gender sensitive implementation of policy decisions. Thirdly, it aims to achieve equitable gender participation in the processes of society; political, economic and social. To have global application and hence, success, feminist legal theory must be representative.

At present, its success is only partial. It is partial because there are certain areas, such as race and culture, which are not yet sufficiently assimilated into the theory. This omission fails African women because not only are they not fully represented by feminism but also because any influence of the legal discourse, as it stands at present, will result in the implementation of policy decisions which may not address their needs and requirements. Further, not only is the language of rights not fluent within most African communities, the discourse itself and the implementation of rights is challenged by culture, the operation of cultural practices and the arguments of cultural relativism; the realisation of rights is adversely affected by restricted democratic and participatory rights under most African governments and it is adversely affected by inadequate implementation.

This thesis accepts that human rights have universal application and that women's rights are an integral and indivisible part of

human rights. It also accepts feminist legal theory as a means of achieving actual rather than formal equality for all women. To achieve this, it suggests that feminist legal theory must be truly representative and its purpose is to demonstrate the current omissions and suggestions for inclusion, using an African perspective in the desire that these omissions will be remedied.

In its challenge to the international order, particularly with respect to human rights law, feminist aims to have women's rights recognised as enforceable human rights have been achieved in theory.¹ The implementation of women's human rights, as with other human rights in domestic jurisdictions, is more difficult to achieve. The difficulties vary from the reduction of states parties' obligations to treaty terms through the use of reservations, clawback provisions, lack of incorporation into national law, tension between customary and statutory laws and restricted access to legal redress, either because of financial hardship or lack of knowledge of rights.

In an African context, the human rights discourse is challenged by cultural relativism and further, core democratic rights which would otherwise enable challenges to be made to violations of human rights by states are either severely restricted or suspended under authoritarian regimes, despite the current wave of democratisation on the continent. Moreover, the number of internal armed conflicts within the region means that legal redress is not the most expedient or useful form of redress, nor even a priority in that context. In the light of the specificities of the African context - uneven commitment by various Governments to participatory political representation of the population, limited participation by the people in their social and economic affairs, internal conflicts whose roots may be traced back to the legacy of colonialism - it is apparent that the foundations of the type of civil society in which the protection and promotion of human rights can flourish has yet to

¹Vienna Declaration and Programme of Action, A/CONF.157/23 1993, see para. 18, p.7.

be fully established. This does not mean that protection of human rights and the rights discourse has no application to African societies; it merely serves as a practical reminder that its application will be affected by the specificities of developments on the continent. In spite of these difficulties, there are many national and international non-governmental organisations and grass roots organisations working to ensure that as a part of the development of Africa, the promotion and protection of human rights have an integral role.

Cultural relativism, the argument that human rights must be applied within the cultural structures of a particular society, challenges the universal application of human rights, not least because it translates to mean that these rights will apply only in so far as they do not conflict with established cultural practices or customary law. This is a problem because implicitly it means that human rights are not, by definition, universal, and in the context of women who are primarily affected by these practices, it means that in those areas where culture is entrenched to their detriment, any protection afforded by universal standards are excepted. The argument of non-interference in domestic jurisdictions, coupled with the developmental problems the continent faces, means that the situation of women needs to be approached with a sensitivity to their predicament. Using two legal principles, the right to self-determination and the right to development, the thesis attempts to demonstrate how women, with other groups, in Africa are affected differently by the application of international standards and how this ought to inform approaches to protection and implementation of human rights.

African values are argued to be based on communitarianism which is at odds with the concept of individually based rights upon which international standards are predicated. The fact that these standards are derived from western philosophy is an additional factor of tension because they are regarded as a new form of imperialism. This position is understandable, given the African

experience of coercive, external influence in the form of colonialism. However, Africa, as a continent, is in a uniquely placed position to decide its approach to its development. Most African states are young, they are relatively newly independent and the end of the Cold War has meant that the cynical use of African states as strategic pawns is largely ended. Further, the resurgence of internal conflicts, the diversion of interest and aid to Eastern and Central European countries and the concomitant marginalisation of Africa means that perhaps, for the first time, African leaders are having to resolve, with limited external interference, pressing issues affecting the continent.² In this dynamic situation, it is imperative that a gender sensitive approach is included in the consideration of possible solutions to African problems.

If we accept the notion of African values, it is necessary to ascertain if there is evidence of an African approach in Africa's regional mechanisms that marks them uniquely from other international and regional organisations. This thesis demonstrates, through a consideration of the Organization of African Unity (OAU),³ Economic Community of West African States (ECOWAS)⁴ and other select regional mechanisms, that African regional organisations are structured similarly to other regional and international organisations and that the legal principles relied upon are equally similar. The similarity of these organisations is based on the concept of state sovereignty, which as a legal principle admits of no cultural influence or difference and is especially pertinent in Africa where newly

²see further Keller, E.J. & Rothchild, D., AFRICA IN THE NEW INTERNATIONAL ORDER: RETHINKING STATE SOVEREIGNTY AND REGIONAL SECURITY, London, 1996.

³ constituted at a conference of African heads of state and government in Addis Ababa held between May 23-26, 1963 to promote the unity and solidarity of African and Malagasy states. For text of the Charter see 2 ILM, 1963, 766.

⁴for Articles of Association establishing ECOWAS see Sohn, L., (ed) DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS, 1005, Inter-American Institute of International Legal Studies, 1971.

independent states are anxious to assert their equality with established states. These African regional structures, rather than evidencing an African approach, replicate existing structures of international organisation and are based on similar legal principles. These principles have been and are inherently challenged by feminist approaches to law. Therefore, not only is there no evidence in the organisation of regional institutions of a quintessential African value, the legal foundational basis of these institutions have been shown to be androcentric. For African women, cultural relativist arguments adversely affect the guarantee of their rights, it is essentially a gendered relativist argument. There is no notion of African values that can serve to promote their rights because regionally based treaties such as the African Charter on Human and Peoples' Rights (ACHPR and also referred to as the Banjul Charter)⁵ and other regional organisations are essentially based on existing structures. The existing structures have marginalised women and feminist legal theory has been instrumental in exposing this.

Feminist theory emerged from the West and ignores indigenous feminisms both substantively and its processes. It is historically rooted in its own experiences. This is not to say that feminist activism and theory did not exist in other parts of the world. It did, but the theoretical development of feminism as a political force, occurred primarily in the West and it is this development, and its omission of women who are not a part of that tradition that this thesis is concerned with. However, feminist theory itself has not taken sufficient account of the experiences of African women. This omission or oversight is important because if it is to influence policy on an international level, as it aims to do, feminist legal theory must be truly representative. To be truly representative, feminist legal theory in its approaches to human rights law must incorporate the differences of race and culture as these have

⁵adopted 17th June, 1981 by the 18th Assembly of Heads of Government and States of the OAU and entered into force on 21st October, 1986, reprinted 21 ILM, 58, 1982.

differing cumulative effects in addition to gender subordination in the lives of many women.

The inefficacy of traditional human rights to assure the human rights of women has been attributed to their exclusion from the organisational, normative and doctrinal structures of human rights law. Feminist approaches to international law has shown it to be androcentric. In challenging the status quo of the legal order, despite their internal differences, feminist theory presents a unified front. The purported cohesiveness of feminist theory has been challenged on the grounds of the failure of essentialism to take race into sufficient account. My intention is to introduce an additional element to the debate in terms of an African perspective with a case study of Yoruba women. While it is important to be aware of the dangers of splintering feminist theory, essentialism could potentially run the same error of exclusion if all women's experiences do not form the foundational core of feminist theory in impugning the existing legal order.

The marginalisation at the least, and exclusion, at the most, of women from the legal processes of the international world order attributed to western liberal theory has been replicated in new states like Nigeria, to the detriment of the development of the country and new states like it. Indigenous organisational and normative structures enabled participation in the government of the country, however imperfect. However, colonialism wrought changes that decimated existing indigenous structures, supplanted new structures without enabling participatory structures that were equivalent to, or that allowed the same level of participation from all strata of society, especially with regard to women.

Chapter 2 of the thesis begins, in Part I, with a consideration of the notion of an African concept of human rights evident in the paradigm of cultural relativism. The notion of 'African Values' is integral to the African Charter on Human and Peoples'

Rights. The Chapter attempts to discover if there is an African way or values. Part II discusses the African Charter on Human and Peoples' Rights and other regional promulgations on rights protection in addition to the work of the African Commission on Human Rights. Part III looks at African regional systems, in particular, the Organization of African Unity, OAU, the primary regional organization and its contribution to the resolution of African problems. The Chapter will demonstrate, through the structure and norms of the OAU and the African Charter, that African regional organisations replicate the international order of institutional structures, not only in its organisational and normative values, but also in its processes. This will illustrate that the challenge feminist legal theory poses to international law inherently applies to African regional institutions. If there exist no African values which can serve to protect women and the regional institutional structures are inherently challenged by feminist legal theory, it is clearly imperative that feminist theory be representative of all women.

In order to demonstrate the complexities of the rights discourse in an African context, I evaluate in Chapter 3 certain legal principles - self-determination and the right to development - in order to demonstrate that legal principles do not necessarily result in the protection of and may further marginalise women in these areas. Self-determination, in the African context, is interpreted to mean external self-determination not internal self-determination. Hence, there does not exist in practice the right to participate in the government of one's country. There is no accountability or transparency and no means to influence or assure certain rights. Similarly, the right to development means the right of the country or state to development, not the right of the people. Women are major contributors to the African economy through agriculture, therefore it is important that they have access to land and possessory rights in land. Customary law in many African countries limits the right of women to own land. The discriminatory effect of customary law is affirmed by statutory law in most cases. Key rights that would enable women

to work towards their development are restricted by customary law. Development projects aimed at redressing the balance have little or no participation by women in the formulation of policy and its implementation. Internal structures are discriminatory, external efforts aimed at ameliorating the status of women and increase their opportunities operate on a basis of assumptions. Interventions, both internal and external, aimed at improving the status of women tend to have limited participation by the women who are to be the beneficiaries of these efforts.

Cultural relativity, or the right to retain an African value or integrity, has meant a maintenance of the status quo even when certain cultural practices result in clear and unequivocal discrimination. For instance, women are discriminated against in terms of inheritance laws and custodial rights. Where these manifestations of discrimination are not sanctioned by customary law, change is resisted on the grounds of culture. The purpose of using the legal principles is not only to demonstrate the marginalisation of women from these areas but to show that for the purposes of implementation of human rights in an African context in a way that would benefit women, there are core problems in using legal discourse. These problems may be peculiarly African but they are germane to the discourse. Feminist critiques of human rights law at the international level have evidenced its androcentric nature. Essentialism must include an African perspective in order to be truly effective since implementation can only take place at the domestic level. It is equally important that while the development of theory is progressing, the practicalities which may influence the implementation and protection of guaranteed rights are taken into account.

Chapter 4 looks at feminist critiques and approaches to international law. International law has been shown to be androcentric in its normative and organisational structures. The foundational basis for this is western liberal theory which is based on the distinction between the public and private sphere.

The structure of the international legal order has affected the development of women's human rights. The inadequacies of the Convention for the Elimination of Discrimination Against Women (CEDAW or the Women's Convention),⁶ including enforcement and implementation, may be attributed to the core foundational basis of the theory of human rights which distinguishes between the public and the private sphere; the latter being where women's rights are most crucial. The problems of implementation internationally and within domestic jurisdictions will be considered in the light of inadequacies with formal guarantees of women's human rights. The use of reservations to the Women's Convention is demonstrative. Part I of the Chapter looks at the growth of the concept(s) of women's rights and the challenges posed to international law in terms of necessitating a rethinking of sovereignty, culture and challenging the participation of only state actors in international law. There is an overview on law making within the UN system on matters relating to women's rights. Part II discusses the omission of race and culture in feminist legal theory through an essentialist perspective and considers theorisations of Black feminisms and the theory of cultural or gendered relativism and its impact on women's rights with a feminist critique of cultural relativism.

Chapter 5 looks at indigenous systems, through a case study of Yoruba Egba women, of societal organisation prior to colonialism, including legal systems, the role of women and the substance of customary law. It will then consider how colonialism has affected the gender aspects of legal structures and its impact on familial/kinship relationships using case law. This will illuminate the tension between indigenous systems and the new legal systems resulting in a cultural lag. A practical problem is that the language of rights discourse is not yet fluent while the old ways have been desecrated. Women's human rights obtain primarily in the private sphere and this Chapter will concentrate on these areas; namely rights subsisting on marriage, divorce,

⁶UN Doc. A/34/46, adopted 18th December, 1979, 1249 UNTS 14, reprinted in 19 ILM 33, 1980.

inheritance and custody of children. These rights will be looked at under customary law in addition to statutory law.

Chapter 6, the conclusion, will analyse the reason why so-called universal norms of human rights are not wholly accepted and why there is a need to rely on cultural difference or diversity in emerging countries. At the time the Universal Declaration of Human Rights (UDHR)⁷ was promulgated in 1948, a number of states who would later sign the Declaration were still under colonial rule. As they gained independence, they subscribed to these principles. Cultural relativism, it will be argued, should be seen on inception as nationalist fervour by a people keen to assert their independence and autonomy. 'People' may be and is used variously to refer to the state, government as representative of the people, ethnic groups within the state or minorities and other groups such as women within groups. The problem is that those who assert are not necessarily representative of the heterogenous groupings of people contained within an artificially constructed nation state. Claims of cultural relativism are challenged within its framework. At domestic level, there has been little or no participation by women in national decision making. State structures take little account of their needs. In terms of the cultural relativist argument, it is important to establish whose culture is being promoted. Culture is neither common nor monolithic nor static. Not all citizens of a state participate in equal part and to the same extent in this culture. The culture that is being presented in international fora is the culture of government and of the elite and that usually means the culture of an unelected group of people keen to perpetuate their power. The acceptance of the argument of culture also implicitly implies acceptance that a certain group of people on the basis of sex, age, class or ethnicity are excluded from, and are consequently not deserving, of human rights.

⁷UN Doc. A/811, adopted 10th December, 1948 by the United Nations General Assembly, Res. 217A(III).

The inability of the state in new countries such as Nigeria, to be fully representative of women is not a phenomenon restricted to developing countries. The law, including international law, is being shown to be very specifically gendered. Despite international obligations and the accompanying rhetoric, women's rights are inadequately protected. It is very important also, that the perspectives of African women and the issues that affect them are taken into account lest feminist legal theory replicates male structures of dominance and social construct. The problems faced by Nigerian women are compounded by the peculiar socio-cultural and historical development of the country. Discrimination under customary law, the legacy of colonialism, religious inequalities, developmental problems, military oppression and the lack of popular participation in the political system are contributory factors to their oppression. There is a tendency to look at these issues in isolation but the import is such that until there is a means of tackling these issues in a comprehensive manner, the realisation of women's rights in Africa will remain unfulfilled. The development of women's human rights internationally will have little relevance to their rights in exactly the same way that international law has been shown to be androcentric and exclusionary.

CHAPTER 2

THE AFRICAN REGIONAL SYSTEM OF RIGHTS PROTECTION:A REPLICATION OF THE EXISTING INTERNATIONAL ORDER.

INTRODUCTION

Independence from colonialism, the fruits of which began to appear from the late 1950s, signalled the beginning of Africa's contemporary problems in a number of ways. Apart from the efforts of the newly created states to establish their sovereignty on the world stage, formerly autonomous, homogenous ethnic groups became composite parts of several new states without a common interest except the experience of oppressive colonial force. The acceptance of the principle of *utis possidetis* by the Organization of African Unity (OAU)¹ established territorial boundaries as inviolable.² Yet within those boundaries there was no basis for true unity between the ethnic groups. Without a common enemy, the tension between the groups as a result of their conflicting interests, based on social, cultural and even political differences, surfaced, often exacerbated by previous colonial history. It was possible in some instances to contain these divisions by a number of compromises and at times, use of force. In others, however, the underlying tension and conflict led to more serious consequences. The situation in Nigeria ultimately led to the Biafra-Nigeria civil war of 1967-1970, although tension and conflict was not restricted to the Eastern region of Nigeria. More recently, in the 1990s, these differences, exacerbated by environmental degradation due to oil exploration in the eastern region of Nigeria has resulted in unrest by the Ogoni people and there are sporadic outbreaks of violence based on religious differences between Muslims and

¹OAU Charter, adopted 25th May, 1963, 47 UNTS 39, reprinted in 2 ILM 1963, 766.

²Resolution on the Intangibility of Frontiers AGH/Res.16(1), 1964. See Brownlie, I., BASIC DOCUMENTS ON AFRICAN AFFAIRS, Clarendon Press, Oxford, 1971, 360 for text.

Christians in the northern part of the country.

Administratively, the influence of colonisation remained. Official languages in most newly independent countries remain the foreign language of the colonial masters; English in the case of Nigeria. Previous indigenous modes of societal organisation, with differences in various communities, remained either supplanted by foreign models or subsidiary thereto, even though the foreign models had existed to ease the burden of administration of the colonies for the administrators. In the immediate aftermath of independence, many economies remained linked to that of the former colonising country. While in theory, these countries were independent, in practice they retained the influence of the political systems of the former colonising countries, imported to institute formal democracy and representation in government and they remained heavily tied and influenced by the economic policies of (and benefits to) their former masters. The economic policies of most African countries remain influenced to date by external forces and the basis of their political systems, when operative, also retains that influence. The globalisation of economics and finance under the General Agreement on Trade and Tariffs, the World Trade Organisation and the Bretton Woods institutions, notably the International Bank of Reconstruction and Development (the World Bank), remain a pervasive and interventionist influence on the economies of African countries.³

The development of international human rights, the philosophy underlying that development and the universal applicability thereto have given rise to tensions. Human rights norms, as drafted in the International Bill of Rights,⁴ are derived from

³For example, through the implementation of structural adjustment programmes. See further Chapter 3 for a discussion of the intervention of the International Monetary Fund and the World Bank in the economy of developing countries and the effects of such intervention.

⁴These are the Universal Declaration of Human Rights, 1948, UN Doc A/811, (UDHR), the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171 (ICCPR) and the

the tradition of western liberal philosophy and many countries of a different culture, for instance in Africa and Asia, argue that rights are culturally relative. Firstly, the argument suggests that rights are derived from the cultural traditions of a particular culture, secondly that each culture has its own notion of rights which may be equated with the rights enumerated in the Universal Declaration of Human Rights and thirdly, if the so-called universal rights are globally applicable, they must be implemented within the cultural milieu of any given society, rights must be relative. In Africa, cultural relativity is referred to interchangeably with the notion of African values. My position is that there can be no such thing as "African values", it is too diverse and heterogenous a continent for that. Homogenous groups within states may have values and cultures but a continent cannot. It is conceded that these communities may have their own notion of rights which may correspond broadly to those rights in the Universal Declaration but they do not have the legal imperative that the International Bill of Rights accord the rights enumerated and protected. Moreover, it is given that all rights must be implemented within a culturally relevant social milieu to have legitimacy.⁵

This Chapter demonstrates that, despite claims to African values and an African way of doing things, the African regional model of organisation and rights protection models itself so closely on the existing international model that, not only does it accept the underlying legal principles on which the structure and substance of these models are based, it also fails women on the basis of its normative, organisational and institutionalised structures as feminist challenges to law have demonstrated.⁶ Further, the notion of culture on which African values rely, impacts so adversely on women and their rights that culture and

International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3 (ICESCR).

⁵see infra Part I of this Chapter.

⁶ see Chapter 4 of this work.

cultural relativist arguments afford women minimal rights protection. Consequently, it is important to factor culture and its effects into feminist legal theory.

All interstate modes of organisation are primarily concerned with the retention of state sovereignty and will only in exceptional cases, human rights law being one, deviate from that. The basic model then is standard. To that extent, the arguments that feminist theory has presented against international law and its organisation apply to African regional institutional mechanisms. Given the concern of this thesis, particularly with regard to culture, it is important to ascertain firstly, if there exists an African world view, secondly, if it exists, how it has manifested itself in its regional modes of organisation and thirdly how this manifestation affects the position of women within their communities in the different sub-Saharan countries, if at all. The primary illustration in this study is the position of Yoruba women in Nigeria and consequently there will only be passing reference to women in other countries.

This Chapter begins, in Part I, with a discussion of cultural relativism. Part II discusses regional promulgations on rights protection such as the African Charter of Human and Peoples' Rights (ACHPR),⁷ the African Charter on the Rights and Welfare of the Child⁸ and the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women⁹ in addition to the work of the African Commission on Human and Peoples' Rights and proposals for an African Court of Human Rights. Part III considers whether there is an African approach to regional protection and conflict resolution through an overview of African regional institutions, both political and economic to ascertain

⁷1981, adopted 17th June, 1981 by 18th Assembly of Heads of Government and States of the OAU and entered into force 21st October, 1986, reprinted in 21 ILM, 58, 1982.

⁸adopted July, 1990, reprinted in 3 RADIC 1991, 173.

⁹copy on file with candidate, see appendix to this work.

if there exists an African way of "doing things". It also looks at the current position of Africa in the new international order following the collapse of the Cold War and the new wave of international relations which favours democratisation set against economic globalisation and continual economic dependence.

On the question of an Africa world view or perspective, it is important to emphasise from the outset that Africa is a continent, not a country. Yet there is a tendency to discuss the problems of one country as applicable to all African countries. There are certain commonalities in the problems that beset many countries in Africa. Africa is however, treated in theory and in fact as a unity consisting of two regions, sub-Saharan Africa, or Black Africa, and Arab Africa.¹⁰ Thus, when we refer to Africa, we must be aware of the dangers of 'essentialising' Africa itself. The commonalities of many sub-Saharan African countries derive from their colonial experience, the struggle for independence, the formation of arbitrarily defined multi-ethnic states, the inevitable potential for regional and continental conflict as a direct result, the influence of the Cold War and the proxy claims of the USA and USSR and their struggle for economic independence. Within these commonalities there exist great difference, particularly politically. Some states are or have been ruled by the military, some have been ruled by despots, self-proclaimed life rulers, while others have or have had democratically elected governments. There are obvious differences of language, religion and culture. Africa is not homogenous and care needs to be taken that prescriptive solutions to one country's problems do not become the prescription for the whole of sub-Saharan Africa.

This applies equally to the notion of African values. African

¹⁰NGOs such as Human Rights Watch treat Africa as two distinct regions; north African countries are considered a part of the Middle East. The foreign office of Government departments also make the same distinction e.g. in the UK and USA.

values have been heralded variously.¹¹ But surely what is meant is the value of a certain community in a particular country at a specific time? In human rights law, some Africanists¹² have tended to eschew human rights as being universally applicable on the ground that they are western in inception and represent a form of imperialism.¹³ They argue that cultural standards determine the nature of human rights and this will vary from culture to culture. Further, where they accept that human rights exist, they argue that its meaning varies from culture to culture.¹⁴ Whereas human rights have been acknowledged as universal and women's rights also have been declared universal, indivisible and integral to human rights,¹⁵ the importance of culture on the implementation of human rights cannot be understated. Legal proclamations do not result in immediate changes in cultural identification or practice. There is certainly a differing world view that emanates from Africa but differences exist amongst different countries. This difference or perception of difference may derive from a different mode of societal organisation, the communitarian ideal which is common in sufficient sub-Saharan countries for it to be referred to as "African". The difficulty with this cultural relativist position is that it makes insufficient allowance for change and dynamism in societies. Colonialism has definitely impacted on the

¹¹see for instance, Shivji, I. THE CONCEPT OF HUMAN RIGHTS IN AFRICA, CODESRIA BOOK SERIES, 1989.

¹²In referring to Africanists, I mean supporters of the view that there exists within various African cultures, concepts of rights comparable to human rights norms as enumerated in the UDHR and other covenants. This includes scholars of African origin as well as those of different races.

¹³This viewpoint is not restricted to African countries, many developing or Third World countries have posited this view also.

¹⁴see Teson, F., "International human rights and cultural relativism", 25 VJIL n4 (1985), 869. See Chapters 2 and 5 on the impact of culture on Yoruba women, a form of gendered relativism.

¹⁵Vienna Declaration and Programme of Action, 1993, UN Doc A/CONF.157/23.

organisation of life and will have modified it; industrialisation has also modified societal organisation. Exposure to other cultures will have also impacted on social development. These developments have affected the status quo and communitarian values or way of life no longer exist in an unmodified form. This requires a corresponding modification of Africanist viewpoints and a more accurate reflection of modern societal organisation in African countries.

PART I. CULTURAL RELATIVITY OR CROSS-CULTURAL FERTILISATION?

1. Universalism vs Cultural Relativity

The Universal Declaration of Human Rights (UDHR), promulgated by the United Nations in 1948,¹⁶ was the first set of rights deemed applicable worldwide.¹⁷ Its adoption was directly related to particular historical factors in Europe at that time, the second world war, and the devastation that resulted from that war. While its roots lay in the geo-political developments of the European continent, the values from which the rights are derived are generally regarded to have no geographical boundaries.

At the time of the Declaration only four African countries were independent.¹⁸ As African countries gained their independence, legal guarantees of rights were included in their constitutions.¹⁹

¹⁶ Adopted 10th December, 1948, General Assembly Res. 217A(III), UN Doc A/811.

¹⁷ Other bills of rights guaranteeing the rights of men existed prior to that time but application was limited to a particular jurisdiction. For example, the French Declaration of the Rights of Man, 1789.

¹⁸ Ethiopia, South Africa, Egypt and Liberia.

¹⁹ It has been noted that constitutional rights protection, which the colonial powers were not concerned with when they ruled over the various territories, was in part to safeguard the interests, mainly economic and property, of the remaining expatriate minority. See Motala, Z., "Human Rights in Africa: A Cultural, Ideological, and Legal Examination", Hastings

The formal protection of rights through constitutional guarantees was perhaps influenced by developments at the international level although in the case of Nigeria, the need to allay the fear of minority ethnic groups from being dominated by the majority ethnic groups of Hausa-Fulani, Yoruba and Ibo played a part.²⁰ With independence, many of the newly created countries demonstrated their allegiance to these principles by becoming members of the United Nations and signing the UDHR, in addition to the other instruments guaranteeing formal protection of rights. This signalled their participation in the world order and was also an assertion of sovereignty. These new countries were faced with problems of a unique nature. They were faced with an artificially constructed state that was multi-lingual, heterogeneous, economically unstable and which lacked cohesion. Their primary concerns were to buttress their sovereignty, eradicate colonialism, racism and apartheid from the continent and realign the world economic order so that existing inequities might be reduced sufficiently for their countries to develop economically.²¹ While they nominally subscribed to the values in the international documents that protected human rights by signing or ratifying them, implementation and enforcement were not a priority, as with other ratifying countries. In any event, at the time, implementation mechanisms were limited.

The instability in many African countries, including Nigeria, that subsequently manifested itself in the form of *coup d'etats*, political detentions and civil wars resulted in widespread abuse and infringements of human rights. While the instability may be

Int. & Comp. Law Rev., v12 (2), 1989, 373-410 and Welch, C., "Human Rights as a Problem in Contemporary Africa", in Welch, C., and Meltzer, R., (eds) HUMAN RIGHTS AND DEVELOPMENT IN AFRICA, State University of New York Press:Albany, 1984, at 13, hereafter, Welch and Meltzer, HUMAN RIGHTS AND DEVELOPMENT.

²⁰ see further Odinkalu, C., "The Judiciary and Legal Protection of Human Rights in Common Law Africa: Allocating responsibility for the failure of post-independence bills of rights", ASICL Pro. 8 (1996), 124.

²¹ see further Chapter 3.

attributed in part to the geo-political and socio-economic history of the continent, human rights abuses were not excusable on any grounds. Once created, the continental organisation, the OAU, was hampered by its internal doctrine of non-interference,²² and had little or no political will to act. External appeals for the protection of human rights were parried on two grounds; a) economic development took precedence over civil and political rights and b) the human rights discourse was Eurocentric and inherently contrasted with an African position on the rights discourse - the notion that human rights are culturally relative.

The human rights discourse in the 1980s was focussed on the debate of universalism versus cultural relativism. Since then, it has been affirmed at the World Conference on Human Rights in Vienna in 1993 that '[t]he universal nature of these [human] rights and freedoms is beyond question.'²³ The debate currently appears to focus on cross-fertilisation of the recognised rights and freedoms with the values of different cultures.²⁴ The primary purpose of informing the human rights debate with the values of a different culture is to facilitate the incorporation of the rights discourse into that culture and hence ease implementation. Once people are aware of their rights and are able to use the language of rights discourse, they can demand respect for those rights, the obligation of which is incumbent on the governments who have freely undertaken to guarantee and protect those rights under international law.

²² article 3(2), OAU Charter.

²³ Vienna Declaration and Programme of Action A/CONF.157/23, reprinted in 32 ILM 1661, 1993, para. 1.

²⁴ see Mutua, M., "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", VJIL, vol 35(2), 1995, 339, hereafter, Mutua, "African Cultural Fingerprint".

Shivji²⁵ identified four levels of the universalism discourse. The first is the historical and philosophical basis of human rights, the second is the nature of the applicability of rights, the third is the identification of rights in traditional African society similar to modern conceptions of human rights and the fourth level locates human rights in a culturally specific paradigm. It is possible, however, to deal with all four levels coherently under the universality and cultural relativity paradigm.

The philosophical basis of human rights is generally regarded as western in origin deriving from a western liberal tradition.²⁶ Some scholars argue, however, that conceptions of human rights existed in other cultures. Opponents of this view refute the argument.

"There is no specifically African Concept of human rights. The argument for such concept is based on a philosophical confusion of human dignity with human rights, and on an inadequate understanding of structural organization and social changes in African society."²⁷

²⁵ Shivji, Issa, G., THE CONCEPT OF HUMAN RIGHTS IN AFRICA, CODESRIA BOOK SERIES, 1989.

²⁶ I do not intend to go into an exposition of the philosophical basis of human rights. My premise is that human rights are universal in application irrespective of their derivation. In any event, it has been declared categorically by the General Assembly of the UN that human rights and fundamental freedoms are universal in the Vienna Declaration and Platform for Action. My intent is to explore the tension between proponents of African values and proponents of absolute universalism with a purpose to establishing a means of rights implementation and enforcement in any cultural, and particularly in the African, context. However, for a cross-section of materials on differing approaches see for example, Steiner, H.J., & Alston, P., INTERNATIONAL HUMAN RIGHTS IN CONTEXT; LAW, POLITICS, MORALS, 1996, Clarendon Press, Oxford, Chapter 4 in addition to other references in this work on an African perspective.

²⁷ Howard, Rhoda, HUMAN RIGHTS IN COMMONWEALTH AFRICA, New Jersey: Rowman & Littlefield, 1986, p23, hereafter, Howard,

Howard's argument runs thus. Peoples' rights is equated in the African Charter on Human and Peoples' Rights (ACHPR) with the right of sovereign states. The Charter uses the term 'peoples' to consolidate the African ideal of communitarianism and national interests, which she equates with elite interests, and hence to simulate the idea of cohesion. She argues that the difficulty in protecting human rights in Africa can be ascribed to its underdeveloped status which limits the realisation of economic rights and the social conditions necessary for the protection of civil and political rights. What she terms 'regime consolidation', primarily by the ruling elites, has led to violations of rights. Commonwealth²⁸ Africa is affected by three main economic circumstances; a colonial heritage of labour and raw material exploitation, vulnerability in the world economic order and domination of the internal economy by the state/ruling class. Having identified these economic obstacles to the maintenance of the social conditions necessary for rights protection in Africa, Howard asserts that human rights performance can be discussed without taking into account any cultural uniqueness. While these economic and development obstacles to rights protection do not amount to cultural uniqueness, they are nonetheless specificities that inform the rights discourse in an African context and, in my view, Howard should have placed more emphasis on their potential to hinder the application of rights.

On cultural relativism, Howard's premise is that contact with the western world has meant that any cultural distinctness that African societies have has been diluted, consequently, aspects

COMMONWEALTH AFRICA. A caveat needs to be attached to the nature of Howard's work. While the countries discussed have the same colonial history they have a different development. None of them are homogenous, Nigeria itself is not homogenous. The term African society is nonsense - there is no such definitive thing.

²⁸essentially former colonies with similar legal and originally similar institutionalised political systems on independence, derived from colonisation by the UK with the exception of Mozambique.

of African needs and ideals are closer to the West than might have been imagined or credited. Rights are inherent in the individual and therefore must not be contingent on the fulfilment of obligation to a group or on granting of rights by a state. She argues that stress on group rights in the ACHPR derogates from the concept of individual rights by placing emphasis on the rights of nation states or the ruling class.

"I do not accept any relativity in the substance of rights. I do accept that implementation may vary and, further, the interpretation may vary in societies whose social norms (for instance, regarding marriage) do not accept particular rights. However, this derogation from the standard of absolute international human rights is acceptable only in the rare cases in which a weakened interpretation of a right does not support the entrenchment of a ruling class.

Thus while the principle of cultural relativity should not be raised to an absolute standard to excuse any and all deviations from international human rights standards, it may be used as a check on radical universalism in very carefully defined circumstances. These circumstances are rare in Commonwealth Africa, where changes in the direction of increased individual autonomy are occurring, partly because of severe structural dislocation and partly because of the introduction of new ideologies. Cultural stasis is unlikely, however indigenous culture may be. African cultures are changing to reflect the emergence of new social classes with differential access to property and power. Most assertions of cultural relativity in fact are an ideological tool to serve the interests of powerful emergent groups in Commonwealth African society."²⁹

²⁹Howard, COMMONWEALTH AFRICA at 16-17

I have quoted at length from Howard because most critiques of her work centre around her assertion of confusion of human dignity and human rights. Her position, however, is very clear; that the substance of human rights is universal while the implementation may vary in form. While I do not accept that there is a confusion of the African concept of dignity with human rights, there is a truth in that whatever form of rights protection existed in precolonial Africa, they were not articulated in the form of a rights discourse. Further, they were applicable only within a circumscribed, communal, kinship group within which there certainly existed inequalities. Proponents of cultural relativism do not take adequate account of the dynamic nature of custom and the fact that it must have been influenced by European colonisation. Custom is not static; the milieu in which people place traditional African values no longer exists in a meaningful way.³⁰ Howard's views on the ruling elite would appear to be borne out by some post-independence events. Nevertheless, it is not entirely true that a culturally relative view is solely to entrench power. Power is complex and multiple; there is the power of elders in a society, religious forms of power, power structures within family settings as well as elite political power.

There does exist a different world view and that can be accounted for in the implementation of rights which she accepts may vary. It is this variance that other commentators³¹ have been at pains

³⁰ see for example, Ilumoka, Adetoun, 'African Women's Economic, Social and Cultural Rights - Towards a Relevant Theory and Practice' in Cook, R. (ed) HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, University of Pennsylvania Press, 1994 at 317 -319 for a discussion of the erosion of traditional support systems for women without its replacement by a modern equivalent. This illustrates the dynamic changes occurring in modern African society today. Account needs to be taken of this fact and relevant theories must be used to tackle the issues, instead of assuming that modern African society has not changed.

³¹ Mutua, "African Cultural Fingerprint", *ibid* note 24 and Cobbah, J.A.M. "African Values and the Human Rights Debate: An African Perspective", 9 HRQ, 1987, 309, hereafter, "African Values".

to establish. Those³² who disagree with an extreme cultural relative position do so because it is clearly open to abuse yet they would not disagree with a need to locate the implementation of international human rights norms within a specific social context.³³ Society in Africa, and Nigeria in particular, is in a constant flux. The rights discourse is a useful tool in the fight for accountable government precisely because they are rights that can be asserted against a state.

Although the legal formalisation of human rights as entitlements against the state are western in origin and philosophical basis, they are regarded as universally applicable. Cultural relativists argue that the philosophical basis of human rights are contrary to African conceptions. The notion of human rights vested in the individual is regarded as contrary to the African concept of communitarianism. For example, Cobbah³⁴ suggests that the rights discourse should take place within a cultural context. He presents an africentric concept of human dignity as a valid worldview which should inform the cross-fertilisation of ideas.³⁵

"Within the organisation of African social life one can discern various organizing principles. As a people, Africans emphasize groupness, sameness, and commonality. Rather than survival of the fittest and control over nature, the African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility."³⁶

³² Mahmud, Sakah, "The State and Human Rights in the 1990s", 15 HRQ, 1993, pp485-498.

³³ see Motala, Ziyad, "Human Rights in Africa:A Cultural, Ideological, and Legal Examination", note 19.

³⁴ Cobbah, J.A.M, "African Values and the Human Rights Debate:An African Perspective", 9 HRQ, 1987, 309.

³⁵ibid at 310

³⁶ibid at 320.

Welch is of the view that there was recognition and protection of human rights in the precolonial period. These however differed from the Western concept because a "web of kinship provided a framework within which individuals exercised their economic, political and social liberties and duties".³⁷ The African framework has been markedly influenced by external factors: artificially constructed nation-states for imperial economic convenience; a marginalised indigenous system of justice and rights protection in favour of a colonial ruling framework; incomplete codification of indigenous customary law by colonial administrators resulting in a parallel but unequal legal system; the introduction of constitutional rights protection primarily for the protection of the expatriate minority prior to independence; and constitutional provisions based on the colonial model which was lacking in popular support and ultimately legitimacy.

Subscribing to the communitarian view, Welch notes that rights were exercised in traditional African societies within a particular social context. These rights were not enforceable against a state or government. Protection of these rights was ensured through the social context of kinship relationship and expectation of behaviour. While undoubtedly, as with most systems of rights protection, there existed inequities in terms of age, gender and ethnic groups in the guarantee and operation of these rights, the ignorance of Europeans of the way the system worked meant they had little regard or understanding for it and imposed their own values, perhaps also for administrative ease. Erroneous perceptions also led to belief that there existed no form of rights in traditional African societies.

Mahmud³⁸ critiques communitarian ideals and dismisses them as a politically expedient means of shoring up political power by the

³⁷ op cit., note 19, in Welch and Meltzer (eds) HUMAN RIGHTS AND DEVELOPMENT at 11.

³⁸ Mahmud, Sakah, op cit., note 32.

ruling elite. He notes that most of these traditional values - provision of food, shelter - were subject to inequalities in terms of age, gender, lineage; they were essentially privileges not necessarily available on an equal basis to all members of society, they could not be laid claim to and they were privileges granted to members of the community.

Mutua³⁹ also identifies what he describes as an African cultural fingerprint but he approaches the debate from a different aspect. In a paper in which he argues for a reconfiguration of a rights regime that would have legitimacy in Africa, he identifies and elaborates on human rights ideals in existence in indigenous societies prior to colonisation. He is critical of universalists or "cultural chauvinists" who are dismissive of the African cultural fingerprint firstly because it is implicit in their work that only European liberalism, which is claimed to be inevitable under modernisation, can be the foundation for the concept of human rights. There is a likelihood that their stress on universality may lead to a reinforcement of culture as a reaction. In any event, he argues that by making liberalism a concomitant development with modernisation, this places the concept of human rights, for which there is widespread consensus on its derivation, within a specific culture. Secondly, a universal argument implies a duty to impose that concept of human rights on non-European cultures because it is universal. Mutua is also critical of Africanist writers who claim a distinctively African concept of human rights because they exaggerate its uniqueness. This unique value they assert fails to recognise that concepts of human dignity - the basis of human rights - are inherent in all human societies. African traditional communities were communitarian⁴⁰ but changes have been wrought in modern day African urban society through a combination of colonisation, industrialisation and modernisation. These have not combined to

³⁹ "African Cultural Fingerprint", op cit., note 24.

⁴⁰ see generally Fadipe, N.A., THE SOCIOLOGY OF THE YORUBA, Ibadan University Press, 1970, reprinted, 1990 for the structure of Yoruba society.

totally transmute or even transform the pre-existing society into a wholly modern society. In fact, rural society remains largely unchanged by the effects of industrialisation and modern society and traditional values still hold sway. In urban areas, modern African society remains an uneasy mix of traditional values and modern influences.

"What may best characterise contemporary Africa is a richness, or confusion, of norms: expectations imposed during the colonial period, presuppositions inherited from earlier periods, and new ideas developed since independence."⁴¹

A shift of emphasis in the whole debate, which is overlooked and with which I agree, was recognised by Pollis and Schwab and clarifies the whole issue;

"It should not be forgotten that the San Francisco Conference which established the United Nations in 1945 was dominated by the West, and that the Universal Declaration of Human Rights was adopted at a time when most Third World countries were still under colonial rule. Thus to argue that human rights has a standing which is universal in character is to contradict historical reality. What ought to be admitted by those who argue universality is that human rights as a western concept based on natural right *should* become the standard upon which all nations ought to agree, recognizing however, that this is only one particular value system."⁴²

⁴¹ Welch in Welch & Meltzer, HUMAN RIGHTS AND DEVELOPMENT, op cit., note 19, at 15.

⁴² Pollis, A., & Schwab, P., 'Human Rights:A Western construct with limited Applicability' in Pollis, A. & Schwab, P., (eds) HUMAN RIGHTS:CULTURAL AND IDEOLOGICAL PERSPECTIVES, Praeger Press:New York, 1979 at 4.

They go on to state further that "[i]f the notion of human rights is to be a viable universal concept it will be necessary to analyze the different cultural and ideological conceptions of human rights and the impact of one on the other."⁴³

Essentially, the tensions within the human rights discourse are artificial, even if genuine. The crux of the matter appears to be that there may exist norms within variable cultures around the world which correspond to the human rights contained within international documents. These norms have been variously decribed as principles of human dignity or traditional African values. It has been suggested that the Western concept of dignity is expressed as human rights.⁴⁴ All the commentators agree that cognisance needs to be taken of these values; it is the extent to which recognition is given and the level of legal formulation that appears to be thorny. Differing cultures and values do not obliterate the problems of abuse in any milieu. Where discrimination exists, it must still be addressed, either with regard to the value system of a specific culture or with reference to accepted human rights norms.

Eugene Kamenka has written that "Peoples...are...members of the human race. As such, they are entitled to dignity, respect, and the recognition that they are fully members of the human race. They are not entitled to immunity from outside or internal criticism of their dominant customs, practices and traditions in so far as these are themselves destructive of respect for persons, of moral compassion and of the recognition of the moral equality of all people and the destructive character of pain,

⁴³ ibid at p15.

⁴⁴ Leary, V., 'The Effect of Western Perspectives on International Human Rights' in An-Naim, A. and Deng, F., (eds) HUMAN RIGHTS IN AFRICA: CROSS CULTURAL PERSPECTIVES, Brookings Institute, 1990, chapter 2, hereafter An-Naim and Deng, HUMAN RIGHTS IN AFRICA.

suffering, and deprivation as regular features of social life."⁴⁵

It is possible to argue that despite the fact that human rights are Western in inception, they are and should be considered universal as Pollis and Schwab posit because they have been accepted all over the world. Communitarian values may be more important in African societies but it does not invalidate the relevance of human rights norms to their society. Human rights serve to protect people individually and within groups and can help to regulate competing claims.⁴⁶ Further, there have been considerable contributions by developing countries to the development of human rights.⁴⁷ The approach in the African Charter and the Charter on the Rights and Welfare of the Child, discussed

⁴⁵ Kamenka, E., 'Human Rights: Peoples Rights' in Crawford, J. (ed) RIGHTS OF PEOPLES, Oxford, Clarendon Press, 1988 at 133.

⁴⁶ Howard, R., 'Group versus Individual Identity in the African Debate on Human Rights' in An-Naim and Deng, HUMAN RIGHTS IN AFRICA, chapter 7. Howard states that the argument of human rights equalling anomic individualism is based on a misperception of the reality of Western based societies. Rights based philosophy and individualism simply occurred around the same time and are not an inevitable consequence of industrialisation. Yet, in an earlier work HUMAN RIGHTS IN COMMONWEALTH AFRICA, she argued that modernisation in the modern African nation states has resulted in a dislocation of the communitarian values of traditional societies resulting in more individualism and as such human rights are the ideal tool to regulate and protect the relationship between the individual and the state. To note this does not invalidate her argument of the relevance of human rights norms within communitarian societies. But the premise of her earlier argument that modern society has influenced and informed behavioural norms to the extent that the appropriate safeguard is the notion of human rights appears to have shifted to a more radical universal strain where the value of human rights norms is not obviated by a differing value system.

⁴⁷ This is particularly true with the development of so-called third generation rights like the right to development, a declaration on which was adopted by the U.N. General Assembly in 1986. Clearly, existing documents did not adequately address the whole gamut of issues and areas important to developing countries. While the proliferation of Declarations may be counter-productive in the long term, they do serve as persuasive reminders of the values considered to deserve the moral imperative of rights.

below, which couples rights and duties is illustrative.

The central issue, however, is the enforcement and implementation of human rights. For enforcement to be effective, principles need legitimacy within any cultural context; they need acceptance by the community which is expected to rely on them for the protection of their rights. As Abdullahi An-Naim⁴⁸ has stated, the inefficacy of the implementation of established rights may lie in the lack of cultural acceptance. Cultural legitimacy acts as a framework for internal implementation and gives the requisite acceptance of values that is required for effective enforcement. Obstacles to effective implementation also include the underdeveloped nature of most African economies and the lack of the social conditions necessary for rights protection and these factors make it imperative that the rights discourse is imbued with a sensitivity to the practical realities. The specificities of the African continent, with respect to the limitations of the rights discourse⁴⁹ must inform and influence approaches to implementation. Cultural legitimacy is an important aspect of this, not only because it aids implementation, but because it is operative at the implementation stage. It means that cultural aspects of a society can be assimilated into the application of the substance of the rights. Cultural legitimacy carries the scope of universality of rights with cultural implementation.

Official recognition of human rights instruments through ratification does not amount to internal legitimacy. This is particularly important in an African context given the uneasy relationship between the formal State and the people. Identification of nationality tends to be primarily with one's ethnic group with all the cultural implications as opposed to the state. Legitimacy of values, societal organisation, dispute resolution and intra-ethnic socialisation is determined by that

⁴⁸ An-Naim, A.A., in An-Naim and Deng, (eds), HUMAN RIGHTS IN AFRICA, chapter 13.

⁴⁹ see further Chapter 3.

cultural identification. The role of the state and the activities of government are detached from societal organisation. It remains difficult to attach cultural significance to governmental action. Consequently, human rights are to be viewed in a cross-cultural perspective, within a relativist sensitivity in order to be legitimate within any society. The substance of rights are universal while the implementation may vary in form. Shwartz⁵⁰ posits the view that universal support for human rights is possible if it draws on elements from differing cultural traditions, if there is sufficient integration of civil, political and economic rights and if it enables self-determination of all nations. This culture of human rights can provide a system for governing and regulating world society.

PART II

A. REGIONAL PROMULGATIONS ON RIGHTS PROTECTION

1. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights took essentially a holistic view of rights, primarily due to geo-political and historical reasons. The success of the breadth of rights tackled within such a framework has yet to be proven. The inclusion of notions of African values and traditions has enabled assertion of a differing but valid world view. This world view does not obviate nor invalidate the universal nature of international human rights principles.

Historical factors play an important role in the extent to which African states independently and collectively through the Organization of African Unity have been able to contribute to the development of international law.⁵¹ At the time of the

⁵⁰ "Human Rights in an Evolving World Culture", in An-Naim and Deng (eds) HUMAN RIGHTS IN AFRICA, chapter 14.

⁵¹ See Elias, T.O., NEW HORIZONS IN INTERNATIONAL LAW, Sijthoff & Noordhoff Publishers B.V.:The Netherlands, 1979, Chapter 2, pp21-34, on the contribution of Asia and Africa to contemporary international law.

proclamation of the Universal Declaration of Human Rights, most African countries were still under colonial rule. As African states began to gain independence, the primary issues of concern were self-determination, racism and apartheid. State territorial integrity and sovereignty were considered the most important forms of rights protection. Safeguards against any future attempts at territorial or sovereign subjugation were of the paramount importance. The new state, then was the primary organ requiring protection. This history, and the perceived threat of future harm informed the establishment of the OAU and the contents of its Charter.

The following section will briefly look at the factors that led to the establishment of the OAU, some of its substantive contents, the principal institutions, factors that led to the drafting of the African Charter on Human and Peoples Rights and the concept of African values. It demonstrates that in following established organisational structures of political organisation and human rights protection, the African system of rights protection has replicated the exclusionary nature of the international legal order which is detrimental to the protection of women's human rights.

1.1 The Organization of African Unity (OAU)

The Organization of African Unity⁵² was constituted at a conference of African heads of state and government in Addis Ababa held from May 23 to 26, 1963 to promote the unity and solidarity of African and Malagasy states.⁵³ There were initially 30 signatories to the Charter but that number has since increased to 53. Namibia joined after independence in March 1990 and

⁵²OAU Charter, adopted 25th May, 1963, 47 UNTS 39, reprinted 2 ILM, 766, 1963, see also Sohn, L. (ed) DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS, Vol. 1, 62, Inter-American Institute of International Legal Studies, 1971 and also Degenhardt, Henry, W. (ed), Day, Alan, J. (Gen. Ed.), TREATY ALLIANCES OF THE WORLD, 3rd edition, (Keesing's reference publications), Longman Group Ltd, 1981.

⁵³Article 2(1)(a), OAU Charter.

Eritrea in May, 1993. South Africa joined after its first multi-racial elections in 1994. All the North African countries with the exception of Morocco are members. Morocco left the Organization in 1985 in a dispute over the admission of the Sahrawi Arab Democratic Republic (SADR). Morocco requested the expulsion of SADR at the 1992 head of state summit which was rejected.

The principal institutions⁵⁴ of the Organization are the Assembly of Heads of State and Government which meets at least once a year, the Council of Ministers which meets at least twice a year to discuss the implementation of the Organization's accords, the General Secretariat with an administrative General Secretary to direct the affairs of the secretariat and the Commission of Mediation, Conciliation and Arbitration⁵⁵ which was replaced in 1993 by the Mechanism for Conflict Prevention, Management and Resolution.⁵⁶ The OAU had been active in its early years in mediation and conciliation attempts in disputes between its member states.⁵⁷ Faced with increasing conflicts on the

⁵⁴Article 7, OAU Charter.

⁵⁵see Sohn, L., DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS, for the Protocol of the Commission of Mediation, Conciliation and Arbitration, 1964, at 69, Rules of procedure of the Assembly of Heads of State and Government, 1964, 77, Rules of Procedure of the Council of Foreign Ministers of the OAU, 1963, 86 and Functions and Regulations of the General Secretariat of OAU, 1963, 92.

⁵⁶ see Part II of this Chapter and the Secretary General's Report on "Resolving Conflicts in Africa - Implementation Options" OAU Information Services Publication - Series (II), 1993.

⁵⁷See generally, Zartman, I.W., "The OAU in the African State System", pp13-44 at 14-19, Wiseman, H., "The OAU:Peacekeeping and Conflict Resolution", pp123-154, Damis, J., "The OAU and Western Sahara", pp273-296 and Pittman, D., "The OAU and Chad", pp297-326 in El-Ayouty, Y. & Zartman, I.W. (eds) THE OAU AFTER TWENTY YEARS (A SAIS study on Africa), Praeger:New York, 1984. See also Fredland, R., A GUIDE TO AFRICAN INTERNATIONAL ORGANIZATIONS, Hans Zell Publishers, U.K., 1990, at 27-28 for a table of African disputes considered by the OAU up to 1980.

continent, the NGO Africa Leadership Forum, the OAU and the UN Economic Commission for Africa sponsored a conference in Kampala, Uganda in 1991. The final report, the Kampala Document, proposed the establishment of a permanent Conference on Security, Stability, Development and Cooperation and called for the establishment of continental peacekeeping machinery. Based on this theme, plans were made by the OAU for the establishment of a Conflict Management Mechanism and the Mechanism for Conflict Prevention, Management and Resolution was established in June, 1993 by the adoption of a Declaration in Cairo by the Assembly of Heads of States and Government.⁵⁸ The central organ of the mechanism is the Bureau of the Summit,⁵⁹ a committee consisting of member states,⁶⁰ with the Secretary General working closely with and acting under the supervision of the central organ. The idea of a wholly OAU financed peace-keeping operation was retained as a long-term measure with resort to UN financial and logistical assistance where necessary. It was agreed that the OAU could mount small observer operations as it did in Rwanda.⁶¹ The mechanism, as with the OAU, is beset with financial constraints which will affect its ability to implement its plans.

There are various specialised commissions⁶² in the OAU, in a structure similar to that of the UN, including the Economic and Social Commission, the Educational and Cultural Commission, the Defence Commission and the Scientific, Technical and Research

⁵⁸see Bakwesegha, C.J., op cit. on conflict resolution by the OAU. see also Keller's introduction to AFRICA IN THE NEW INTERNATIONAL ORDER, pp11-12 on Kampala conference.

⁵⁹para 149 Secretary General's Report.

⁶⁰ At the 30th Assembly in 1994, the following member states were named as members of the Bureau; Benin, Chad, Cote d'Ivoire, Egypt, Ethiopia, Mauritius, Nigeria, South Africa and Tunisia.

⁶¹ see paras. 170-171 of the Secretary General's report.

⁶²Article 20, OAU Charter.



Commission.⁶³ The annual conference of the OAU takes place each year in the member state which is due to take over the chairmanship of the Organization for the next year. There have been three extraordinary conferences, permitted under Article 9 on approval by the majority of the member states; the first was to discuss the Angolan crisis, the second in 1980 to address the continent's economic problems and the third, in 1990 on the African debt problem.⁶⁴

The structure of the OAU is similar to that of the United Nations. The Charters of both Organisation make reference to the *raison d'etre* of each; the UN Charter makes explicit reference in its preamble to the two world wars which necessitated international co-operation to avoid such conflicts in the future and the OAU Charter refers in Article II to the eradication of colonialism, defence of sovereignty, independence and territorial integrity. While both organisations came into being for differing reasons, there are some commonalities. Both refer to international co-operation and the OAU Charter makes direct reference to the UN Charter and the Universal Declaration of Human Rights. Structurally, the Assembly of Heads of States and Government is akin to the UN General Assembly. Both meet annually, special sessions can be convoked,⁶⁵ both elect a

⁶³ In addition to the Assembly of Heads of States and Government, the Council of Ministers, the General Secretariat and the Economic and Social Council, the Abuja Treaty of 1991 established as organs of the African Economic Community a Pan-African Parliament, a Court of Justice and Specialised Technical Committees under article 7. The established committees are on Rural Economy and Agricultural Matters, on Monetary and Financial Matters, on Trade, Customs and Immigration Matters, on Industry, Science and Technology, Energy, Natural Resources and Environment, on Transport, Communications and Tourism, on Health, Labour and Social Affairs and on Education, Culture and Human Resources. Article 25. For text, see 3 RADIC 1991, 792.

⁶⁴ An Extraordinary session on human rights in Africa is to be held in November, 1998 in Angola which was decided at the Yaounde summit in 1996.

⁶⁵UN Charter, article 20

president or chairman each session⁶⁶ and both may establish subsidiary organs to perform functions.⁶⁷ While there is nothing in the OAU comparable to the Security Council,⁶⁸ the maintenance of peace and security on the continent is arguably being dealt with under the aegis of the recently established Mechanism for Conflict Prevention, Management and Resolution which will also deal with dispute resolution, dealt with under Chapter VI of the UN Charter. Both Organisations have a secretariat. Structurally, the OAU has followed the pattern of institutional organisation of the United Nations.

While the OAU Charter affirms adherence to the Charter of the United Nations and the Universal Declaration of Human Rights in Article 2(1)(e), its main purpose on creation was and remains unity between African states in order to safeguard their independence and territorial sovereignty and to fight against colonialism and 'neo-colonialism in all its forms'.⁶⁹ It is essentially a political organisation intended to form a bulwark against outside interference while collaborating to develop Africa's autonomy economically, socially and culturally. The principles contained in Article III demonstrate the factors which informed the drafting committee: non-interference in internal affairs, sovereignty, territorial integrity of each state and the right to independent existence. Colonialism had so impacted adversely on the independence and sovereignty of the states that their primary concern was to prevent its incidence at any cost in the future. Main concerns at the time were the eradication of

⁶⁶UN Charter, article 21

⁶⁷UN Charter, article 22.

⁶⁸ the idea of establishing an African Security Council within the OAU has been discussed for many years but has found little favour with the member states who have generally felt that establishing such a council would erode the principle of sovereign equality of member states. See para 139, Secretary-General's report on Resolving Conflicts, 1993,

⁶⁹ Charter of the Organization of African Unity, preamble.

colonialism and apartheid from the continent. Human rights concerns were restricted to the minority regimes of South Africa and Rhodesia/Zimbabwe. Broader protection of human rights received no mention in the Charter.

"This neglect in 1963 is hardly surprising. The major preoccupation of the African leaders was how to enhance the security of the fragile state system which they had then just inherited from their erstwhile colonial masters. Already in this period some independent African states were seriously threatened by internal as well as external forces. Indeed, many of the African leaders that gathered in Addis Ababa in May, 1963 were already under threat from internal opposition groups. The Congo Crisis and the assassination of Sylvanus Olympio of Togo in a *coup d'etat* shortly before the founding conference of the OAU graphically illustrated this dilemma. Furthermore, the experience of African leaders during the colonial era did not inculcate in them respect for human rights. Many of them had served prison terms for daring to criticise the colonial policies. Besides, they inherited the colonial instruments of repression: the police, the intelligence services, the army, and the prisons."⁷⁰

The OAU's neglect of human rights on the continent can be ascribed to two related factors; protection of states' sovereignty and the application of the principle of 'non-interference in the internal affairs of States'.⁷¹ Violations of

⁷⁰ Sesay, A. *et al*, THE OAU AFTER TWENTY YEARS, Westview Press, Inc, 1984 at 79.

⁷¹ Article III (2), OAU Charter. The principle of 'non-interference' in a state's domestic jurisdiction is also contained in the U.N Charter, article 2(7). The article 2(7) defence is nowadays invoked primarily in response to threats of

human rights were assumed to come under internal affairs and did not admit interference by other states. However, the provision itself has not been absolutely prohibitive. The OAU involved itself in two cases of civil war; in Nigeria and Zaire, and member states have expressed their disapproval of coup d'etats by refusing to participate in sessions where new regimes have been part of the proceedings.⁷² In recent years, the burgeoning number of unresolvable conflicts on the continent, which has been the primary cause of displacement, devastation, hunger and the creation of refugees within Africa, has led to the creation of a Mechanism for Conflict Prevention, Management and Resolution within the OAU.⁷³

forceful intervention. The role of the UN system, in particular, the General Assembly in publicising the situation in South Africa, stimulating response to it and the role of the Security Council in ordering sanctions ensured that the prevailing view is that the establishment of a non-racial and democratic constitution that would guarantee equal rights to all was no longer a matter of domestic jurisdiction. See further Steiner & Alston, *op cit.* on the role of the UN in South Africa and the restriction of the domestic jurisdiction defence.

⁷² The regime of Togo was prevented from attending the inaugural conference of the OAU because of opposition from Nigeria, Guinea, Tanganyika, Sierra Leone, Ivory Coast, Niger and the Central African Republic. When Nkrumah was overthrown, Congo, Guinea, Mali, Tanzania, Kenya and Mauritania refused to participate at the OAU summit when attempts to deny participation to the new regime failed. When Idi Amin overthrew Obote in January 1971, both Obote and Amin sent delegations to the summit. Both delegations were supported to varying degrees by other countries. Neither delegations were seated and the Conference broke up. See Akinyemi, A.B., "The Organisation of African Unity and the concept of non-interference in internal affairs of member-states", *BYBIL* 1972-73, XLVI, pp393-400 at 399.

See Part III on Regional Institutions, *infra*, for more detail on the Assembly of Heads of Government and States, the principal institution of the OAU, and the appropriate forum for discussion of such issues.

⁷³ Established in June 1993 by the adoption of the Assembly of Heads of State and Government of a Declaration in Cairo. See further, Bakwesegha, Chris, J., "The role of the Organization of African Unity in Conflict Prevention, Management and Resolution", *International Journal of Refugee Law*, July 1995, pp207-219, OAU/UNHCR special issue.

The OAU Charter makes no explicit reference to human rights save a preambular statement reaffirming its adherence to the principles of the Charter of the United Nations and the Universal Declaration of Human Rights which 'provide a solid foundation for the peaceful and positive co-operation among states'. As a state-centric political organisation, individual rights were not mentioned.

However, events on the continent made it clear that some sort of formal legal document encapsulating the notion of rights, as with other regions, was necessary. The unprecedented levels of brutality reached by the regimes of Idi Amin of Uganda, Francisco Macias Nguema of Equatorial Guinea and Jean Bokassa of the former Central African Empire forced the OAU to take the question of human rights seriously. At the sixteenth ordinary session held in Monrovia, Liberia from 17-20 July 1979, the Assembly of Heads of State and Government decided to undertake a study 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 protect human and peoples' rights.

The African Charter on Human and Peoples' Rights was adopted on 17 June 1981⁷⁴ and entered into force on 21 October 1986. The historical context⁷⁵ of the origins of the African Charter lay in

This replaced the Commission of Mediation, Conciliation and Arbitration, one of the institutional mechanisms established under the OAU Charter, but which was effectively dormant from its establishment. Its jurisdiction was limited to inter-state disputes (thus excluding intra-state disputes) and was concerned with dispute resolution, not prevention. See further the Secretary General's report on "Resolving Conflicts in Africa - Implementation Options", OAU Information Services Publication - Series (II) 1993 which considers the feasibility of establishing a Mechanism for Conflict Prevention, Management and Resolution which was subsequently established in 1993 as noted.

⁷⁴ Eighteenth Assembly of the Heads of State and Government of the Organisation of African Unity in Nairobi, Kenya. Reprinted in 21 ILM 58, 1982.

⁷⁵ The decision of the OAU meeting to call a meeting of experts to prepare an African Charter had part of its roots in

increasing despotism in Africa, continued apartheid in South Africa and the struggle for a new international economic order. Colonialism and institutionalised racism, the *raison d'etre* of the OAU showed no sign of waning, at the continental level atrocities were burgeoning and at the international level, African states were trying to assert themselves to realign the inequities and inequalities in the economic system. It was not possible to maintain a stance of rights due to the state in a context where states were rampantly undermining the human rights of its people. It became imperative that principles that promoted the respect for human rights be readily applicable to Africa.

An additional influential factor was the international affirmation of human rights and fundamental freedoms as principles integral to the full development of a country. The call for a new international economic order, primarily by developing nations, was linked to the right to development which itself related to the enjoyment of civil, political, economic, social and cultural rights.⁷⁶ The time was essentially propitious for a regional document on the protection of human rights.

the United Nations which had mooted the point of establishing African machinery at various seminars on human rights and in fact had various African situations such as Uganda, under investigation. Ramcharan, B.G., "The travaux preparatoires of the African Commission on Human Rights", 13 HRLJ 1992, 307.

⁷⁶ The New International Economic Order and the Promotion of Human Rights UN Doc E/CN.4/Sub.2/1983/24/Rev. See *infra* Chapter 3 for a full discussion.

1.2 An African Concept of Human Rights?

The drafters⁷⁷ of the Charter had to reconcile several issues. The diversity, different ideology and multi-cultural nature of all African countries had to be taken into account. The proposed Charter, while conforming to universal principles had to contain African values. The Charter⁷⁸ is distinct in that it contains both civil and political rights as well as economic, social and cultural rights in one document which differs from other human rights regional instruments. It is a far-reaching and ambitious document. It includes a familiar catalogue of rights. In addition the notion of peoples' rights, the right to self-determination,⁷⁹ the concept of rights⁸⁰ and duties⁸¹ and the inclusion of the right to development⁸² and a satisfactory environment⁸³ were all a new and laudable approach to an African concept of human rights. Although article 29 of the Universal Declaration of Human Rights refers to the general duty of the individual to the

⁷⁷ For information on the drafting history see Ramcharan, B.G. op. cit. and Kodjo, E., "The African Charter on Human and Peoples' Rights", 11 HRLJ, Nos 3-4, 1990, 271 at 274-275. See also, Kannyo, Edward, "The Banjul Charter on Human and People's Rights: Genesis and Political Background" in Welch, C. & Meltzer, R., (eds), HUMAN RIGHTS AND DEVELOPMENT op cit.

⁷⁸ See Gittleman, R., "The African Charter on Human and Peoples' Rights: A Legal Analysis", VJIL v22(4), 1982, pp667-714, Umozurike, U.O., "The African Charter on Human and Peoples Rights", 77 AJIL, 1983, 902, Bondzie-Simpson, E., "A critique of the African Charter on Human and Peoples' Rights", Howard Law Jnl v31(4), 1988, pp643-665 and Okere, Obinna, B., "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", HRQ v6(2) 1984, pp141-159.

⁷⁹ article 20. Article 21 deals with the right of all peoples to freely dispose of their wealth and natural resources.

⁸⁰ Chapter I, ACHPR.

⁸¹ Chapter II, ACHPR.

⁸² article 22, which is expressed in terms of States having the duty to ensure the exercise of the right to development.

⁸³ article 24.

community within which the full development of his personality is possible, the concept of duties in the ACHPR is more specific and requires that the individual undertake certain responsibilities.⁸⁴ While common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights refer to the right to self-determination, article 20 of the ACHPR puts self-determination in the context of freedom from domination and refers to the right to self-determination as inalienable.

The document, however, lacks precision in several respects. There is no definition of 'peoples', there is inadequate clarity with regards to the right to self-determination, particularly in the context of peoples' rights and there is no definition or explanation as to what constitutes culture.⁸⁵ It is questionable whether the idea of duties of the individual to family, community and indeed the state is enforceable, or even justiciable, besides which there exists inherent potential for conflict of duties in the named areas. There are no derogation clauses and consequently no non-derogable rights. The clawback clauses, where they exist, are drafted widely and restrict the protected rights with no procedural guarantees. For example, article 6 provides that no individual may be deprived of his or her liberty except for reasons and conditions previously laid down by law and article 8, the provision for freedom of conscience and free practice of religion, operates subject to law and order. However, as discussed below, the use and operation of retrospective legislation and ouster clauses in particular countries can result in uncertainty as to what constitutes law at any given time. Yet, in article 11, the right of free assembly, and article 12, the right of freedom of movement, provision exists for the enjoyment of these rights except under certain stated circumstances such as the interest of national security, public health, law and

84 See articles 27-29, ACHPR.

85 article 17(2) and especially article 29(7) where the Charter imposes a duty on the individual to preserve positive African cultural values.

order and freedom of others.

The institutional mechanism for the implementation and enforcement of the Charter, the African Commission on Human Rights, is hampered by restrictions on what it can do and the rule on confidentiality although the Commission has, since 1994, begun to make disclosures of its work.⁸⁶ There was no provision for a court to enforce the rights although this is now in the process of being established.

The Preamble of the African Charter demonstrates the concerns of the drafters. There is a reaffirmation of the pledge made in Article 2 of the Charter of the OAU 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." While taking into consideration the traditions of Africa, there is recognition 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." There is a statement that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone." There is a categorical statement "that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights" and a further reaffirmation of the adherence of the state members of the OAU to "the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the

⁸⁶In its seventh activity report, submitted to the OAU in 1994, the Commission made disclosures on its work by indicating the status of specific cases before and stating its views on admissibility. See Ankumah, E.A, "Towards an Effective Implementation of the African Charter" Interights Bulletin, 1994, Volume 8, No 3, a special edition on the Protection of Human Rights in Africa.

Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations."

There is an ambivalence in the preambular paragraphs that aptly identifies the quandary of African governments at the time. The eradication of colonialism, apartheid and discrimination was highly central to ensuring the human rights of the African people. The difficulties that states had in asserting their sovereignty is evidenced in the repeated references to peoples' rights. While there is recognition of human rights as being natural to human beings, it appears to be subsumed to the "reality and respect of peoples' rights [which] should necessarily guarantee human rights." In addition, this natural right also implied the performance of duties by individuals. The satisfaction of economic, social and cultural rights is given priority over civil and political rights from the onset. The Preamble states that "it is henceforth essential to pay 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". Although there is reaffirmation of the principles of human rights contained in international documents and promulgated by international organisations such as the United Nations, the caveat of African values and traditions is attached. The Preamble states that the promotion and protection of human and peoples' rights must take into account the "importance traditionally attached to these rights and freedoms in Africa". There are several contradictory statements within the Preamble itself which does not bode well for the text. Are the fundamental rights and freedoms guaranteed under the African Charter dependent on the performance of duties? It is also questionable to make civil and political rights conditional on the satisfaction of economic, social and cultural rights.

Rights

Chapter I of the Charter enumerates rights and duties. Article 2, the non-discrimination provision states:

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 and social origin, fortune, birth or other status.

Article 3 states:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Under the non-discrimination article, article 3 should apply without distinction. However, the existence of parallel customary legal systems⁸⁷ in Africa operate to discriminate against women particularly in the area of family law⁸⁸ and in addition conflict with the provisions of article 18(3) of the Charter which provides that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and child as stipulated in international declarations and conventions." Prima facie, the guarantee of equal rights under article 3 is breached by operation of national law in most countries. For example, Constitutional provisions exist for formal legal equality in Nigeria⁸⁹ but in the area of personal laws, the main site for inequality in terms of the

⁸⁷ See Neff, Stephen, C., "Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the light of case law from Botswana, Lesotho and Swaziland", 33 ICLQ 1984, 331. While the main thrust of the article is concerned with the southern African countries and the case law, there is a short discussion of the issue of non-discrimination.

⁸⁸ see further Chapter 5.

⁸⁹ section 39, Chapter IV on fundamental rights.

promotion and protection of women's rights, customary law is usually given precedence over statutory provisions.⁹⁰ The Charter has failed to consider and make provision for an African problem they could have envisaged.

"The difficulty with the Banjul Charter, however, is that it does not contain an express saving for discriminatory laws which are justiciable on grounds of reasonableness

...

The existence of what amount to parallel legal universes within African countries is certainly not easy to square with the notion of equality before the law. Yet such squaring should be done, in the overriding interest of ensuring that the Banjul Charter norms are able to function meaningfully in the current African social framework."⁹¹

Article 6,⁹² article 7,⁹³ article 8,⁹⁴ article 9,⁹⁵ article 10,⁹⁶

90 For instance, section 69 of the Matrimonial Causes Act, Laws of the Federation of Nigeria, 1990 rev. ed; Cap 220 excludes the application of its ancillary relief provisions to spouses married under customary law. See further Chapter 5 on obstacles to the enjoyment of the human rights of women especially the conflicts that exist between formal legal equality and existing customary law.

⁹¹ Neff, S.C, op cit at 336.

⁹²the right to liberty and security of the person

⁹³ the right to have a cause heard

⁹⁴ freedom of conscience, the profession and free practice of religion

⁹⁵ freedom of information

⁹⁶ freedom of association

article 11,⁹⁷ and article 12,⁹⁸ contain essentially civil and political rights. These rights are circumscribed by reference to operation within the law. There are no procedural guarantees that go with these rights, particularly under article 7 which guarantees the right to have a cause heard. The 'margin of appreciation',⁹⁹ which allows national security or public safety limitations to the enjoyment of rights has uneven application in the Charter.¹⁰⁰ Initially, it would appear that these rights offer wide guarantees of protection because they are only limited by operation of the law and because of the lack of derogation clauses. In actual fact, they are potentially restrictive because they are subject to differing national laws, whatever they may be and however potentially they conflict with the guarantees under the Charter. The clawback clauses effectively restrict the formal guarantees.¹⁰¹ They restrict the formal guarantees because unlike, for example, the European Convention on Human Rights¹⁰² which provides in its corresponding clawback clauses that the rights guaranteed must be protected¹⁰³ in conformity with the rights of others, or where there is a restriction it must be prescribed by law and necessary for the protection of other,

⁹⁷ the right to freely assemble with others

⁹⁸ freedom of movement

⁹⁹ see Higgins, R. "Derogations under Human Rights Treaties", BYBIL 48, 1978, 281.

¹⁰⁰ As noted above, articles 11 and 12 have some express limitations to the enjoyment of the rights they provide while the others do not. These others are limited only by operation of the law.

¹⁰¹ See Higgins, R., op cit. See also Gittleman, R., "The Banjul Charter on Human and Peoples' Rights: A Legal Analysis", in Welch and Meltzer, HUMAN RIGHTS AND DEVELOPMENT, op cit. note 19, at p154ff for an analysis of the lack of provision for derogations in the ACHPR.

¹⁰² Convention for the Protection of Human Rights and Fundamental Freedoms and relevant protocols (European Convention) signed in Rome 4th November, 1950 and entered into force on 3rd September, 1953, 213 UNTS 221.

¹⁰³ For example, see articles 8(2), 9(2), 10(2) and 11(2) ECHR.

public morals or national security reasons and necessary in a democratic society, the clawback clauses in the African Charter need only be prescribed by law.

This includes, in practice, retrospective legislation, whether by decree or otherwise and legislative enactments which oust or exclude the courts' jurisdiction or nullifies the courts' jurisdiction.¹⁰⁴ The use of ouster clauses, for instance in Nigeria, are arguably prescribed by law but have the effect of excluding the provisions of the Charter. Fawehinmi notes that between independence in 1960 and 1991, a total of 164 laws were promulgated by Federal Governments containing ousters of courts' jurisdiction; the total number of ouster sections in those laws being 216. The African Charter was ratified by Nigeria in 1983 by Act No.2 of 1983 as the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act 1983 with a commencement date of 17th March, 1983. It is a part of national law. Article 7 of the Charter provides that:

"1. Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for

¹⁰⁴See Fawehinmi, G., "Denial of Justice through ouster of Courts jurisdiction in Nigeria." *Journal of Human Rights Law & Practice*, Vol.1 No.2, 7, 1991.

an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

Ouster clauses or enactments may be general, may be retrospective to protect unconstitutional laws, may be used to prevent the general process of court or may be used to intervene, stop or nullify court orders.¹⁰⁵ Such use of ouster clauses and provisions also directly challenge the role of the judiciary and in the absence of activism and dynamism by a judiciary dedicated to the protection of their independence, violations of rights will continue unabated despite regional and international treaty obligations.¹⁰⁶ Ouster of a court's jurisdiction violates the right of an individual to have his cause heard and retrospective legislative enactments also violate s7(2).¹⁰⁷ Nonetheless, no matter how heinous or unacceptable the law or the exceptional circumstances in which the enactments have been promulgated for whatever aims, the limitation or violation of any individual's rights will, *prima facie* be valid under the Charter if it is prescribed by law. It is possible, however, to argue that the

¹⁰⁵ Fawehinmi, at pp5-9.

¹⁰⁶ See Onyekpere, E., "Democracy, Human Rights, Dictatorship and the Nigerian Judiciary", JHRLP, Vol 3, Nos. 1,2,3, December, 1993 (Composite Edition), 49.

¹⁰⁷ See Annual Report, 1994; A CLO report on the state of human rights in Nigeria, Civil Liberties Organisation, 1995, especially pages 156-164 noting the various decrees promulgated by the incumbent military government during the preceding year. One of the decrees, Concord Newspapers and African Concord Weekly Magazine (Proscription and Prohibition from Circulation) Decree No.6, aimed at curbing freedom of expression and press freedom also prohibited the institution of proceedings or suit by any person against any act or thing done or purported to be done in respect of compliance with the decree and any suit or proceedings instituted shall be of no effect whatsoever. Another dissolved the national executive of a union, the Nigeria Labour Congress (Dissolution of National Executive Council) Decree No.9, violating articles 10 and 11 of the Charter on freedom of association and yet another, State Security (Detention of Persons) (Amendment) (No. 2) Decree No.14, stated that no writ of habeas corpus shall be issued by the order of any court for the production of any person, at 161-162. Other examples abound.

reference to prescription by law includes international law presumably including *jus cogens*.¹⁰⁸

Duties

Articles 27 to 29 deal with the concept of the duty of the individual towards his family and society. It is doubtful whether the notion of duties owed to a family, community, state or international community is enforceable or even justiciable. Article 27 states that:

"1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

The exact nature of these duties is not explicitly expressed. What it comprises of is not enumerated. The rationale for the whole notion of duties may be explained by article 29 where the individual's duty is stated to include maintenance of the family, including parents (article 29(1)), payment of taxes, (article 29(6)), service to the national community, (article 29 (2)) and preservation and strengthening of positive African values, (article 29 (7)). These duties are intended to foster a spirit of unity and perhaps to reinforce a notion of African communitarianism and values. But are they legal and justiciable?

The notion of duties as a correlative to rights is explained by Cobbah thus:

108 This argument has recently been presented before the Commission on the legality or otherwise of the execution of the Ogoni men in 1995 by the Nigerian government. The decision is forthcoming.

"Within the organization of African social life one can discern various organizing principles. As a people, Africans emphasize groupness, sameness, and commonality. Rather than survival of the fittest and control over nature, the African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility.

The extended family unit, like family units in nearly all societies, assigns each family member a social role that permits the family to operate as a reproductive, economic, and socialization unit. These roles of kinship, however, are defined differently than in Western families and the behavior (sic) of kin toward one another is different than that which pertains in the West. In many African societies, for example, there is no distinction between a father and an uncle, or a brother and a cousin. Among the Akans of Ghana the English word "aunt" has no equivalent. For the Akan all aunts are mothers - i.e., older mothers and younger mothers. Likewise there is no equivalence for the English word "cousin" in the Akan language. A cousin is simply a brother or a sister. The differences that one finds in responsibilities toward different kin people usually revolve around whether the particular society is matrilineal or patrilineal.

These kinship terminologies, that is, the way relatives are named, are related to the ideals and expected behavioral patterns and norms that govern family members. The kinship terminology defines and institutionalizes the family member's social role. "These roles are essentially *rights* which each kinship member customarily possesses, and *duties* which each kinship member has toward his kin." Viewed another way, the right of one kinship member is the duty of the other and the duty of the other kinship member is

the right of another."¹⁰⁹

Clearly, for proponents of African values or what Mutua has termed "the African cultural fingerprint",¹¹⁰ the concept of duties is an inherent part of African communitarian society and is quite properly expressed in correlation to the language of rights in the African Charter. He identifies and elaborates on human rights ideals which existed in precolonial societies in his attempt to reconfigure a rights regime that could achieve legitimacy in Africa and become the basis for social and political reconstruction. Inherent in his thesis is the concept of duties. The concept of duties is an important contribution to culturally specific values because it informs the human rights discourse with an African contribution. What are these African values? They seem to incorporate primarily social and kinship relations and are expressed by Mutua as:

"The principles and ideals common to all these conceptions are, according to the author's own observations of various African societies, respect for, and protection of, the individual and individuality within the family and the greater socio-political unit; deference to age because a long life is generally wise and knowledgeable; commitment and responsibility to other individuals, family, and community; solidarity with fellow human beings, especially in times of need; tolerance for difference in political views and personal ability; reciprocity in labor issues and for generosity; and consultation in matters of governance."¹¹¹

¹⁰⁹ Cobbah, J.A.M, "African Values and the Human Rights Debate: An African Perspective". HRQ volume 9, 1987, 309 at 320-321, footnotes omitted, italics are author's own.

¹¹⁰ Mutua, Makau wa, "African Cultural Fingerprint" op cit., note 24.

¹¹¹ ibid at 352, footnote and italics omitted.

"In practical terms, this philosophy of the group-centered individual evolves through a series of carefully taught rights and responsibilities. At the root were structures of social and political organization, informed by gender and age, which served to enhance solidarity and ensure the existence of the community into perpetuity

...

Relationships, rights, and obligations flowed from these organizational structures, giving the community cohesion and viability. Certain obligations, such as the duty to defend the community and its territory, attached by virtue of birth and group membership."¹¹²

I quote at length from Cobbah and Mutua in order to show exactly what are denoted African values. African values consist of an intricate network of rules and regulations that govern social and kinship relationships. Culturally based as these values are, it is unsurprising that the manifestations of such mores should be primarily social. In terms of an easily identifiable notion of African values with respect to regional protection of human rights, I remain unconvinced that this is evidenced either in the regional human rights documents or in their institutional mechanisms.

The documents make reference to "African Values" but they are not defined. Social values are important, they influence societal organisation and are also linked to moral values which in turn influence legal policy and the law. Yet the idea of an intrinsically African notion of cultural values contradicts the fact that culture is not monolithic, nor is it possible to attribute a culture to a continent. The only common African experience is colonialism and the effect it has had on the economic and social development of the majority of African countries.

¹¹² Mutua, *ibid* at 361.

While there may be similarities in culture amongst countries in Africa, it remains the case that, save in express reference to "culture" the regional human rights documents do not evidence an intrinsic notion of African cultural values. Further, regional institutional mechanisms for rights protection do not demonstrate a specific African model of rights promotion and protection; they are based on international and other regional models.¹¹³ The specificities of Africa relates directly to its geo-political, colonial history especially with regard to economic underdevelopment which has affected the capability of many countries in terms of social development. These specificities need to inform the implementation of human rights; in the creation of the social conditions on which the promotion and protection of human rights is predicated.

2. African Charter on the Rights and Welfare of the Child¹¹⁴

The proclamation of the African Charter on the Rights and Welfare of the Child is evidence of the commitment of the OAU to the regional development of human rights norms and protection. The precursor to the Charter was the Declaration on the Rights and Welfare of the African Child, 1979¹¹⁵ adopted by the Assembly of Heads of State and Government of the OAU at its Sixteenth Ordinary Session in Monrovia, Liberia which recognised the need to protect the welfare of the African Child. The Charter names

113 see infra Part B Enforcement Mechanisms.

114 1990, reprinted in 3 RADIC 1991, 173. For commentary on the Charter, see Thompson, B., "Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism", VOL 41 ICLQ 1992, 432.

115 AHG/ST.4 Rev.1. This Declaration was adopted during the period leading up to the adoption of the ACHPR in 1981 and was clearly part of the development of regional human rights protection. There is no clear reason why so much time elapsed before the Charter on the Rights and Welfare of the Child itself was adopted.

the UN Convention on the Rights of the Child,¹¹⁶ the OAU Declaration on the Rights and Welfare of the African Child and principles of the rights and welfare of the child contained in various OAU promulgations as sources of inspiration in its Preamble.

There are also references to African values in this Charter. The preamble mentions "...the virtues of their cultural heritage, ...the values of African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child..." The notion of duties is also mentioned. While article 1 states that "any custom, tradition or religious practice that is inconsistent with the rights, duties and obligations" in the Charter should be discouraged other articles refer to custom and tradition as part of the African child's heritage. For instance, article 11 on education states that the education of the child shall be directed, inter alia, to the "preservation and strengthening of positive African morals, traditional values and cultures".¹¹⁷ Reading the Charter in conjunction with the ACHPR, presumably the responsibility for cultural education of children falls within the remit of the family since the preservation of cultural values comes under Chapter II on duties in the ACHPR and is expressed in terms of relations with other members of society. Cultural leisure activities is referred to in article 12. There is specific protection in article 21 from harmful social and cultural practices where prejudicial to health or life of the child and article 12(2) prohibits child betrothal. A committee is established under article 32 to promote and protect the rights of the child with a reporting mechanism under article 43.

While the protection of the rights and welfare of the child appears to have emerged as part of the general discussion and development of human rights norms in the period leading up to the

116 UN Doc A/44/25, 1989.

117 article 11(2)(c).

adoption of the primary regional document on rights protection, the African Charter on Human and Peoples' Rights, it appears also to have been influenced by developments internationally which led to the adoption of the UN Convention on the Rights of the Child. The Children's Charter endeavours to incorporate a culturally relevant form of rights protection while retaining similar institutional elements to the UN Children's Convention such as a Committee¹¹⁸ and a reporting procedure.¹¹⁹

3. Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women

In June, 1995, the OAU Assembly of Heads of State and Government endorsed the decision of the African Commission on Human and Peoples' Rights to elaborate a draft protocol on the Rights of Women.¹²⁰

In addition to the usual international treaties on human rights such as the International Bill of Rights and the African Charter itself, the preamble of the draft protocol refers to the recognition of women's essential role in development affirmed in the UN Plans of Action such as on Human Rights in 1993,¹²¹ and Beijing¹²² in 1995. The preamble notes also that rights are considered by many in Africa to be the preserve of men despite the fundamental role of women in peace and development in Africa.

Article 1 defines discrimination as 'any distinction, exclusion or restriction based on sex whose effects compromise or destroy

118 article 43 UN Convention on the Rights of the Child.

119 article 44 UN Convention on the Rights of the Child.

120 a copy of the draft protocol is on file with the candidate. See appendix.

121 A/CONF.157/23.

122 Beijing Declaration and Platform for Action A/CONF./177/20, 1995.

the recognition, enjoyment or the exercise by women - regardless of their matrimonial status - on an equal basis with men, of human rights and fundamental freedoms in all aspects'. Article 2 provides for women to 'contribute to the preservation of those African cultural values that are positive and are based on the principles of equality, dignity, justice and democracy'. Articles 3 and 4 require State Parties to the protocol to take all necessary measure to eliminate all forms of discrimination against women, a similar provision to that in CEDAW, article 2. Article 5 prohibits the sentencing of a pregnant women to death, all forms of trafficking and commercial exploitation of prostitutes, medical or scientific experiments on women, all traditional or cultural practices physically harmful to women and girl children and requires State Parties to protect women against rape and sexual assault. Articles 6 and 7 deal with marriage and divorce. Under article 6, marriage is to be with the consent of both parties including polygamous marriages although the elimination of polygamy should be worked towards. The right of a women to keep her maiden name, retain or change her nationality and to confer it on her husband or children is contained in article 6. Article 7 provides for the equal right of women and men to seek divorce or annulment of a marriage. Article 7(2) prohibits the inhuman, humiliating or degrading treatment of widows. Article 7(4) provides for the widow to be the legal guardian of the children of the family and article 7(5) provides that a widow shall have the right to inherit her husband's property.

Access to legal services and education of women on their rights is provided for under article 8. Articles 9 and 10 provide for equal participation in politics and the promotion of peace and conflict management respectively. Article 11's definition of violence seems to incorporate the definition in the Special Rapporteur's report on Violence against Women in its reference to physical, sexual or psychological harm. Article 12 requires State Parties to eliminate discrimination in education, article 13 provides for equal opportunities for work, article 14 deals

with the provision of adequate healthcare for women, including pre and post-natal healthcare. Article 15 provides for the right to adequate supplies of food, article 16 for housing. Article 17 states that women 'shall have the right to live in a positive cultural environment and to participate at all levels in the determination of cultural policies and article 17(2) requires that State Parties should take measures to protect women from the harmful effects of all forms of fundamentalism. Article 18 provides for women to have the right to live in a healthy environment while article 19, with reference to the ACHPR requires that State Parties take appropriate measures to ensure women fully participate in the development process.

The draft protocol, while an important development for the protection and indeed the justiciability of women's rights on the African continent, draws from existing international human rights instruments, particularly, those dealing with the development and protection of women's rights such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹²³ Its references to culture relate only to the positive aspects of culture which do not harm women or girl-children. It seeks to provide protection from negative cultural influences, including attitudes that affect the protection of women's human rights. In drawing from existing developments on human rights it illustrates the position that African regional documents follow established patterns of rights protection. It recognises also that a lot of what constitutes 'African Values' are cultural values which may be detrimental to the achievement of rights for women.

123 UN Doc A/34/46, 1249 UNTS 14.

B. ENFORCEMENT MECHANISMS

1. The African Commission on Human and Peoples' Rights

The African Commission is the regulatory body of the ACHPR. It consists of eleven members serving in their personal capacity¹²⁴ and elected, from a list nominated by Member States of the Charter, by a secret ballot of the Assembly of Heads of States and Government.¹²⁵ Members are elected for a six year period and are eligible for re-election.¹²⁶ The Commission's mandate is to promote and ensure the protection of human and peoples's rights under the conditions of the Charter and interpret the provisions of the Charter at the request of a State Party, an institution of or recognised by the OAU and perform any task entrusted to it by the Assembly of Heads of State and Government.¹²⁷

The Commission is authorised to lay down its rules of procedure¹²⁸ and in 1995 revised rules of procedure were adopted.¹²⁹ The previous rules were not considered, by many, to be as effective as they could have been.¹³⁰ The Commission generally holds two sessions a year for about two weeks. Extraordinary sessions may be held and only two have been held so far (1987 and 1995, Saro-Wiwa's case). The Commission may receive communications from

¹²⁴ Article 31, ACHPR.

¹²⁵ Article 33, ACHPR.

¹²⁶ Article 36, ACHPR.

¹²⁷ Article 45, ACHPR.

¹²⁸ Article 42(2), ACHPR.

¹²⁹ Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted 6/10/95, 8 RADIC, 1996, 978. The previous Rules of Procedure had been adopted at the Commission's second session in 1988.

¹³⁰ Odinkalu, C. "Proposals for Review of the Rules of Procedure of the African Commission on Human and Peoples' Rights", HRQ, VOL 15, 1993, 533.

states¹³¹ and it may also receive 'other' communications.¹³² There is no requirement that the communications be from an alleged victim or from a non-governmental organisation. The requirements are that the communication is not anonymous, is compatible with the OAU Charter and the African Charter, is not written in an insulting or disparaging language, not based solely on information disseminated in the media, is submitted within a reasonable time after exhausting local remedies and that the cases must not have been settled by those states involved. The Commission reports to the Assembly of Heads of State and Government of measures taken within the provisions of the Charter who decide if it shall be published.¹³³ Applicable principles to be applied by the Commission include the UDHR, other UN documents, OAU Charter and provisions of other African documents in the area of human and peoples' rights. States Parties are required to submit a report on actions taken to implement the provisions of the Charter every two years.

There is no equitable gender distribution in the eleven member Commission. Until 1993 at the 14th Session when a nominee from Cape Verde was elected, there was no woman on the Commission. In 1995, another woman joined the Commission, a national of Congo.

The impartiality of members of the Commission has at times been open to question. For instance, it has happened that certain members have been serving members of the incumbent government in their states.¹³⁴ Although members are serving in their personal

¹³¹Articles 47 to 54, ACHPR.

¹³² see Odinkalu, C. & Christensen, C., "The African Commission on Human Rights: The Development of its Non-state Communication Procedures", 20 HRQ, 1998, 235-280.

¹³³Article 59, ACHPR.

¹³⁴The Congo Minister of Interior served on the Commission between 1987 and 1993 as did the Attorney General of Botswana during the same period. See Ankumah, E.A., THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS : PRACTICE AND PROCEDURES, Kluwer international Publishing, 1996, at 18.

capacities, the potential for conflict of interest is more likely if a serving member is a member of government, despite the fact that Commission members are not allowed to take part in the deliberations concerning their own member state. The tendency for members to take on other posts and responsibilities, even though admittedly appointment to the Commission is a part-time appointment, has also resulted in situations where members have not been able to fulfil their duties by attending sessions.¹³⁵ The fact that reporting under article 58 is to the OAU Assembly of Heads of Government and States is very tied to the political process.

The Secretariat which exists to support the work of the Commission is grossly understaffed and under funded. Not only does this add to the inefficiency of the work of the Commission, it has left the Commission open to the vagaries of conditional funding. Some NGOs have supplied staff at no cost to the Commission but they have tended to be Western staff. Not only has this marginalised African involvement in the administration and development of the work of the Commission, it is also highly inappropriate to have sensitive information dealt with by the nationals of non-member states of the Charter. These volunteers and interns draft decisions, sit in on the Commission's deliberation and have a day-to-day involvement in what is supposed to be an African regional mechanism.

Admissibility, Monitoring of States Reports and the Complaints Procedure

The practice¹³⁶ of the Commission in dealing with communications is to first ascertain whether a communication is receivable or not.¹³⁷ This appears to be a means of disposing of the cases that

¹³⁵ Ibid, at 47.

¹³⁶ Ibid. This is one of the few published accounts of the practice of the Commission. The reporting process was hampered at first by confidentiality.

¹³⁷ Ibid, p56ff.

do not fit in with the Charter provisions and it is confusing since these communications would presumably be also inadmissible. The notion of receivability makes it unclear whether a communication is *prima facie* inadmissible or has failed on its merits. Further, the Commission does not give reasons why a communication is irreceivable. Where a communication is received alleging a violation against a state that is not a member to the Charter, the communication is kept on file and if the state becomes a member, the communicant is informed and the communication may be re-submitted if desired.

The factors which influence the adequacy and quality of submitted state reports include the lack or insufficient mobilisation of national resources. The Commission issued guidelines to aid report preparation.¹³⁸ The purpose of the guidelines is to ensure that reports are made in a uniform manner and to reduce the need for the Commission to request additional information and to obtain a clearer picture of the situation in each state regarding implementation. The guideline includes a section, Section VII on women and requires each state report to include details of measures taken to eliminate the 'anachronism' of gender based discrimination. It is recommended that reports, instead of enumerating lists of legal instruments, should indicate how these are reflected in actual, economic, political and social realities and general conditions existing in their countries with data and statistics categorised according to sex. Whether this is done is unknown. The reports vary in quality,¹³⁹ a problem faced by other UN treaty monitoring bodies. An increasing use of alternate country reports by NGOs, to individual Commissioners, may be a way to obtain additional information that may be used in questioning country representatives. The Charter does not require

¹³⁸African Commission on Human and Peoples' Rights, Fourth Ordinary Session, Cairo, Egypt, 17-26 October 1986, AFR/COM/HPR.5(iv), Guidelines for National Periodic Reports. See also 5, RADIC, 885, 1993.

¹³⁹Ankumah, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES, op cit, note 134, pp90-93.

the presence of state representatives during the consideration of their reports but Rule 83 of the Rules of Procedure allows a state to send a representative before the Commission to discuss it. The practice of the Commission, however, has been not to discuss a state report if there is no representative present.¹⁴⁰ The Commission appears to question the representatives quite rigorously¹⁴¹ and has begun to call upon specific states who are tardy in submitting reports, to do so in its communique.¹⁴²

The Rules of Procedure of the African Commission were revised and came into effect in 1995¹⁴³ and were fully applicable at the 19th session in 1996.¹⁴⁴ The revised rules attempt to increase the power of the Commission and reduce the political influence of the OAU by reducing the role of the Secretary-General and substituting the Secretary of the Commission instead. For instance, the drawing up of the agenda is now the responsibility of the Secretary as are some other administrative functions such as keeping a register of communications.¹⁴⁵ The Secretary General of the OAU still, however, maintains a close link with the Commission. Communications from states parties to the Charter under Article 47 are still to be submitted to the Secretary General, the Chairman of the Communication and the state party concerned.¹⁴⁶ Complaints submitted under Articles 48 and 49 of the Charter may be submitted to the Commission through notification to the Chairman of the Commission, the Secretary General and the state party concerned. Communications received under Article 55 (non-state communications) are not expressed to be notified

¹⁴⁰ibid at 97. See also footnote 290.

¹⁴¹ibid, 96-107.

¹⁴²i.e. 16th Ordinary Session, 1994, Item 49, Final Communique.

¹⁴³for text see RADIC, Vol 8, pt 4, December, 1996 at 978.

¹⁴⁴26 March-4 April, 1996.

¹⁴⁵Rule 89.

¹⁴⁶Rule 88.

through the Secretary General or the Chairman of the Commission,¹⁴⁷ therefore presumably, the Secretary may receive these communications directly. Other aspects of the involvement of the OAU Secretary General's involvement with the work of the Commission include consultation on dates for the sessions of the Commission which may be changed in exceptional circumstances by the Secretary General.¹⁴⁸

One aspect of the work of the Commission which had given cause for concern was the requirement for confidentiality under Article 59 of the Charter which states that "all measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall decide otherwise." The revised Rules of Procedure have made some modifications to this requirement. Rule 32 states that all sittings of the Commission and of its subsidiary bodies are to be held in public unless the Charter provisions provide otherwise. Further, under Rule 33, the Commission may issue a communique at the end of each private or public sitting. Reports of the Commission to the Assembly of Heads of States and Governments on communications relating to states parties remain confidential¹⁴⁹ but shall be published by the Chairman of the Commission unless the Assembly directs otherwise.

Amendments to the Charter itself was also discussed at the 19th session.¹⁵⁰ Areas for change considered included Article 58 on responses to emergency situations which reveal serious and massive violations of human and peoples' rights, an additional

¹⁴⁷Rule 102.

¹⁴⁸Rule 2.

¹⁴⁹Rule 77.

¹⁵⁰see further, Murray, R., "Report on the 1996 Sessions of the African Commission on Human and Peoples' Rights - 19th and 20th Ordinary Sessions:26 March-4 April, and 21-31 October, 1996" HRLJ vol 18, 1-4, 1997, 16.

protocol on women's rights,¹⁵¹ article 46 on the ability of the Commission to resort to any mode of investigation, clawback clauses and the insertion of a clause on non-derogable rights. Arguments against amendment included the need for stability, the potential for the Commission to exploit its present powers creatively and the fact that articles 60 and 61 allow inspiration to be drawn from international law on human rights. A working group was established under Commissioner Ndiaye to work on the issue. The drafting of an additional protocol on women's rights was brought up at the 20th session but there was no further debate.¹⁵² The establishment of a Court was also debated at both sessions. Following an OAU resolution,¹⁵³ a group of inter-government experts met in Cape Town in September, 1995 and a report and Draft Protocol for a Court were prepared. The Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights was accepted by OAU member states in 1997.¹⁵⁴

Decisions of the Commission

A number of communications have been considered by the Commission so far. It is only recently that some of the decisions have been published.¹⁵⁵ The common factor in all the cases is the cursory reasoning, even when violations have been upheld, although this has improved in the more recent decisions.

151 see supra for comment on the draft protocol.

¹⁵²Murray, R, *ibid* at 19.

¹⁵³ AHG/230(XXX), *id* at 19.

154 For text see 9 RADIC 1997, 432.

¹⁵⁵For instance, the cases discussed here are the only communications received by the Commission to be published in a widely available international journal. Access had previously been restricted to either Banjul, the Commission headquarters or Addis Ababa, the OAU headquarters and given the peripatetic nature of communications in Africa, it has been extremely difficult to gain access to Commission decisions. For details of some of the reported cases see HRLJ, VOL 18, No 1-4, 1997. Decisions of the Commission since 1995 have been reported in the International Human Rights Law Reports published by Nottingham University. Decisions are also reported in Interights Bulletin.

For example, in Communication 60/91, Constitutional Rights Projects v Nigeria (in respect of Wahab Akamu, G. Adeaga and others), the issue was the imposition of the death penalty under the Robbery and Firearms (Special Provision) Decree which created a special tribunal composed of one serving or retired judge, one member of the armed forces and one member of the police force. The decree provides for no judicial appeal of sentences but they are subject to confirmation or disallowance by the state Governor. The communication argued that the prohibition on judicial review was contrary to article 7(1)(a) of the Charter and further the setting up of special tribunals violates the right to be tried by an impartial tribunal under article 7(1)(d). The case was considered admissible on the ground that the remedies available, confirmation or dismissal by a state Governor, was of a non-judicial nature and it would be improper that the complainants seek to exhaust it since it is neither adequate nor effective. On the merits of the case, the Commission found that the prohibition of appeal clearly violated article 7(1)(a) and the composition of the tribunal did not create the appearance of impartiality and thus violated article 7(1)(d). It recommended that the complainants be freed by the government.

In Communications 64/92, Krischna Achutan (on behalf of Aleke Banda) joined with 68/92 and 72/92, Amnesty International on behalf of Orton and Vera Chirwa v Malawi, the issues were the detention of Mr Banda, the death penalty, later commuted to life imprisonment of Orton and Vera Chirwa and mass arrests in Malawi in 1992 and poor prison conditions. From the report of the opinions of the Commission, it would appear that the admissibility of the communications was not considered. It considered that shootings by police officers violated article 4 of the Charter on the right to life. There is no detail of the circumstances of the shootings, whether it was reasonable (nor was reasonableness defined) for the police to have shot at people perhaps to disperse them, whether this use of force was prescribed by law, whether it was necessary for any reasons, national security maybe. The decision of the Commission is not

being challenged, but the reasoning for reaching the decision that the act of the police in this particular circumstance violated article 4 would have been useful, if only for precedential value and for the creation of Charter jurisprudence.

Similarly, in finding that there was a violation of article 5, which prohibits torture, the Commission was of the opinion that overcrowding, beating and torture (without defining what constitutes torture), excessive solitary confinement of the Chirwas, shackling, poor food and denial of access to medical care all amounted to torture, cruel, inhuman and degrading treatment. There was no reference to existing international jurisprudence on torture, nor was it defined, nor was there consideration of prison conditions, either in general or in Africa, or whether the situation of the Chirwas was common or exceptional. On the violation of the right to personal liberty and security of the person under article 6 the Commission found a violation. It appears from the report that the arrests, which they considered arbitrary without describing what constitutes arbitrary detention, violated the right to liberty and security of the person. Clearly not all arrest amount to arbitrary arrests nor do they amount to violation of the right to liberty. It would have been useful for the Commission to delineate the circumstances in which such arrests amount to a violation in contravention of the terms of the Charter.

In Communication 129/94, Civil Liberties Organization v Nigeria, the attempt of the Nigerian government to oust the courts' jurisdiction in respect of any Decree promulgated after December 1983, suspending the Constitution by the same 1993 Decree and nullifying the domestic effect of the African Charter came before the Commission. The Commission was of the opinion that the Decrees, the Constitution (Suspension and Modification) Decree No. 107 of 1993 which suspends the Constitution and oust the jurisdiction of the court after December 1993 in respect of any decree promulgation and the Political Parties (Dissolution) Decree No.114 of 1993 which not only dissolved political parties

but specifically nullifies the domestic effect of the African Charter, breached article 7, the right to be heard, article 26 on the independence of the courts and the establishment of national institutions to promote and protect the rights enumerated in the Charter and finally, finds the attempt of the Nigerian government to nullify the domestic effect of the Charter a serious irregularity.

This last communication is an interesting development since the Commission was forced to consider laws nullifying its jurisdiction. While it decided that the attempt was an irregularity it did not declare it null and void. It also raises the question of an effective remedy. The Charter makes no provisions for an effective remedy for a victim of a violation and there are limitations on what the Commission can achieve. It cannot enforce its opinions, (a general problem of international law) and only makes reports to the Assembly of Heads of Governments and States on its activities. The issue of enforcement makes proposals for an African Court attractive but given the current difficulties faced by the Commission in terms of time constraints, financial limitations and administrative inefficiency, it is unlikely that a Court would enhance the protection of human rights in Africa without a considerable strengthening of the existing mechanism for promotion and protection.¹⁵⁶

There is only one reported case on economic, social and cultural rights, *Ebrima M.S. Cessay v Gambia*¹⁵⁷ which was declared inadmissible for non-exhaustion of local remedies.

One of the foremost pressing issues with regard to the work of the Commission is the inaccessibility of its decisions. They are

¹⁵⁶see Amoah, P. "The African Charter on Human and Peoples' Rights - An Effective Weapon for Human Rights?", 4 RADIC, 1992 226.

¹⁵⁷Communication No. 86/93. Reported in Ankumah, op cit. at 146. No further details are provided on the case.

largely unreported and those that are reported are summaries of the decision. There is no access to the reasoning behind the decisions and it has been difficult to determine whether there is developing an African human rights jurisprudence or instead, a more prosaic, practical procedure of disposal of cases. This paucity of information makes it difficult to gauge the importance of the willingness of the Commission to reach settlement of cases. The Commission meets only twice a year, the responsibilities of other posts undertaken by Commissioners means that some have on occasion not been able to fulfil their obligations and potential conflict of interest arises when the post is undertaken with a government post. The Secretariat is inefficient, understaffed and underfunded. There is no provision for enforcement of decisions, a report of which is sent to the Assembly of Heads of States and Governments.¹⁵⁸ The Commission obviously needs strengthening; it needs financial and human resources. The cases need to be published so that the reasoning is apparent to develop an African human rights jurisprudence.

2. An African Court of Human Rights

At the 1994 Assembly of Heads of State and Government in Tunis, Tunisia, a resolution was adopted¹⁵⁹ requesting the Secretary-General to convene a Government experts' meeting to consider, with the African Commission, means of enhancing the work of the Commission particularly with the establishment of an African Court on Human and Peoples' Rights. A draft Protocol was adopted by a group of government experts in Cape Town in September, 1995.¹⁶⁰ At the second legal experts' meeting in Nouakchott,

¹⁵⁸see Rule 101, Revised rules of Procedure of the African Commission.

¹⁵⁹ Resolution AHG/Res.230 (XXX), June, 1994.

¹⁶⁰ See Naldi, G. and Magliveras, K., "The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison", 8 RADIC 1996, 944 at 945.

Mauritania in 1997, a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was accepted by the member states of the OAU.¹⁶¹ The Court is to complement the mandate of the Commission,¹⁶² have jurisdiction over the interpretation and application of the Charter, the Protocol and any applicable African Human Rights instrument¹⁶³ and give advisory opinions at the request of member states of the OAU, its organs or any African organisation recognised by the OAU relating to the Charter or other applicable human rights instruments with each judge entitled to give a separate or dissenting opinion.¹⁶⁴ Member States and the Commission are entitled to submit cases to the Court¹⁶⁵ in addition to NGOs with observer status at the Commission whom the Court have entitled to make submissions.¹⁶⁶ The Court is to apply the provisions of the Charter and other human rights instruments,¹⁶⁷ specifically not limited to African regional instruments. The Court is to be composed of eleven judges with no two judges to be the nationals of the same state.¹⁶⁸ In the nomination of judges, the Protocol requires that due consideration be given to adequate gender representation in the nomination process¹⁶⁹ as in the election process.¹⁷⁰ Judges are to be elected for a six year period and may be re-elected once.¹⁷¹

161 for text see 9 RADIC 1997, 432.

162 article 2.

163 article 3(1).

164 article 4.

165 article 5.

166 article 6.

167 article 7.

168 article 11.

169 article 12(2).

170 article 14(3).

171 article 15(1).

The Court is to elect its President and Vice-President.¹⁷² Provision is made for the independence of the judges under article 17. At present, the seat of the Court has not been decided; it is to be determined by the Assembly and may be changed by the Assembly after consideration with the Court. The Protocol comes into force one month after fifteen ratifications or accessions.

It remains to be seen, once the court is established, whether it will be a strong structure or whether it will be a facade. It took the European Court of Human Rights at least 40 years to stamp its authority so perhaps expectations of the African court should be tempered with caution. It is also worth querying at this juncture if there is not an inherent contradiction in establishing an African Court of Human Rights to promote African values while recognising international human rights norms predicated on their universality.

172 article 20.

PART III AN AFRICAN APPROACH TO REGIONAL PROTECTION

1. Regional Institutions

(1) The Organization of African Unity (OAU)¹⁷³

In spite of a cautious beginning for a number of reasons which have already been dealt with, there has of recent, been a shift in the approach of the OAU on how best to achieve unity and solidarity in Africa, not least because of the end of the Cold War, an increase in internal conflicts within states, economic hardship, the debt problem, increasing agitation by civil society for democratisation as well as by the international community. The creation of the conflict resolution mechanism appears to be a modification of previous non-interventionist positions even though it is required to give regard to article 3(2) of the OAU Charter. The focus on external factors as the cause of Africa's ills appears to have been modified.

The problem facing the OAU at present is what role it will and it is able to play in redefining Africa's role in the international order and to begin to come up with solutions to Africa's problems. This involves a determination of when to intervene in internal conflicts especially given the principle of non-interference in the internal affairs of states in Article 3(2) of the Charter. It also involves issues of determining when an internal problem poses a regional security risk and intervention becomes necessary. The approach of the United Nations in challenging concepts of sovereignty and domestic jurisdiction with human rights law, under Article 2(7) of its Charter may be illustrative. Non-interference in that context has come to mean not tolerating massive violations of human rights. The development of human rights law over the last 50 years has considerably reduced the scope for the claim of freedom from interference in domestic jurisdiction in that respect. Developments in South Africa and international approbation of the

¹⁷³see Part II, *supra*, on the creation of the OAU and events leading to the adoption of the ACHPR.

apartheid government attest to this fact.¹⁷⁴ The Kampala Document's definition of security as not only the state's security but the individual's security to live in peace, enjoy fundamental human rights, participate in the affairs of the country and have basic needs met could conceivably be used, in addition to the OAU's Charter obligations to promote unity and adherence to the UN Charter and the Universal Declaration of Human Rights, to justify intervention in conflict situations in Africa. Displacement of population, refugee influx into neighbouring countries, internecine conflicts such as in Rwanda and Burundi, not only have obvious unfortunate results, it is possible that the initial conflicts which developed into violent situations and the concomitant problems for the state concerned and its neighbours, might have been avoided by a more direct and tougher stance taken by the OAU. But as stated earlier, early preoccupations of the OAU and governments were with territorial integrity and sovereignty although there were some attempts at conflict and dispute resolution by the Assembly of Heads of States and Governments.

(2) Assembly of Heads of State and Government¹⁷⁵

The second Assembly of Heads of State and Government was held in Cairo in 1964. In addition to making Addis Ababa the seat of the organization's permanent headquarters, it also saw an undertaking by members states to respect their frontiers as they existed at independence.

Between 1971 and 1972 the OAU was instrumental in achieving reconciliation in a number of disputes between member states, including those between Senegal and Guinea on Senegal's alleged failure to suppress guerrilla activities against the Guinean government, between Guinea and Ghana over the burial of Kwame

¹⁷⁴see Steiner & Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT:LAW, POLITICS, MORALS, Clarendon Press, Oxford, 1996, pp148-65 and pp363-370.

¹⁷⁵The following information is obtained from Keesing's Reference Publications, op cit., note 52, p352ff.

Nkrumah and between rival Angolan factions. The 11th Assembly was held also in Ethiopia. The disputes between Ethiopia and Somalia and between Uganda and Tanzania were the subject of OAU mediation. A 'good offices committee' was formed to seek ways of reconciling the territorial dispute between Ethiopia and Somalia. The Uganda/Tanzania conflict arose from the invasion of Uganda from Tanzania by armed followers of former President Obote in the September, 1972. An agreement was reached and was signed by the two Presidents on May 28. Under the terms of the agreement, the Ugandan government agreed to pay to Tanzania compensation for the deaths of the 24 Tanzanian nationals in Uganda; both parties agreed to adhere to the Mogadishu Agreement (signed on October 5, 1972 and which provided for the withdrawal of troops from the Ugandan-Tanzanian border and for a cessation of all military activities by the two sides against each other), and to prevent their territories from being used as bases of subversion, the Tanzanian government assumed responsibility that President Obote would not interfere in Uganda's affairs and the Ugandan government would not demand Obote's expulsion from Tanzania.

At the 12th Assembly in Mogadishu in 1974, no progress was made towards a solution to the dispute between Ethiopia and Somalia despite a private meeting between the two heads of state on June 13. In 1975 at the 13th Assembly held in Kampala, Idi Amin was elected as President of the OAU in spite of strong protests and opposition to Amin's policies by the Presidents of Botswana, Mozambique, Tanzania and Zambia. Resolutions supporting the freedom fighters of the ANC in Rhodesia, armed struggle as the only way left, measures taken to isolate South Africa including sanctions and a special OAU committee to be appointed from among African members of the UN Council for Namibia were adopted at an extraordinary meeting of OAU Council Ministers on April 11, 1975 (Dar-es-Salaam Declaration). Strong resolutions were also approved against South Africa at the 14th Assembly in 1976 in Port Louis, Mauritius.

The 1977 Assembly in Libreville, Gabon was marked by strong

attacks by African leaders on Soviet interference in African affairs. There were numerous disputes among Africa states during 1976-1977; between Egypt and Libya, Libya and Sudan, Ethiopia and its neighbours, between Mauritania and Morocco and Algeria and the Polisario Front of the Western Sahara, in connection with which Morocco had decided on 25 February, 1977 to temporarily suspend its participation in the OAU. On the conflict between Ethiopia and Somalia, the committee set up in 1973 reaffirmed on 9 August, the inviolability of frontiers inherited from the colonial era and condemned all subversive activities on the part of neighbouring states or other states. The Assembly also approved a draft resolution submitted by Senegal which appealed to all African states to abstain from having recourse to foreign intervention in internal African problems, invited OAU members states to prohibit the use of their territory as a base for aggression against another African state, requested powers outside Africa not to interfere in the internal affairs of African states and recommended that member states reach peaceful settlement of their disputes through mediation and negotiation.

The 1978 16th Assembly in Khartoum was taken up with the problem of foreign troops and bases in Africa. The adopted resolution while condemning military alliances with non-African powers, reaffirmed the right of each country to choose its own ideological system and strongly condemned the use of mercenaries by some countries, unspecified, to destabilise African countries. The 17th Assembly in Monrovia, Liberia in 1979 was also marked by disputes among member states. Tanzania's role in the overthrow of Amin in 1978 was strongly criticised, notably by Nigeria and Sudan, a resolution calling for cease fire and a UN supervised referendum in Western Sahara caused the Moroccan delegation to leave the session and during a speech by the Egyptian President in defence of the Egypt-Israeli peace treaty, several other Arab delegations also walked out. In his opening speech President Tolbert of Liberia suggested that the OAU Charter be revised to make the protection of human rights explicit in consideration of the conflicts in Africa which had resulted in over four million

refugees.

In 1980, a special conference of the OAU held in Lagos between April 28-30, adopted the Lagos Plan of Action for the implementation of a strategy for the economic development of Africa setting out guidelines on strengthening subregional groupings in central, eastern northern and southern Africa between 1980-90 and for closer integration between such groupings between 1990-2000. This African Economic Community (AEC), was originally scheduled to be in place by 2000 but at the 27th Assembly in Abuja in 1991, this target was postponed to 2025. The AEC treaty which was signed at this summit, outlined six stages, including the removal of tariff and non-tariff barriers to trade and the establishment of a continent-wide customs union by 2004. A commitment was also made to the establishment of an African Common Market with a central bank and single market by 2031.

The Lagos Plan of Action devotes a chapter to the needs of women.¹⁷⁶ It states that ... "The steps to be taken to solve the problems of African women should not be marginal and separate from the question of over-all development"¹⁷⁷ and advocates improvements in the status of women in the areas of health and healthcare, education, employment and better legislative and administrative improvements, especially in the area of family law. It advocates the increased participation of women in law-making and institutional structures. The implementation of these matters, even though the achievement of the Plan itself has been postponed, remains at the vagaries of the tensions between custom and formal legal rights. The right to education, for instance, is a legal right but the reduced number of girl children attending secondary schools in comparison to boys can be attributed to societal expectations of the role of women in society. Parpart gives a figure of 60% of eligible girls

¹⁷⁶see Parpart, J. L., "Women's Rights and the Lagos Plan of Action", 8 HRQ, 1986, 180.

¹⁷⁷quoted *ibid* at 181.

attending primary schools in Ghana while only 27% go on to secondary schools compared with a figure of 77% of boys in primary schools and 44% in secondary schools.¹⁷⁸

In a recently published work on the status of women, statistics on school attendance in Nigeria shows that 51% of primary school age girls are not in school,¹⁷⁹ girls form 44%¹⁸⁰ of the student body at primary level, 55%¹⁸¹ at secondary and 24%¹⁸² at tertiary level. Figures for Ghana show that 45% of girls attend primary school,¹⁸³ 39% attend secondary school¹⁸⁴ and only 17% go on to higher education.¹⁸⁵ Clearly, existing practice affects implementation. Without a change to the foundational basis of social organisation, the achievement of real equality in terms of access to opportunity which will result in equitable participation in decision-making, the success of any developmental plans can only be partial.

The 1981 18th Assembly, held in Nairobi was notable for the adoption of the African Charter of Human and People's Rights. The 19th Assembly, scheduled for August 5-8, 1982 could not be held because the two-thirds quorum could not be achieved as a result of a boycott by Morocco and those states which supported its opposition to the SADR's admission to the OAU.¹⁸⁶ The SADR

¹⁷⁸ibid 186.

¹⁷⁹ Neft, N. & Levine, A.D., WHERE WOMEN STAND:AN INTERNATIONAL REPORT ON THE STATUS OF WOMEN IN 140 COUNTRIES 1997-1998, Random House, 1997, at 38.

¹⁸⁰ ibid at 39.

¹⁸¹ ibid at 40.

¹⁸² ibid at 43..

¹⁸³ ibid at 39.

¹⁸⁴ ibid at 40.

¹⁸⁵ ibid at 43.

¹⁸⁶ See further Keesings Reference Publications, op cit., note 52 at 422.

declared on 8th June, 1983 that it had decided not to participate voluntarily and temporarily in the 19th Assembly. The Assembly opened in Addis Ababa on the same day. It was dominated by the Western Sahara question and adopted by consensus on November 21, a draft resolution calling on Morocco and the Polisario Front to undertake direct negotiations to bring about a cease fire and to create the conditions necessary for a fair referendum in the territory in December, 1983.¹⁸⁷ No agreement was however reached on such negotiations.

The 20th Assembly held in Addis Ababa in 1984 was notable for the withdrawal of Morocco from OAU membership following the representation of the SADR at the session. The OAU's commitment to the 1980 Lagos Plan of Action was affirmed. The 21st Assembly in 1985 in Addis Ababa adopted a declaration on 25th July which contained a survey of the economic situation and a five-year draft programme of measures to achieve recovery in the short, medium and long term. The programme also called for the accelerated implementation of the Lagos Plan of Action. In 1986, the 22nd Assembly dealt with, *inter alia*, sanctions against South Africa, voluntary sanctions against the United Kingdom for its opposition to sanctions against South Africa, expressed support for the convening of an international conference on Africa's external debt, established a council charged with reconciling disputes between OAU member states and approved an OAU anthem.¹⁸⁸

At the 25th Assembly in 1989, the newly elected Secretary-General, Salim Ahmed Salim highlighted three areas to which he would give special consideration during his tenure; Africa's economic problems, the environment and human rights. Africa's debt problem was discussed and the member states renewed their call for an international conference to discuss the problem on

¹⁸⁷ Keesings Reference Publications, *ibid* at 423.

¹⁸⁸ Keesings Reference Publications at 423.

a global basis rather than case by case approach.¹⁸⁹ At the 26th Assembly, Namibia participated as the Organization's 51st member. Nelson Mandela was also present for the first time. Growing demands for democracy on the continent was under discussion.

At the 1991 summit, held in Abuja, Nigeria, the Treaty of Abuja or the African Economic Community Treaty was signed. The treaty, signed on 3rd June, provided for the establishment of a continental framework for the development of resources, economic and trade co-operation between member states and a common trade policy towards non-member states.¹⁹⁰ At the 28th summit in 1992, it was agreed that the OAU Secretariat should prepare a feasibility study, for presentation to the 1993 Assembly, on the prevention and management of conflicts.¹⁹¹ Eritrea was represented at the 29th Assembly in 1993, its admission having been unanimously accepted at the Council of Ministers meeting. A resolution was passed establishing a mechanism for conflict resolution and management as was a resolution on the means of implementing the AEC treaty, *inter alia*. At the 30th Assembly in Tunis in 1994, South Africa took its seat for the first time. The Assembly also passed a resolution requesting a governmental legal experts to consider the establishment of an African Court on Human and Peoples' Rights.¹⁹²

¹⁸⁹ see further, N.J. Rengger with John Campbell, TREATIES AND ALLIANCES OF THE WORLD, Catermill International Limited, U.K., 1995 at 428.

¹⁹⁰ for text of treaty see 3 RADIC, 1991, 792.

¹⁹¹for further information on the summary of the 1992 summit, see Rengger, *op cit.*, TREATIES AND ALLIANCES OF THE WORLD, 430.

¹⁹² Resolution AHG/Res. 230(XXX). See Part II of the Chapter *supra*.

Reports of the developments at the Assembly of Heads of Governments and States is limited to available published accounts.

(3) African Development Bank (AfDB)¹⁹³

The decision to set up an African Development Bank was reached in 1963 when the Council of Ministers signed an agreement which came into force on 10 September, 1964. The Bank was formally constituted on 25 September, 1964, its capital being subscribed exclusively by African states. It began operations in 1966. The Bank has four associated institutions; the African Development Fund (ADF) set up in 1972, the Nigeria Trust Fund, set up by agreement with Nigeria and ADF in 1976, Societe Internationale Financiere pour les Investissements et le Developpement en Afrique (SIFIDA), set up in Geneva in November, 1970 with the object of promoting the establishment and growth of productive enterprises in Africa and Africa Reinsurance Coporation (AFRICARE), established in 1976 and which came into force from January 1977, with the object of fostering the development of the insurance and reinsurance industry in Africa.

The African Development Bank was instrumental in the establishment of the African Export Bank (Afreximbank), in Cairo in 1994 to facilitate, promote and expand trade within and outside the continent through the provision of pre and post-shipment finance credit to eligible African exporters, short and medium term credit to African exporters and importers, credit to finance imports needed for export development and the promotion and provision of insurance and guarantee services covering commercial and non-commercial risks associated with African exports. Its membership comprises independent African states, regional and sub-regional financial institutions and economic organisations; African public and private banks and financial institutions and African public and private investors and non-African international financial institutions and economic organisations and banks, financial institutions and public and private investors. The financial performance of the Bank has been

¹⁹³ see Sohn, DOCUMENTS OF AFRICAN REGIONAL ORGANIZATION, *ibid* at 165 for the Agreement establishing the ADB and at 205 for General Regulations of the ADB. See also Keesing's Reference Publications, *ibid* at 357 for a short summary.

affected by the general economic problems in the region. It lost its triple A credit rating¹⁹⁴ in August 1995 when Standard and Poor, the international credit agency, deemed downgrading necessary because of the excessive political influences which govern the Bank's management.¹⁹⁵

The African Development Bank, like the Asian Development Bank and the European Bank of Reconstruction and Development, seems to have developed following the model of the International Bank of Reconstruction and Development (World Bank). Although it has been difficult to obtain information on the work of the African Development Bank, its establishment seems to follow a trend of regional development banks which in turn appears to have been influenced by the establishment of the World Bank. In spite of the absence of information with which to make comparisons, it seems clear that international developments clearly influence regional institutional developments which in turn supports the argument that African regional institutional mechanisms replicate the international model.

(4) Economic Community of West African States (ECOWAS)¹⁹⁶

Although strictly a regional African organisation, ECOWAS, is included in this section of institutions because of the role its peacekeeping force (ECOMOG) is playing in Liberia and because of the renewed commitment to conflict resolution in Africa, given its necessity to security in the region. ECOWAS has its headquarters in Lagos, Nigeria and has 17 members.¹⁹⁷ It was

194 The downgrading of the credit rating invariably results in a loss of confidence by investors which has effects on the markets of the concerned institution.

¹⁹⁵ some of the information on the African Development Bank was obtained from a Crown Agents report written by Ruka Sanusi, n.d.

¹⁹⁶For Articles of Association to establish ECOWAS see Sohn, L. Documents of African Regional Organizations, *ibid* at 1005.

¹⁹⁷Benin, Cape Verde, The Gambia, Ghana, Guinea, Guinea-Bissau, the Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, Upper Volta and Sao Tome.

established in 1976 under the Treaty of Lagos by all member states except Cape Verde which did not join until 1977. The treaty's principal objective, to be achieved in stages, was the harmonisation of the economic and industrial policies of member states and the elimination of the disparities between the development of member states.¹⁹⁸ The role of ECOMOG in monitoring the cease fire represented a radical departure from the principal objectives of ECOWAS but it gave the organization a high profile in West African affairs and it was decided that a permanent regional conflict resolution role should be adopted by ECOWAS. On 24 July, 1993, a new treaty was signed by all members replacing the 1975 treaty and added the role of regional peacekeeping to the list of ECOWAS objectives. The revised treaty also provided for the establishment of a regional parliament, an Economic and Social Council and and ECOWAS Court of Justice.

(5) The Lome Convention

The Lome Convention is a trade and aid agreement signed by the EC and 69 African, Caribbean and Pacific (ACP) states which guarantees duty-free entry to the EU for some commodities produced by the ACP states. All sub-Saharan African countries are members with the exception of South Africa. The fourth Lome Convention (Lome IV) was signed in December, 1989, replacing the 1975, 1979 and 1984 convention. Namibia became a new member under Lome IV with Haiti and the Dominican Republic.

2. A New Approach to Regional Problems?

Societal changes have been reflected in upheavals on the African continent. The end of the Cold War and events in Eastern Europe following the fall of the Berlin Wall in 1989-90 represents the possibility of a new approach and role for sub-Saharan Africa,

198 These objectives are similar to that of the European Economic Community as it was, and now the European Union. There is no clear indication that ECOWAS was modelled on this form of regional development but the similarity in objectives is persuasive of some element of influence.

should the continent be desirous of it and able to work towards it. During the Cold War, many African countries were strategic pawns for the two superpowers, USSR and the USA in their ideological battle for supremacy. In their efforts to establish a strategic regional base, incompetent and autocratic regimes were supported, with aid and arms, and many African countries became heavily militarised.

The Cold War also dampened regional tensions to a certain extent. With the end of the ideological battle, there began a marginalisation of Africa economically and politically, or at least, a perception of marginalisation. Attention, aid and economic restructuring efforts have been directed towards Eastern Europe and the Commonwealth of Independent States, (CIS) and the end of the Cold War has also meant the drying up of assistance from former Eastern Bloc countries. For example, in April, 1991 Western Europe announced a package of assistance for Russia of \$24 billion and \$80 billion for CIS compared to a total of \$3.4 billion for the whole of Africa at the end of the 1980s.¹⁹⁹ Africa's share of official development assistance (ODA) fell from 37.1 per cent. in 1990 to 36.3 per cent. while in comparison ODA share of Eastern Europe and former Soviet Union rose from 1.4 per cent. to over 7 per cent. This is with African debt increasing; the total debt in 1980 was \$84 billion, in 1992 it was \$194,264 billion and in 1993 it was estimated at \$199,046 billion despite efforts at servicing the debts.²⁰⁰ Following the 1993 Uruguay Round of the General Agreement of Trade and Tariffs, GATT, Africa is likely to face an increase in imported foods, loss of preferential advantage, stiff competition in banking and services

¹⁹⁹Gambari, I.A, "The role of Regional and Global Organization in addressing African Security Issues" in AFRICA IN THE NEW INTERNATIONAL ORDER:RETHINKING STATE SOVEREIGNTY, Keller, E.J & Rothchild, D. (eds), Lynne Rienner Publishers, 1996, hereafter Keller & Rothchild, AFRICA IN THE NEW INTERNATIONAL ORDER, at 30.

²⁰⁰These figures are taken from Obasanjo, O, "A Balance Sheet of the African Region and the Cold War", at 21, Keller & Rothchild, AFRICA IN THE NEW INTERNATIONAL ORDER.

and loss of bioproperty rights. A 1993 publication of the OECD/World Bank projects that net losses for Africa will be about \$2.6 billion by 2000 with the leading industrialised countries projected to gain about 64% of total annual income gains from GATT amounting to \$135 billion.²⁰¹

Politically, the 'new international order' has resulted in a wave of enforced democratisation across the continent, tied to official assistance and trade conditions. This has facilitated Namibia's independence in 1990, the end of apartheid in South Africa in 1994 and elections in Malawi and Benin. At the same time efforts to institute democratic systems have failed in other countries such as Nigeria where the 1993 elections were annulled. The Cold War prevented, in a way, regional and perhaps internal conflict. With its demise and the redirection of aid and assistance to Eastern Europe, adverse socio-economic conditions have been exacerbated, structural adjustment programmes have imposed stringent economic conditions and the mixture of economic hardship, coupled with the new wave of democratisation, have resulted in internal unrest across the continent. These have manifested themselves in violence as in Rwanda, Burundi and Liberia and have resulted in regional security problems with the displacement of peoples and influx of refugees to neighbouring countries and ensuing tension, Congo-Zaire is a case in point although other factors were at play in that internal conflict (as is true elsewhere). Where there has been no internal conflict as such, there has been an increase in ethnic groups within states seeking self-determination. In Nigeria, this has taken the form of the formation of increasing smaller states along ethnic lines in a federal structure. From three broad regions in 1960, there now exist 36 states. Eritrea seceded from Ethiopia in 1990 after years of civil conflict. It has been suggested that the power vacuum created after the end of the Cold War resulted in the

²⁰¹ Ibid, at 21.

breakdown of order in Somalia.²⁰²

This breakdown of order in Somalia, Liberia, Rwanda has resulted in a re-evaluation of the role of the OAU in conflict resolution. There have also been regional efforts to resolve conflicts such as the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) in Liberia, led by Nigerian troops. The OAU, however, as the primary continental organisation has had to redefine its involvement and efforts to ensure regional security. Territorial security or the physical security of the state is not synonymous with internal security and efforts are being made to define the problems which give rise to continuous conflict situations and to devise a solution to contain and resolve them.

"The concept of security goes beyond military consideration. It embraces all aspects of the society including economic, political and social dimensions of individual, family, community, local and national life. The security of a nation must be construed in terms of the security of the individual citizen to live in peace with access to basic necessities of life while fully participating in the affairs of his/her society in freedom and enjoying all fundamental human rights."²⁰³

This definition of security encompasses accountability of governments, implies transparency of government and integral to this definition is the representation of people and their participation in the affairs of their country. With the scramble for Africa effectively over, politically and economically, at this juncture of great change in approach to the solution of

²⁰²see Simons, A., "Somalia:A Regional Security Dilemma" and in general Part 2 of Keller & Rothchild AFRICA IN THE NEW INTERNATIONAL ORDER on regional security.

²⁰³African Leadership Forum, The Kampala Document:Towards a Conference on Security, Stability, Development and Cooperation (New York:African Leadership Forum), 1992 at 9, quoted in Gambari, I., op cit. note 199.

African problems by African leaders, and indeed African people, it is important that existing inequities within institutional structures are also redefined and that includes gender inequities.

CONCLUSIONS - AFRICAN VALUES OR A REPLICATION OF EXISTING MODELS?

The structure and content of the OAU Charter is substantively similar to that of other treaties regulating the relationship between states such as the UN Charter. Established legal principles such as no interference in domestic jurisdictions to ensure the inviolability of state sovereignty is evident in the OAU Charter.²⁰⁴ While the fundamental purpose of the Charter is to assert sovereign autonomy from colonial or imperial influence, it still remains a political document and the OAU itself is essentially a political organ reflecting the concerns of states using received legal discourse and the language of rights due to a state. It will be shown in Chapter 4 that the organisational and normative structures of international law excludes the participation of women. In replicating the organisational structures of the international legal system, the political organisation of the OAU, from which the African Charter evolved, has replicated at its inception, the non-participatory flaws of the international legal system.

Similarly, the African Charter follows existing structures of human rights protection contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and regional documents such as the European²⁰⁵ and American²⁰⁶ Conventions on Human Rights. For example, a

204 compare with article 2(7) of the UN Charter.

205 signed in Rome, 4th November, 1950 and entered into force on 3rd September, 1953.

206 signed 22nd November, 1969, entered into force 18th July, 1978, reprinted in 9 ILM 673, 1970.

comparative study of the three regional instruments and mechanisms for the protection of rights; the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights, shows that there is a similarity in the provision for rights protection. All three instruments provides rights protection for non-discrimination,²⁰⁷ the right to life,²⁰⁸ cruel, inhuman, degrading treatment/torture,²⁰⁹ from slavery,²¹⁰ liberty and security,²¹¹ fair trial,²¹² freedom of conscience and religion,²¹³ freedom of expression/receive information²¹⁴ and freedom of association/assembly with others.²¹⁵ Both the African Charter and the American Convention, however, make explicit provision for a right to participate in government (article 13 and 23 respectively), the right to freedom of movement and residence (articles 12 and 21 respectively), the right to property (articles 14 and 21 respectively and the right to development (articles 22(2) and 26 respectively). The American Convention makes provision to a right to a name under article 18, the right to a nationality under article 20 and the rights of the child under article 19. The African Charter has some unique provisions; it makes provision for the right to work and equal pay under article 15, physical and mental health under article 16, the right to education under article 17, self-determination under

207 ACHPR article 2, AmCHR article 24, ECHR article 14.

208 ACHPR art 4, AmCHR art 3, ECHR art 2.

209 ACHPR art 5, AmCHR art 5, ECHR art 3.

210 ACHPR art 5 (torture, cruel inhuman and degrading treatment and slavery are dealt with under the same article), AmCHR art 6 and ECHR art 4.

211 ACHPR art 6. AmCHR art 7, ECHR art 5.

212 ACHPR art 7, AmCHR art8, ECHR art 6.

213 ACHPR art 8, AmCHR art 12, ECHR art 9.

214 ACHPR art9, AmCHR art 13, ECHR art 10.

215 ACHPR art 10 & 11, AmCHR art 16 & 15, ECHR art 11.

article 20, natural resources and wealth under article 21, the right to development under article 22, peace and security under article 23 and environment under article 24.

The institutional mechanisms for the protection of rights under the three regional systems are similar. All three have a commission whose members, of high moral character, are elected to serve in their personal capacity.²¹⁶ Communications may be received from victims or an interested party after exhaustion of local remedies within a time limit and must not be ill founded or vexatious.²¹⁷ The European and American systems have already established courts and the establishment of an African Court for the protection of human rights has been agreed with a protocol to the Charter adopted in 1997, the Nouakchott Protocol to the African Charter on Human and Peoples' Rights.²¹⁸

While the African Charter and the Charter on the Rights and Welfare of the Child, contain additional elements of African values, including rights and duties, the form of human rights protection follow an established legal pattern. The preamble of the Charter on the Rights and Welfare of the Child affirms its adherence to the UN Convention on the Rights of the Child as well as OAU instruments such as its Declaration on the Rights of the Child of 1979. The preamble of the ACHPR refers to the UN Charter and the Universal Declaration of Human Rights. Therefore, these promulgations suffer from the same foundational problems that feminist approaches to human rights protection has demonstrated. Consequently, in terms of the protection of women's human rights, notwithstanding a specifically African flavour, the African regional system is inherently challenged by feminist approaches to human rights protection.

216 see art 19(1) ECHR, art 33(a), 34 and 35AmCHR and arts 30, 31 ACPHR.

217 see arts 25, 25 and 27 ECHR, arts 44, 45, 46 and 47 Am CHR and arts 47 to 59 ACHPR.

218 see 9 RADIC, 432, 1997.

I have attempted to ascertain whether there is an intrinsically African approach in the overview of selected institutional mechanisms above. However, what comes across is an alliance of political entities with a common history of colonialism, the effects of which still reverberate in Africa's economy, finance, trade and political structures to the detriment of its people and particularly its women. The provisions of the OAU Charter are state centric, for instance in its references to territorial integrity and sovereignty. Where there is reference to the peoples of Africa in the preamble, there is reference to the inalienable right of all people to control their destiny. Freedom, equality, justice and dignity are stated essential objectives and peace and security are to be maintained and established. The definition of security in the Kampala Document arguably gives the preamble a modern day political importance. Despite references to non-interference, the OAU Charter adheres to UDHR and UN principles. These same legal principles are those same principles which have not elsewhere ensured protection for women. The only peculiarly African experience is colonialism. The African regional system is comparable to and based on the same structures as other regional systems. It accepts the foundational basis of these structures and not only has it maintained existing imported systems of law imposed during colonisation, it has replicated these same models in its regional organisations after independence, while maintaining its position of difference. Difference lies only in culture and that is not a peculiarly African experience, it is diverse not only across the continent but across the world. African regional mechanisms are based on the international model. These laws and these institutional structures are androcentric and therefore, for Africa's women feminist challenges to these laws apply.

The various African regional institutions²¹⁹ represent to me,

²¹⁹There are of course many more regional groupings and alliances within Africa serving a number of purposes. For details of them see Sohn, L. op cit. note 193 and also Keesings Reference Publications op cit. note 52.

rather than an African way of doing things, a desire for Africans to be a part of the process of their own development. This is reflected in the repeated resolutions at various Assemblies of Heads of State and Government condemning interference in the internal affairs. While there have been, and there continue to, be a disproportionate number of conflicts on the continent, their causes lie in issues relating to territorial disputes, insurgency, counter-insurgency and despotic governments previously maintained in positions of power by the Cold War. The causes of a predominant number of disputes may be directly attributed to the legacy of the colonial era exacerbated by bad government, lack of accountability, lack of transparency, lack of representation of the populace. The only thing peculiarly African about the problems faced by Africa is its geo-political history which has resulted in this situation.

Approaches taken thus far, as far as institutional mechanisms in terms of structure and rules of association are concerned, are very similar to other regional alliances based on economic, financial and political objectives. To that extent, the African regional system models itself on existing structures founded on legal principles. These principles have been challenged by feminist legal theory and implicitly the legal bases which underlies the structures of these institutions are also inherently challenged.

CHAPTER 3

SELF-DETERMINATION AND THE RIGHT TO DEVELOPMENT: THE EXCLUSION OF WOMEN

This Chapter looks at self-determination and the right to development as a means of demonstrating how, in spite of guaranteed rights under these established legal principles, the operation of the law in an African context has limitations. These two core doctrines are promoted by post-colonial states for the benefit of such states and an evaluation of the operation of these doctrines is useful in ascertaining the benefits for the states and their citizens. This Chapter will show that for the purposes of implementation of human rights in an African context, especially in terms of women's rights, there are core problems in using legal discourse because of the marginalisation of women from policy making and the decision making process. Nevertheless, these same principles are intrinsically capable of being used to assure women's wider political participation especially when coupled with a feminist legal theory which is informed of the specificities of women in an African context. Therefore, if the possibilities of the legal discourse are at present flawed in its application to certain African situations, there exists the potential to use the discourse itself and its representative and inclusionary elements to ameliorate the implementation of women's human rights. Part I discusses self-determination and Part II discusses the Right to Development.

PART I SELF-DETERMINATION

The right to self-determination is central to the Charter of the Organization of African Unity (OAU) and the African Charter on Human and Peoples' Rights¹ (ACHPR). The preamble of the OAU Charter refers to a determin[ation] "to safeguard and consolidate

¹adopted 17th June, 1981, entered into force 21st October, 1986, reprinted in 21 ILM 58, 1982.

the hard-won independence as well as the sovereignty and territorial integrity of our States..." while article 20 of the ACHPR states that not only shall all peoples shall have a right to existence, it goes on state that "[All peoples]...shall have the unquestionable and inalienable right to self-determination." Article 21 (1) states that "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people". The right to self-determination is also recognised in the United Nations Charter,² the International Covenant on Civil and Political Rights³ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁴ (ICESCR),⁵ the Declaration on the Granting of Independence to Colonial Territories and Peoples,⁶ the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations,⁷ the General Assembly Resolution on Permanent Sovereignty over Natural Resources,⁸ the Declaration on the Establishment of a New International Economic Order,⁹ the Charter of Economic Rights and Duties of States,¹⁰ and the Declaration on the Right to Development.¹¹ All these international documents deal with connected doctrines of human rights, economic rights,

² articles 1 & 73.

³999 UNTS 171, 1966.

⁴993 UNTS 3, 1966.

⁵ Common article 1.

⁶ General Assembly Resolution 1514 (XV) 14 December, 1960, UN Doc A/4684 (1960), GAOR 15th Session, Supp 16, p.66.

⁷ General Assembly Resolution 2625 (XXV), 1970.

⁸ A/Res/3171, 5 February 1974, reprinted in 13 ILM 1974, 238.

⁹ A/RES/3201 (S-VI), 9 May, 1974, reprinted in 13 ILM 1974, 715.

¹⁰ A/RES/3281 (XXIX) 15 January 1975, reprinted in 14 ILM 1975, 251.

¹¹ General Assembly Resolution 41/128, 4 December 1986.

sovereignty over natural resources and generally, international peace and security of which it might be said, the right to self-determination is encompassed.

Self-determination is a peoples' right. While there is no legal certainty over the definition of 'people', it has been stated that:

"...[T]he principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives."¹²

The term 'rights of peoples' is used in three interchangeable ways; as a reference to governments as the authoritative representatives of people in international documents such as the United Nations Charter, as the description of action by civil society within domestic jurisdictions to challenge the actions of government policy in relation to military/human rights decisions *inter alia*, and to refer to indigenous peoples who are marginalised from dominant society.¹³

Four characteristics of self-determination have been noted.¹⁴ It is a right against the state which controls that people, it is a right against other governments, it is vested in the people concerned and it is vested in the people as a group and as a collective right. Peoples' rights is distinct from the rights of a state or a government. The people in whom a particular right

¹² Brownlie, I., "The Rights of Peoples in Modern International Law" in Crawford, J. (ed) THE RIGHTS OF PEOPLES, Oxford:Clarendon Press, 1988 at 5, hereafter Crawford, RIGHTS OF PEOPLES.

¹³ Falk, R., "The Rights of People (In Particular Indigenous People)", in Crawford, J., RIGHTS OF PEOPLE, at 24-36.

¹⁴ Crawford, J, "The Rights of Peoples: Some Conclusions" in Crawford (ed), THE RIGHT OF PEOPLES, pp.164-165.

is vested are not necessarily represented by states or governments of states. Conversely, the vesting of peoples' rights in governments disqualifies the right from being regarded as peoples' rights.¹⁵ The constituent of the term 'peoples' has been described as 'context - dependent'.¹⁶ Nonetheless, Crawford has identified the content of 'peoples' rights' as the principle of self-determination, the right of peoples to free political choice, the right to existence consisting of the right not to be subjected to genocide and not to be deprived of the means of subsistence¹⁷ and the right to permanent sovereignty over natural resources.¹⁸ On the latter point, it is debatable whether the right to permanent sovereignty over natural resources is subject to domestic jurisdiction, particularly in the context of the ACHPR which stipulates that disposal must be for the benefit of the people under Article 21.¹⁹ Three further criteria are enumerated by Crawford for determining whether a particular asserted right is a right of peoples. Is it a right of peoples

¹⁵ *ibid* at 167.

¹⁶ *ibid* at 169.

¹⁷ On the issue of the right to subsistence as part of the right to self-determination with particular regard to the rights of women, see Chinkin, C., and Wright, S., "The Hunger Trap: Women, Food and Self-Determination", 14 *Michigan Journal of International Law*, 1993, 262.

¹⁸ Crawford, "The Rights of Peoples: Some Conclusions" at 167.

¹⁹ Permanent sovereignty over natural resources is of course affected by the effect of corruption of African governments. Crawford states on this issue:

"...[T]he principle of permanent sovereignty over natural resources is certainly capable of operating as a guarantee of peoples against their own governments, limiting the capacity of governments for the time being in the interests of the community. In the case of provisions such as Article 21 of the African Charter, that would tend to make a State's natural resources policy justiciable in the African Commission on Human and Peoples' Rights"

Crawford, J. "Rights of Peoples: 'Peoples or Governments'?" in Crawford, J., (ed) *RIGHTS OF PEOPLES*, 64, footnote omitted.

rather than a right of government or states? Is the right articulated so that it has legal consequences? Has the right achieved a sufficient degree of acceptance?²⁰ The issue of self-determination of peoples involves questions of what constitutes a 'people' and whether the legal principle of self-determination is limited to a context of decolonisation.

Self-determination is linked to homogeneity²¹ and was historically limited to the ideals of democracy²² and the nation state. The concept and legal principle of self-determination is circumscribed within the legal principles of territorial integrity²³ and the state as the primary entity in international

²⁰ *ibid* at 167.

²¹ see Makinson, D., "Rights of Peoples: A Logician Point of View" in Crawford, *RIGHTS OF PEOPLES* at 74 on the point of self-determination in a decolonization context disregarding language, culture, history and group identification.

²² The Wilsonian ideal of self-determination revolved around the principles of democracy and political participation by the peoples of a state. See Cassesse, A., *SELF-DETERMINATION OF PEOPLES*, Cambridge University Press, 1995, Chapter 1, hereafter, Cassesse, *SELF-DETERMINATION OF PEOPLES*.

²³ Self-determination does not always involve a claim to secession. See Brownlie, *ibid* at 6. One of the flaws of the self-determination principle is the inherent tension between the principle and territorial integrity. See Cassesse, A., *SELF-DETERMINATION OF PEOPLES*, at 327ff.

relations.²⁴ In an African context, the principle of *utis possidetis* by which leaders agreed to accept the boundaries of the colonial state means that the homogeneity required for an ideal nation-state is lacking.²⁵ The adoption in 1964 by the OAU Assembly of Heads of Governments and States of the Resolution on the Intangibility of Frontiers²⁶ affirmed the principle of *utis possidetis*. It seems, however, to be circumscribed within the bounds of territorial integrity under article 3, paragraph 3 of the OAU Charter. In *Burkina Faso v Mali*,²⁷ the Chamber of the International Court of Justice, ICJ, stated that an apparent conflict existed between *utis possidetis* and self-determination but that it seemed that in Africa, maintenance of the status quo had been decided on as the wisest policy.

²⁴ Agenda for Peace, Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, para. 10 and 19; hereafter Agenda for Peace. On competing claims of the state against self-determination Falk writes that:

"Part of the impetus for 'the rights of peoples' is to provide normative co-ordinates to assess claims on the basis of a world order logic that is mindful of statist claims, but also receptive to societal claims of an anti-statist character, including those of 'captive nations' caught within the confines of these juristic entities often established and maintained by coercion, not consent, that we identify as States".

Falk. R., in Crawford, RIGHTS OF PEOPLES, op cit. at 23-24.

²⁵ Another flaw of the principle of self-determination noted by Cassesse, is that external self-determination was limited to colonial peoples as a whole taking scant regard of conflicts and tensions between the population within state boundaries. Cassesse, SELF-DETERMINATION OF PEOPLES, op cit., 327 ff.

²⁶AGH/Res. 16(1). See Brownlie, I, BASIC DOCUMENTS ON AFRICAN AFFAIRS, 1971, 360-361 for text.

²⁷ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* 1986 ICJ Rep., 554. See also, Naldi, G., "The case concerning the frontier dispute (Burkina Faso/Republic of Mali): *Utis Possidetis* in an African Perspective", vol 36, ICLQ, 893, 1987.

Self-determination is also linked to sovereignty over natural resources. There are thus two strands to the principle; political self-determination and economic self-determination. Political self-determination comprises external self-determination and internal self-determination. External self-determination is primarily freedom of states and the inhabitants of that state from foreign rule. State determination is concerned with sovereign equality in the world order and a concomitant realignment of the world order,²⁸ primarily economically. Internal self-determination is contained in the essence of the principle of self-determination which "requires a free and genuine expression of the will of the peoples concerned".²⁹ If borders are inviolable, it is imperative that the tensions that may exist within boundaries are diffused with efforts to allow self-determination of groups within the national boundary through efforts that fall short of full self-determination or independence with internal self-determination, for example, through full participation in the affairs of the country. Internal self-determination might enable issues of minority rights to be addressed with some form of participation that is representative. It is, however, important that individual rights do not become subsumed to group rights and that the human rights aspects of self-determination are not overlooked.

The peaceful realisation of self-determination and stable territorial integrity is an important component of the maintenance of international peace and security.³⁰ One of the

²⁸ The New International Economic World Order is discussed in Part II.

²⁹ *Western Sahara (Advisory Opinion)*, ICJ Reports, 1975, 12 at 32. See also Cassese, SELF-DETERMINATION OF PEOPLES at 320.

³⁰ see *An Agenda for Peace*, op cit. note 24. It has been noted elsewhere however that:

"Food, shelter, clean water, a healthy environment, peace, and a stable existence must be the first priorities in how we define or "determine" the "self" of both individuals and groups, instead of present definitions, which are based on masculinist goals of

purposes of the United Nations is stated in its Charter in article 1(2) as the "[development of] friendly relations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."³¹ The Universal Declaration of Human Rights makes no mention of the right to self-determination. The General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960 deals with self-determination in a European decolonisation context. The preambular text reflects and affirms the importance of creating 'conditions of stability and...peaceful and friendly relations based on respect for the principles of equal rights and self-determination...' There is an affirmation of the free disposal by peoples of their natural resources and an affirmation of principles of freedom and exercise of sovereignty. Article 2 proclaims the right of peoples to self-determination, both politically and economically for social development. As noted above, numerous other U.N. General Assembly Resolutions affirm the principle.

These various declarations and proclamations stress the interdependence of peace, international security, friendly relations, state sovereignty, territorial integrity, political participation, the right to be free from subjugation, economic development, sovereignty of a people over its natural resources and the right to freely dispose of those natural resources for the benefit of the people. One of the fundamentals of international economic relations is equal rights and self-determination of peoples.³² While the legal doctrine is established as applicable in a decolonisation context, there is

political and economic aggrandizement and aggressive territoriality"

Chinkin, C. and Wright, S., "The Hunger Trap: Women, Food and Self-Determination", op cit. note 17, at 294.

³¹ Chapter 1, Purposes and Principles.

³² Chapter 1 (g), Charter of Economic Rights and Duties of States.

no consensus as to whether it extends beyond it. Cassesse states that self-determination is entrenched in international general rules in only three areas; as an anti-colonialist standard, as a ban on foreign military occupation and as a standard for racial groups to participate in government.³³ The principle of self-determination in these three areas amount to *jus cogens* in international law. As part of the process of ensuring international peace and minimising the potential for conflicts that might destabilise territorial boundaries, the principle of self-determination is generally interpreted within the bounds of territorial integrity. There appears to be a distinction between a territorial based right to self-determination as developed by the UN in the context of colonisation and the "ethnic-linguistic-national principle of self-determination advocated by Wilson".³⁴ Self-determination in a neo-colonisation context is clearly fraught with difficulties since it would threaten the stability of states and consequently international peace.³⁵ During the decolonisation process, self-determination was the preeminent concern rather than territorial integrity.³⁶ Once independence was achieved by former colonies, the demand for self-determination

³³ Cassesse, SELF-DETERMINATION OF PEOPLES, at 319.

³⁴ see Hannum, H., "Rethinking Self-Determination", VJIL VOL 34, No 1, Fall 1993, 1 at 32. Hannum's emphasis. Another flaw of the principle is its inability to grant any right of internal or external self-determination to ethnic groups and national, religious, cultural or linguistic minorities owing to the statist bias of international law. Minorities and groups are protected against racial discrimination, incidentally but not as a group. Only members of racial groups are legally entitled to demand suppression of discriminatory measures. Article 27 of the ICCPR takes account of minorities but as individuals. See Cassesse, SELF-DETERMINATION OF PEOPLES, at 327ff.

³⁵See Hanauer, L., "The Irrelevance of Self-determination to Ethno-National Conflict: A New Look at the Western Sahara Case", Emory International Law Review, 1995 v9 (1), 133. The author argues that the right to self-determination is best characterised as a right to decolonisation using Western Sahara as an example.

³⁶ Blay, S.K.N., "Self-Determination versus Territorial Integrity in Decolonization", New York University Jnl. Int. Law and Politics, 1986 v18(2), 441.

by various groups has been cautiously regarded. For instance, the Biafrans, East Timorese and Sahrawi people³⁷ have not been able to achieve self-determination resulting in full independence, although disputes about the contents of the right allows claims that they have some right. The fact that the definition of peoples is imprecise further compounds the issue.³⁸ Competing minority rights claims, if heeded, would threaten the stability of a state. Perhaps also, since minority rights are protected through other human rights norms,³⁹ there has not been the impetus or even the necessity to deal with the problems of a 'people' under the doctrine of self-determination.

"The standard of legitimacy in the post-colonial era is not observance of the norm of self-determination, but rather adherence by the government of a state to widely accepted international human rights norms. As these norms expand to include rights of particular importance to ethnic, religious, linguistic, and cultural communities, self-determination loses some of its attraction as a means of protection. As human rights norms expand to include political participation and protection of identity (within a larger context of continuing protection for the individual members of both minorities and majorities), self-determination can be more meaningfully and readily exercised through options short of secession."⁴⁰

37 The claims of these three peoples must be distinguished since the Biafrans wanted secession from Nigeria whereas the other two want self-determination in a non decolonisation context.

³⁸ Cassese posits the view that however obliquely, international legal rules specify the units of self-determination, SELF-DETERMINATION OF PEOPLES op cit at 327.

³⁹ Brownlie questions the helpfulness and validity of asserting distinct rights of peoples when it may be dealt with by existing human rights norms. See Brownlie, I., op cit. in Crawford, J. (ed) RIGHTS OF PEOPLES, chapter 1.

⁴⁰ Hannum, H. op cit. note 34, at 66.

If self-determination is the only means to ensure democratic participation in the decision of social and economic affairs by a people then clearly the application of human rights norms will be insufficient to enable that type of "functional sovereignty".⁴¹ If political internal self-determination is possible through the devolution of power to regions or minorities without secession, then it is possible to have the effect of self-determination buttressed with recourse to international human rights norms as an additional safeguard. If this is not possible, or is an inappropriate way to guarantee the rights of a homogenous group, then the legal doctrine still has validity but perhaps in a contemporary modified form. A refusal to acknowledge the real concerns of a group of people on the issue of their self-determination often results in protracted conflict that in itself jeopardises the security of a state.⁴²

Internal political self-determination is a pressing issue in much of sub-Saharan Africa. Bad governance, whether military or civilian, lack of accountability, lack of transparency and corruption in Africa have played a role in denying people the right to both economic⁴³ and political self-determination which is unacceptable. An arbitrary distinction is drawn by governments between self-determination of a state and self-determination of peoples, in an African context. Self-determination from colonisation has meant in reality a state's right to self-

⁴¹ *ibid.*

⁴² The case of the Ogonis in Nigeria is a case in point. While there is no open conflict between the people and the state as such, they have been targeted with the full force of the military government, See Annual Report of Human Rights in Nigeria, 1994 by the Civil Liberties Organisation.

⁴³ Obebe, O., "The right to economic self-determination: Nigeria under the Shagari government", Temple Intl Comparative Law Jnl, 1988, v2, 39. The author argues that the General Assembly Resolution on Permanent Sovereignty over Natural Resources, and other such international documents, could be used to underlie a claim against the Shagari government for corruption of the right to economic self-determination of the Nigerian people.

determination which is sovereign equality on the world stage. It has not meant self-determination for peoples to participate freely in the governance of their country, it has not meant democracy, it has not resulted in accountability and it has certainly not resulted in transparency.⁴⁴ The essence of self-determination, the need to have regard to the freely expressed and genuine will of the people is not universally respected.⁴⁵ The principle of self-determination clearly has universal scope and appeal, but not universal applicability particularly since customary rules only grant the right to three specific classes of people as indicated above.⁴⁶ It may be argued that the right is conferred on peoples of states that are parties to the 1966 Covenants on Human Rights under common article 1. The reality, however is that political internal self-determination has been reduced solely to territorial integrity without civil and political rights; the effect of which has been to render people powerless to have a say in their own future.

"[T]he capacity of a people to exercise rights of self-determination in a political sense is inextricably connected to economic and cultural integration. Where political, economic, and cultural cohesion disintegrates, basic rights of survival also become impossible."⁴⁷

⁴⁴ see Hannum, H. op cit at 8.

⁴⁵ Recent events in Nigeria following the annulment of the Presidential election in 1992 demonstrate the point. The reaction of civil society in organising and mobilising in order to protest the annulment and the institution of another military government, even though dissent has been harshly punished and is muted at present, is indicative of a move on the part of citizens to have their genuine will represented in government.

⁴⁶ Cassesse, SELF-DETERMINATION OF PEOPLES op cit at 327ff.

⁴⁷ Chinkin, C. and Wright, S., op cit. note 17, at 264.

1. Possibilities of Self-Determination for Women⁴⁸

Self-determination, particularly internal self-determination, has the capacity as a legal principle to enable the full participation of all citizens in the affairs of their state. While at present, as noted above, self determination in an African context seems limited to external self-determination, the principle itself offers scope for and the promise of the representation of the will of the people. Undoubtedly, the heterogenous nature of most African societies and competing minority claims make a true application of internal self-determination complex, it is nevertheless possible. Women as a group tend to be marginalised politically, economically and culturally. If their voice(s) could be heard as a part of the genuine will of the people in the representation of the will of the people in the governance of their country, then self-determination could enable a representation of their needs as part of a larger societal process. Feminist legal theory, as a representation of women's requirements on a wider political spectrum, can also facilitate this achievement. It can do this if it is informed of the specificities, cultural, economic or otherwise, which can affect the articulation of the needs of women, the expression of these requirements and aid the protection of these requirements as rights issues.

Self-determination for women is not simply restricted to participatory rights although that would be an improvement. Self-determination consists of economic and social development and of the opportunities for economic and social development. Therefore issues of education, health and mortality rates are good indicators of how well women as a group (while the recognition

⁴⁸ see Chinkin, C., "The Potential and Pitfalls of the Right to Self-Determination for Women", 93ff in Bowen, S., (ed), HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES, 1997 Kluwer Law International, Netherlands.

of women as a group is in itself problematic⁴⁹) are able to "pursue their economic and social development".⁵⁰ Self-determination is linked to basic survival rights in addition to political expression. Despite achievements by advocates of women's rights, women and girls find that access to education, employment, healthcare, food and even life are influenced or limited solely because of their gender. For example, in the area of education, at primary school level rates of enrollment for girls is approximately equal to rates of enrolment for boys, yet at tertiary level there is a higher percentage of boys. Girls form 44% of the primary student body in Nigeria⁵¹, 55% at secondary level⁵² and only 24% at tertiary level.⁵³ The drop between secondary and tertiary education can be attributed to a number of factors. If there exist financial hardship within the family, girls may be taken out of school to enable boys to continue. Girls can also help by working thereby contributing to the family's income or by looking after younger children. There is also a gender bias in education. Women in higher education,

49 See further Spike Peterson, V. and Parisi, L., "Are women human? It's not an academic question" in Evans, T., HUMAN RIGHTS FIFTY YEARS ON: A Reappraisal, 1998, Manchester University Press, which in locating women within heterosexism, discusses the forms of subordination suffered by women within heterosexist groups which manage to separate women from women in other groups on distinctions of for example, class, age, sexuality; distinctions heterosexism uses to normalise its groupings and its social constructs. Primarily concerned with the continuation of the group, heterosexism subsumes women's interests to the larger interest of perpetuating the group and separate women from other women in other groups. The distinctions made in the group structures further also means that women in a certain group will oppress women in other groups. In that way, the separation of women from other women is assured, being always subsumed to grander heterosexist survival social constructs.

⁵⁰article 20, ACHPR.

⁵¹Neft, N. and Levine, A.D., WHERE WOMEN STAND: AN INTERNATIONAL REPORT ON THE STATUS OF WOMEN IN 140 COUNTRIES 1997-1998, Random House, New York, 1997, 39.

⁵²ibid at 40. There is no explanation for the rise in female enrolment between primary and secondary level from the authors.

⁵³ibid at 43.

when they continue to that level, tend to predominate in what are traditionally considered women's areas; home economics, arts and languages.

In employment, women form 34% of the total workforce⁵⁴ in Nigeria and 43% participate in the work force.⁵⁵ Discrimination, which can take the form of unequal pay, poor training or lack of advancement opportunities is a major problem for women. Poor or inadequate childcare facilities may mean that working mothers are restricted to low-paying part-time jobs. When women do paid work, they are to be found at the lower levels of the particular industry. In Nigeria, six women per every 100 men are to be found in administrative or managerial positions (chief executives, higher administrative posts, heads of villages),⁵⁶ 35 per every 100 men are to be found in technical and professional positions (nurses, teachers etc)⁵⁷ and their average earnings are less than men's.⁵⁸

In terms of healthcare, a 12 week fully paid maternity leave is granted to all women government workers in Nigeria but excludes the majority of women who do paid work outside this area although some private sector industries also provide maternity leave. The government has no official policy regarding childcare and public childcare facilities are few. Most day care facilities are privately owned and are open only to those with resources to use the service. Health care on the whole is poor and is privately provided. Access to health care is determined by wealth and a large proportion of the population will have access only to the

⁵⁴ibid at 51.

⁵⁵ibid at 55.

⁵⁶ibid at 63.

⁵⁷ibid at 66.

⁵⁸no figures are provided for differentials between men and women's wages in Nigeria but the authors estimate that among the countries reporting nonagricultural wages for women and men, the average wage for women is about 75% of men's wages, ibid at 70.

health care it can afford. The average life expectancy is low, 56.6 years for women and 54.1 years for men. The maternal mortality rate is 1,000 deaths per 100,000 live births.⁵⁹

Women's economic and social development as part of the process of their self-determination is affected by a number of factors. The lack of parity between men and women in the areas of education and subsequent employment is based on institutionalised discriminatory practices and these hinder the self-determination of women. Women's economic self-development is hampered by the types of work they are able to do in addition to their responsibilities as mothers and carers of the old. They are affected by initial lack of educational opportunities because of a bias towards boy children, as members of the work force they suffer from a lack of employment prospects and are paid a lower wage. Political self-determination has not resulted in economic and social self-determination for women. Self-determination has not resulted in equal autonomy for men and women. Women's needs differ from men's and women's experiences,⁶⁰ socially, culturally and economically need to be taken into account for their self-determination. A Yoruba woman's life experience differs from a Yoruba man's life experience. In order for a Yoruba woman to be fully emancipated, her social, cultural and economic reality need to inform what may constitute self-determination for her, as a woman. Women need to be included in the internal self-determination process because not only do women experience situations differently to men, experiences among women differ according to class and wealth. The principle of self-determination itself contains elements which can be used to address the problem. It is an inclusionary legal principle which can be relied upon in tandem with the participatory elements of feminist legal theory to claim equal opportunities for women which will enable them to develop socially and economically.

⁵⁹ibid at 370.

⁶⁰see further Chapter 4 on feminist legal theory and the marginalisation of women's experiences.

PART II THE RIGHT TO DEVELOPMENT

1. The New International Economic Order and Development

The call for a New International Economic Order in 1974, which preceded later calls for and recognition of a right to development, was linked to moves on the part of the developing countries to attempt to ensure their economic growth in particular and development in general. If they were economically strong, their sovereignty could not be impugned by the operation of market forces, they would be autonomous and equal to other countries in the world order. The removal of economic disparity would hopefully lead to social restructuring on a global scale.

The call for a New International Economic Order was therefore important for a number of reasons. It was based on ideas of solidarity, international cooperation and the 'common heritage of mankind'. African states could not be autonomous if there was no growth. Economic growth was restricted by the existing world economic system which inherently favoured the developed countries.

The core instruments relating to the new international economic order are the Declaration on the Establishment of a New International Economic Order,⁶¹ the Programme of Action on the Establishment of a New International Economic Order,⁶² the Charter of Economic Rights and Duties of States⁶³ and General Assembly resolution 3362 (S-VII) on development and international economic co-operation.⁶⁴ There are other resolutions which have a bearing on the establishment of the new order.⁶⁵ The underlying purpose

⁶¹ GA Resolution 3201 (S-VI), 1 May 1974.

⁶² GA Resolution 3201 (S-VI), 1 May 1974.

⁶³ GA Resolution 3281 (XXIX), 12 December 1974.

⁶⁴ 16 September, 1975.

⁶⁵ These include the Declaration on Social Progress and Development, GA Resolution 2542 (XXIV) of 11 December 1969, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance

is to redress the balance of inequities and inequality between developed and developing countries.

"The present international economic order is in direct conflict with current developments in international political and economic relations...[T]he world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community."⁶⁶

The fundamental purpose of the Charter of Economic Rights and Duties of States is : "...to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all states, irrespective of their economic and social systems."⁶⁷ Fundamentals of international economic relations include, sovereign equality of all States, equal rights and self-determination of peoples and respect for human rights and

with the Charter of the United Nations, GA Resolution 2625 (XXV) of 24 October 1970 and the International Development Strategy for the Third United Nations Development Decade, GA Resolution 35/36 of 5 December 1980, annex.

⁶⁶ Paragraph 2, Declaration on the Establishment of a New International Economic Order, op. cit., footnote 2.

⁶⁷ Preamble, Declaration on Establishment of a New International Economic Order.

fundamental freedoms.⁶⁸ The new economic order was to form the basis of development of all countries and integral to it was respect for human rights and fundamental freedoms at national and international levels. Essential features of the NIEO cover a number of areas in which there exists imbalances between developed and developing countries. It includes control over natural resources, regulation of the activities of transnational corporations, equitable prices for primary commodities and exports of developing countries and strengthening the technological capacity of developing countries.⁶⁹

The right to development⁷⁰ is linked to the economic order since "...the concept of 'development' is understood not only in terms of economic and material well-being but as being directed towards the physical, moral, intellectual and cultural growth of human beings."⁷¹ It relates to the enjoyment of economic, social and cultural rights as well as to civil and political rights. It has collective and individual dimensions. It comprises two strands of obligations: the obligation of states to co-operate and practice solidarity and the obligation on states to ensure the promotion of higher standards of living and respect for human rights. The former imports some kind of duty on the part of the developed countries towards the developing countries, the starting point of which may be ascribed to the obligation of member states under article 56 of the United Nations Charter "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55" which include "higher standards of living...and

⁶⁸ Chapter 1 (b), (g) and (k), Charter of Economic Rights and Duties of States.

⁶⁹ UN Document E/CN.4/Sub.2/1983/24/Rev, The New International Economic Order and the Promotion of Human Rights, Raul Ferrero, para.203.

⁷⁰ Although the United Nations did not adopt a declaration on this right until 1986, it was recognised in the African Charter on Human and Peoples' Rights.

⁷¹ UN Document E/CN.4/Sub.2/1983/24/Rev.

conditions of economic and social progress and development" and "universal respect for, and observance of, human rights and fundamental freedoms for all..." The latter duty is that which states owe to their citizens and firmly brings the observance and respect for human rights into the context of the right to development. The right to development thus forms a link between the economic order and the promotion of human rights.

It seems that demands for a New International Economic Order became superceded by calls for a right to development which was taken up by the United Nations and was passed as a General Assembly Resolution, although not without some hostility to the NIEO and the Right to Development from the West, in 1986. There is no clear reason for this but the connection of economic development and rights protection, including the right of peoples' over their wealth and natural resources as delineated under article 21, of the ACHPR seems to have found voice within the context of the Declaration on the Right to Development. In many ways, it seems that new ideas and issues become incorporated. For example, the growth of globalisation,⁷² the universalisation of the economic market and the advance of technology⁷³ are the new issues yet they are encompassed in the old ideas: the protection of the rights of individuals in the face of untrammelled economic expansion of trans-nationals; free trade ideals that seem to favour developed countries; fears of economic imperialism; imposition of a dominant economic culture and the efforts of developing countries to assert their

⁷² on globalisation within international law see further Simma, B. & Paulus, A.L., "'The International Community': Facing the Challenge of Globalization", 9 EJIL (1998), 265 and Dupuy, P.M., "International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions", 9 EJIL (1998), 278.

⁷³ see further, Myers, J., "Human Rights and Development: Using Advanced Technology to Promote Human Rights in Sub-Saharan Africa", Case W. Res. J. Int'l L. vol 30 No 2-3, 1998, 343, on how Africa needs to participate in and improve its technological development to enable it to compete in the world market and become better equipped to ensure its social and economic development.

sovereignty to limit this influence. The core issues remain the same; the universalisation of a dominant economic system which threatens and weakens the autonomy of developing nations.

2.The Right to Development

The right to development has been described as a third generation or one of the solidarity rights i.e., a group or peoples' right. The proliferation of such rights has had divergent reactions. The success of the human rights movement has led to an increase in the demands for recognition of new rights.⁷⁴ This essentially means that the concept of rights cannot be dealt with in a discrete manner. Rights discourse must be contextually relevant. Human rights law must take account of groups of people excluded from protection.⁷⁵ In the context of the developing countries geo-political and socio-cultural factors must be taken into account in rights application. Certainly, the recognition of new rights increases the burden on states and international institutions such as the United Nations, but this is not an acceptable reason for non-recognition.

The Declaration on the Right to Development⁷⁶ is ambiguous as to the content of the right to development and as to whether it is an individual, peoples' or state right. There is reiteration of various United Nations instruments such as the Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights; reference to the rights of peoples to self-determination and international peace and security as essential elements for the realisation of the right

74 See Alston, P., "Making space for new human rights:the case of the right to development", 1988, Human Rights Yearbook, 8, Harvard University Press.

⁷⁵ For work on the exclusion of the rights of women from human rights law see Chapter 4.

⁷⁶ GA Resolution 41/128, 4 December 1986.

to development. The Preamble states that the human being is the central subject of the development process and notes that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order. Yet there is no individual articulation of what form the composite right to development should take. It has the status of a human right⁷⁷ and "...implies the full realization of the rights of peoples to self-determination, which includes...the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."⁷⁸ The duty of states to co-operate in ensuring development and to take steps to eliminate violations of human rights is enumerated⁷⁹

Bedjaoui⁸⁰ writes that the content of the right to development has two aspects:1) a right to develop *erga omnes* claimed by a state and opposable by it to all others and 2) a right claimed by a state over others which may be exacted by that state from other states and from the international community. The right to develop *erga omnes* consists of permanent sovereignty over resources, reparations for past injuries and the means necessary for development. State sovereignty is defined through its political aspects yet the political sovereignty of a state may be abrogated by economic pressures from other countries or foreign economic entities with no legal redress available. This means that states cannot be truly sovereign unless they are fully developed in order that they may be equal and not subjected to external economic pressures. "[T]he right to development is a *sine qua non*

⁷⁷ article 1(1)

⁷⁸ article 1(2)

⁷⁹ article 3(3) & article 5.

⁸⁰ Bedjaoui, M., "Some Unorthodox Reflections on the 'Right to Development'. in Snyder, F., & Slinn, P., (eds) INTERNATIONAL LAW OF DEVELOPMENT:COMPARATIVE PERSPECTIVES, Abingdon, Oxon, Professional Books Ltd, 1987, hereafter Snyder & Slinn, INTERNATIONAL LAW OF DEVELOPMENT,86-116 at 101 ff.

of sovereignty."⁸¹ Thus, "the intrinsic condition of the existence of a state's sovereignty is its permanent sovereignty over the natural resources of its territory; there is neither state sovereignty nor State independence without sovereignty over these resources. The second proposition is that any persistent breach of permanent sovereignty over natural resources is a threat to international peace and security."⁸² Reparations for past injuries takes the form of aid and special bilateral arrangements, the practice of which is justified by former administering states with the concept of 'mutually beneficial co-operation' and ideas of solidarity. The last point of the means necessary for normal development means that a people should never be deprived of its own means of subsistence. For a state to exact its right of development over others, it must be able to participate on an equal basis. To do this, the international division of labour must be altered so that a state or peoples gets its due.

The idea of a NIEO obviously challenged international law given the hostility of the West occasioned by the declaration. It raised the issue of whether it was purposive or normative.⁸³ That, and that the concept of the right to development was regarded as destabilising to the established principles of international law meant that international law was regarded as being in a state of crisis. The old order could be seen critically as an instrument to consolidate underdevelopment for the benefit of the 'rich' countries; consequently, international development law could be seen alternatively as an instrument to adapt international law to new economic purposes, or as an

⁸¹ Bedjaoui, *ibid* at 103, in Snyder & Slinn, *INTERNATIONAL LAW OF DEVELOPMENT*.

⁸² *ibid* at 104.

⁸³ Slinn, P., "Differing approaches to the relationship between international law and development" in Snyder & Slinn, *INTERNATIONAL LAW OF DEVELOPMENT*, pp27-39. Slinn discusses how the different terms used to describe the law of development in English and French have different imports which mirrors the different views of international law and its use.

instrument of destabilization in international law.⁸⁴ There emerged two opposing schools of thought. The first regarded the NIEO as having no legal reality as General Assembly resolutions are not binding. The second regarded it as forming part of positive international law, consequently General Assembly resolutions were binding. These opposing views can broadly be broken down into a North/South political stance. For the North, if the NIEO had no legal reality, there could be no challenge to the status quo whereas the South, desirous of a more equitable and pluralistic form of international law, regarded the resolution as part of positive international law. The extreme standpoint initially adopted, however, disregarded the role of the law, international or otherwise, as a tool for change.⁸⁵

The political resistance to the right to development assumed that the law of development had no origin in the principles of international law.⁸⁶ Bedjaoui locates the basis of the right to development within the concept of international solidarity. On the issue of to whom the right should accrue, he notes that making the right to development an individually based human right obscures the fact that a state's search for development is impeded by a variety of factors and will penalise the state for not guaranteeing a right determined by external factors. The fundamental problem is that "...underdevelopment is a structural phenomenon linked to a given model of international economic

⁸⁴ Flory, M., "A North-South Legal Dialogue: The International Law of Development", in Snyder & Slinn, INTERNATIONAL LAW OF DEVELOPMENT, pp 11-26.

⁸⁵ Pellet, A., "A New International Legal Order : What Legal Tools for What Changes?" in Snyder & Slinn, INTERNATIONAL LAW OF DEVELOPMENT pp117-135. Pellet is of the view that if there is a crisis, it only affects international lawyers, not the law itself since new rules of law can accompany economic changes.

⁸⁶ In actual fact, Kwakwa identifies the content of the international development law as part of the duty of states to co-operate for global welfare with the principles on which development is based existing in treaties and customary law. Kwakwa, E., "Emerging International Development Law and Traditional Law-Congruence or Cleavage?", Georgia Jnl of Intl and Comp. Law, 1987, v17(3), p431-455.

relations, and to a certain international division of labour."⁸⁷ He suggests that individual claims to a right to development would weaken a state at the time it is striving to fight against international factors which connive to keep a state underdeveloped. The right to development is regarded as a corollary of the right to self-determination since it is not possible to acknowledge a right to self-determination without simultaneously recognising a right of the people to develop. Therefore, the right to development is a state right or a right of peoples and takes precedence over the right of the individual. In locating the basis of the right to development within the concept of international solidarity, three stages are identified by Bedjaoui:

- a) interdependence as a result of the global nature of the international economy
- b) the universal obligation incumbent on every state to develop the world economy, an obligation which makes development an international problem of the first order and
- c) international solidarity itself as a basis.

Since there has always been a single world economy⁸⁸ as no country has ever been economically self-sufficient, there needs to be a universal approach to the problem of development. This universal approach does not presuppose that the current structure of the world economy must continue unchallenged. The invocation of the right to development means a challenge to the status quo so that there is a balance between growth and development of the developing countries and the continued well-being of the developed countries. The duty incumbent on states to safeguard

⁸⁷ Bedjaoui, op. cit. note 80 at 91.

⁸⁸ see Dupuy, P.M., "International Law:Torn between Coexistence, Cooperation and Globalization. General Conclusions", 9 EJIL (1998), 278 on globalisation.

future generations applies to development and this form of international solidarity may be invoked as a basis of the right to development.

3. The Right to Development and Human Rights

Notwithstanding the legal arguments as to the effect of the proclamation of the right to development on international law, the practical effect has been an additional legal ground to focus breaches of human rights, particularly in the context of development projects. An unforeseen occurrence, however, was the move on the part of the governments of the developing world to trade off human rights for economic development notwithstanding that observance and respect for human rights is regarded as integral to both the right to development⁸⁹ and the NIEO.⁹⁰ It is realistically impossible to separate economic development from human rights since the rights of participation that are so often denied to citizens are necessary for discussion on how best a country should develop. "[H]uman rights observance...is essential for the creation of minimum conditions necessary for political stability which will ensure...development."⁹¹ Responsibility for the failure of the African state has been placed by some commentators on autocratic regimes whose actions have resulted in huge population displacements. For example, Mutua says, "While it is true that external factors have played havoc with Africa's ability to develop and become self-reliant, there can be little doubt that the bulk of the continent's woes have been engineered by the African political elites."⁹²

⁸⁹ Declaration on the Right to Development, article 6.

⁹⁰ Charter of Economic Rights and Duties of States, Chapter 1 (k).

⁹¹ Kibwana, K., "Human Rights and/or economic development: which way Africa?" Third World Legal Studies, 1993, pp43-57 at 45.

⁹² Makau Wa Mutua, "The interaction between human rights, democracy and governance and the displacement of population", Int. Jnl of Refugee Law, 1995, V7(Special Issue), pp37-45 at 43.

In spite of attempts to achieve a basic minimum condition of life for people, poverty and underdevelopment persists. A basic needs approach to development was adopted in the 1970s; the essence of which was to ensure that everyone had access to basic social goods. There is disagreement over the definition of basic needs but the core includes food, water, health, education and shelter.⁹³ Definition of the basic minimum is problematic. Does it mean providing a specific level of goods and services or achieving conditions which lead to a minimally satisfactory life? In what way is a full life to be measured? Are standards to be the same for all countries or relative to the level of development? Human rights is linked to the economic concept of basic needs. The ICESCR encompasses most of what would be termed basic needs. The Right to Development goes beyond it to include cultural and political development. Moral and legal imperative is attached to these needs as rights and consequently there is an increased moral and political commitment to their fulfilment as well as international legal status. Monitoring the fulfilment of basic needs is complex. Its achievement depends on the structure of the economic system in addition to cultural and sociological factors. Whatever method is used to fulfil basic needs, the indices of success should include variables that show a state of life as indicators such as life expectancy, infant mortality rates, literacy rates and mortality rates. If the concept of basic needs were accorded human rights status since most of what it indicates is contained in the ICESCR, it might increase the level of commitment expended to achieve them. Enforcement would require the establishment of mechanisms to monitor the variables such as infant mortality rates before success can be measured. There would need to be "mechanisms for recording relevant aspects of human well-being."⁹⁴

⁹³adequate food, clothing, housing and an adequate standard of living have the status of rights under article 11 ICESCR.

⁹⁴ Stewart, F., "Basic Needs Strategies, Human Rights, and the Right to Development", 11 Human Rights Quarterly 1989 347-374 at 369.

Efforts to ensure that people obtain or have access to a basic minimum condition of life include development projects. A development project may be directed towards development of infrastructure, services, production and marketing or training. For example, World Bank projects are initiated, planned, negotiated, implemented, monitored, evaluated and audited in accordance with an elaborate set of procedures built around the concept of a "project cycle", which consumes years, often at least ten. Many development projects entail deliberate external interventions into the physical and social environments and lives and affairs of particular communities and groups which are politically vulnerable, impact quite differently on particular groups and often adversely in social and economic terms, and often create or exacerbate serious environmental problems which in turn adversely affect people. The World Bank has developed a 'social', 'gender' and 'environmental' analysis as required components of project planning and design. Recognition of an obligation to make these kinds of analyses are large steps towards a recognition that all of the processes involved in a project cycle must be put under a regime of law designed to assure the protection and full exercise of human rights by project affected people.⁹⁵

James Paul looks at the legal bases for the obligation to protect and promote rights in the context of development projects. He examines the relationship between particular kinds of development projects and particular rights, the kinds of harm caused when these rights are ignored and the strategies that International Development Agencies, IDAs, can adapt to meet their duties to protect and promote rights and analyses whether the assumption of these obligations would constitute illegal political interference in the affairs of the countries concerned.⁹⁶

⁹⁵ The information in this paragraph is taken from Paul, J.C.N., "International Development Agencies, Human Rights and Humane Development Projects", Denver J. Intl L + Pol, Vol 17 no. 1, 1988, pp67-120, footnote 1.

⁹⁶ *ibid* at 69.

Development projects are seen as a means to address conditions which constrain productivity, growth and betterment of peoples' lives. Their impact on the human rights of identifiable groups are often foreseeable and this imposes a duty to protect and promote the rights of affected people. The establishment of rules and policies to meet this obligation will make it easier for IDAs to analyse human rights issues.

The categories of harm identified⁹⁷ in international development projects are exclusionary, substantive and lack of redress. Exclusionary harm involves denial of participation which results in inadequate information on both sides. Substantive harm is that which involves landlessness or displacement which leads to health and safety risks. Lack of redress means that the peoples affected receive inadequate compensation for the harm caused or none at all.

Human rights law is relevant to the development process in a number of ways. Article 55 of the UN Charter obliges member states to promote "development" and "human rights and fundamental freedoms". Various promulgations by the UN such as 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, particularly article 14 all address rights protection and the needs of particular groups of people. The obligation to promote and protect these rights ought to be assumed by all international agencies which

⁹⁷ Paul, J., "Law and Development into the '90s: Using international law to impose accountability to people on international development actors", *Third World Legal Studies*, 1992 pp1-16 at 2-3. See also Tomasevski, K, "Monitoring human rights aspects of sustainable development", *American University Jnl of Intl Law & Policy*, 1992, v8 (1), pp85-116. The paper discusses how to ensure development policies do not conflict with human rights obligations and analyses possible substantive criteria that may be used for monitoring the human rights aspects of sustainable development. Tomasevski suggests the extension of the environmental impact assessment to human rights in development.

operate within the international system since although, strictly speaking, these are obligations of states, states are members of these organisations. Further, reaffirmation and incorporation of these rights occur in resolutions and declarations of the General Assembly which affirm the indivisibility and interdependence of political and economic rights. The Declaration on the Right to Development itself mentions human rights and its indivisible nature,⁹⁸ drawing upon affirmations in regional instruments such as the ACHPR.

Many development projects run roughshod over people's interests in food, health, land and education.⁹⁹ IDAs should aim to adhere to the standard of international legal rights protection in the realisation of their projects. In so far as the right to development is proclaimed as a human right, it must be taken seriously by those engaged in development activities. The imposition of the modern state and modern law means that the rights discourse is important. Poor/rural people may not have the capacity to use law in order to assert their right. The notion of the rights discourse may be alien to their traditional cultures and structures although the basic values which underlie the rights discourse exist. It is important that people in the developing world have the right to know they have basic rights and struggle to assert and adapt broad guarantees to their concerns.

The imposition of development forces the issue more. Participation through the identification of particular interests potentially affected by a development project and articulation

⁹⁸ articles 1,2,6,8,9.

⁹⁹ The interaction between States, international organisations such as the World Bank, IMF, non governmental organisations, urban elites and rural women and the conflicting agendas may alienate the same people who are to benefit from projects. These sorts of problems are not diminished by legally formulated rights. See further Harries, C., "Daughters of Our Peoples: International Feminism meets Ugandan Law and Custom", Colum, H.R. Law Rev, vol 25, 493, 1994.

of rights by the people will empower them. Rights to equality can be enforced, or at the very least its abuse discouraged by IDAs, by ensuring that the principles of CEDAW, in particular article 14, are borne in mind in planning and implementing projects. Awareness that discrimination based on class, ethnicity and sex is built into the political economies of development in most countries should inform all stages of the process so that certain groups, for example, women are not further disadvantaged. Past failures to consider the adverse effect of projects on people can be combatted with enlisting meaningful participation of all categories of project-affected people otherwise the project may not be justified in spite of its cost. Those whose rights are threatened must enjoy full rights and legal resources to enable them to dispute the legality of proposed projects.

International law can play a role in reducing the adverse effects of development projects by making the actors accountable. Existing human rights standards, both substantive and procedural should be invoked. Given that IDAs are a part of a system that sets standards of rights, they ought to be expected within their projects to take cognisance that their projects do not denigrate any human or environmental rights. The preamble of the Declaration on the Right to Development states that "the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development". This means that IDAs should be accountable for the effect of projects to ensure that project affected people actually benefit.

Identification of rights to be protected in the development process would facilitate accountability. Those identified include; the rights of participation, basic needs rights, rights of equality, rights of workers, rights to security in land and the right to redress wrongs.¹⁰⁰ Once the legal obligation to respect and promote human rights has been accepted, IDAs must be

¹⁰⁰ Paul, J., "Law and Development into the '90s" op. cit. at 6-12.

put under a more specific rule of law through their own codes. These should include explicit rights of participation through a duty to inform, transparency, standards to protect substantive rights and rights of redress.

4. Monitoring Human Rights Aspects of Development

The World Bank, as the primary lending institution is legally prohibited by its Articles of Association from political interference in the affairs of members.¹⁰¹ This limits the role of the Bank and allows it to abdicate responsibility in the protection and promotion of civil and political rights. Political events which have a bearing on the economic conditions of a member or on the Bank's ability to supervise a project may be taken into account. The persuasive nature or otherwise of UN General Assembly resolutions depends on how consistent the resolution is with the Bank's Articles of Agreement since these Articles will not be modified or amended to suit General Assembly resolutions. Therefore, as a general rule, declarations, statements or resolutions for the Bank to take into account human rights in its lending policies will only be persuasive in so far as they coincide with the Bank's legally stated purpose.¹⁰² In addition, although the Bank is a specialised agency of the UN, under its Relationship Agreement with the UN, the Bank is required to function as an independent organisation.

Notwithstanding limitations imposed on the Bank by its Articles of Agreement, given that it is heavily involved in financing development projects world wide, it is a myopic standpoint to

101 Shihata, I., "The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements", *Denver J. Intl L. & Pol.*, vol no. 1, 1988, pp38-66.

¹⁰² *ibid.* at 43-44. The author refers to the case of South Africa and Portugal as examples of cases when the Bank maintained its position that it was prohibited from interfering with the affairs of its members. Lending to Portugal was suspended on economic grounds and lending to South Africa was stopped on the grounds it was no longer eligible economically.

take to separate politics from economics. Development projects may adversely affect a disproportionate number of people than the projected benefits and the Bank should ensure that borrower governments fulfil their agreements to protect human beings. "The idea that destruction of a single human being jeopardises humanity as a species has not attained acceptance in the development policy formulation."¹⁰³ The difficulty lies in establishing mechanisms and substantive criteria that may be used for monitoring the human rights aspect of sustainable development since the development process itself is not governed by the rule of law and democracy. There are obstacles to effective monitoring,¹⁰⁴ the primary factor being lack of procedures and mechanisms to provide redress in cases of human rights violations stemming from development. The extension of the analogy of environmental impact assessment to human rights in development might serve as a tool for monitoring the effects of a planned development - the human rights impact assessment.

"The model of the environmental impact assessment is useful in developing a feasible scheme for monitoring human rights aspects of development because of the conceptual proximity of both issues to each other. Both environmental protection and human rights protection are inherently cross-cutting issues, spanning the entire process of development...Another similarity is the focus on harmful side-effects of development projects. In cases where the side-effects are severe and irreversible, the necessity of introducing safe-guards becomes persuasive and serves to mobilize public support...[S]uch an assessment would serve to identify possible adverse effects, and would also provide for the introduction of safeguards for the prevention or mitigation of the possible adverse effects identified. As in environmental

¹⁰³ Tomasevski, K, op cit., note 97, at 78.

¹⁰⁴ *ibid* at 83-85.

protection, methods of redress and/or compensation would be possible".¹⁰⁵

Transparency in the development process is an important prerequisite to establishing effective monitoring structures as is identification of the rights most affected by development.¹⁰⁶ In September, 1993, the World Bank's Executive Directors established an independent Inspection Panel¹⁰⁷ to help ensure that Bank operations adhere to the institution's policies and procedures including those to promote sustainable development and reduce poverty. The Inspection Panel enables any group of

¹⁰⁵ *ibid* at 92. For the adverse impact of development on the environment see further; Rowlands, I., "The international politics of environment and development: the post-UNCED agenda", *Millenium*, Summer 1992, pp209-224, Silveira, M.P.W., "International Legal Instruments and sustainable development: principles, requirements and restructuring", *Willamette Law Review*, 1995, v31(2), pp239-251, Shearer, C.R.H., "International Environmental Law and Development in Developing Nations: Agenda setting, articulation, and institutional participation", *Tulane Environmental Law Jnl*, 1994, v7(2), pp391-430, Cycon, D., "When worlds collide: Law, Development and Indigenous People", *New England Law Review*, 1991, v25(3), pp761-794, Wilson, W., "Environmental Law as Development Assistance", *Environmental Law*, 1992, v22(3), pp953-976 and Parkinson, F., "Towards an international river basin development law? (With special reference to Latin America)" in Snyder & Slinn *INTERNATIONAL LAW OF DEVELOPMENT*.

The issues in environmental law and human rights in development are similar. Lack of participation by the people to be affected by projects and little political influence means that resulting harm is not compensated adequately, if at all. This lack of political power is reflected at the international level in the relationship between developed and developing countries. The latter's minimal role in the institutional structures for environmental protection and the cost involved taken together with external economic pressures means that they can only inadequately enforce the rapidly emerging standards of environmental protection.

¹⁰⁶ see above, p136-137 of this work for rights identified by James Paul.

¹⁰⁷ IBRD Resolution 93-10 and IDA Resolution 93-6. A review of the resolution was issued by the Bank on 17th October, 1996, "Clarification of Certain Aspects of the Resolution", (the clarification). For further details of the Inspection Panel and text of the Resolution establishing the Panel, see further http://www.worldbank.org/html/ins-panel/INS_PANEL.html

individuals, who consider they may or might be harmed or that their rights and interests have been or may be directly or adversely affected by Bank-supported projects, to ask the Panel to investigate their their complaints that the Bank has failed to abide by its policies and procedures. The Bank has received 13¹⁰⁸ formal requests since it began operations in 1994 including three from Africa.¹⁰⁹ The role of the Panel is to carry out independent investigations and its functions is to inquire and recommend. If the Board decides that a request shall be investigated, the Panel will collect information and provided its findings, independent assessment and conclusions to the Board. On the basis of the Panel's findings and Management's recommendations, the Executive Directors will consider the actions, if any, to be taken by the Bank. The Bank is to make public the Panel's report, Management recommendations and the Board's decisions.

5. Women and Development

Formal legal protection for the right of women to develop and for the realisation of their economic, social and cultural rights is contained in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹¹⁰ This is in addition to

108 As of 28 July, 1998.

109 These are Tanzania:Power VI Project, Lesotho/South Africa:Proposed Loan for Phase 1b of Lesotho Highlands Water Project and Nigeria: Lagos Drainage and Sanitation Project (Credit No.2517-0). See World Bank Home page at www.worldbank.org and www.worldbank.org/html/ins-panel/INS_PANEL.html

¹¹⁰ *Article 13* states:

States Parties shall take appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational

formal rights of non-discrimination.¹¹¹ The majority of the world's women contribute to the global economy through agriculture, therefore access to land and possessory rights in land is an important aspect of women's right to development. However, customary law in many countries limits the right of women to own land. The discriminatory effect of customary law is often affirmed by statutory law which follows custom in family matters. Land and access to credit are clearly important for the realisation of development. Institutionalised discriminatory practices at all levels ensures that women are excluded from the development process. Politically, they are inadequately represented and as a consequence issues which affect them most are omitted from the agenda. This phenomenon occurs at national and international level. In the area of development projects, there is little participation by the peoples who are to benefit from the project. Given that women participate little or not at all in the decision-making process,¹¹² their input is minimal in this area.

activities, sports and all aspects of cultural life.

Article 14 states:

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in all the elaboration and implementation of development planning at all levels;
- (f) To participate in all community activities.

¹¹¹ CEDAW, articles 1, 2 & 3.

¹¹² the goal of equal participation in the decision making process by women and men is referred to in the Beijing Platform for Action, para 183.

The legal basis for redressing the problems faced by women in development has its foundation in the principle of non-discrimination. In various international documents, the principle of equality and non-discrimination in terms of access to opportunities are affirmed and re-affirmed.¹¹³ Discrimination against women manifests itself in a form specific to a given milieu. Hence factors that limit a woman's right to develop in for instance, an African country, have their roots in prejudicial, discriminatory attitudes that assign an inferior role to women. This has historically limited their participation in decision-making in areas which impact directly on their lives. As traditional societies are being replaced by modern, industrial society, so women's participation has remained minimal and their exclusion more entrenched; in effect a cultural lag. Thus, the rights discourse has, until comparatively recently, not taken cognisance of their needs and requirements.

Lack of awareness of their rights has also further compounded the problem. This is being tackled by various women's organisation at the grass roots level who are instrumental in consciousness raising, using the language of rights discourse in order that women, and other groups, negatively affected by development projects and development issues in general can begin to assert their rights. As long as transparency exists within the development process and institutions involved in development projects recognise rights of participation of the people who will be affected by a project and allow them to take part in the process, and so long as they themselves, as international organisations recognise that they are bound by international laws and principles, then they can actually be a part of the process that ensures, for instance, the formal legal equality of women by taking into account their needs and requirements.

¹¹³ UDHR, art. (2), ICCPR, art 2(1), ICESCR, art2(2) CEDAW, arts. (1), (2) & (3), Vienna Programme of Action, para. 18.

A World Bank¹¹⁴ document states that women head about 40% of African households. They supply an average of 70% of the labour for food production, 50% of labour in domestic food storage, 60% in food marketing and 100% in on-farm food processing. Despite these figures, a wide of range of laws and regulatory practices impede women in obtaining credit, education, training and medical care. This obviously has high developmental costs in terms of maximisation of economic output. The distortions in economic resource allocation is linked to the legal principles underlying them. Gender neutral provisions do not take into account inequities within the structures of society. These legal norms thereby affect the economic development of women.

During the Beijing Conference, the World Bank Chairman, Mr Wolfensohn received a petition which requested that the World Bank take four initiatives to respond to the Platform for Action. These were promoting the participation of grassroots women's groups in economic policy formulation, institutionalising a gender perspective in the design and implementation of projects, increasing Bank lending for basic education, health and credit programmes and increasing the number of women in senior management. On the first initiative, the Bank has responded by, for example, integrating gender into their Policy Assessment which is one of the main instruments used to identify social and economic development priorities for low-income and vulnerable groups and which serves as one of the analytical tools for defining future policy and lending strategies. Gender has also been factored into adjustment programmes and economic reforms since evidence from poverty adjustments show that women and men are affected differently by poverty and by policies and programmes. Pilot countries for this gender adjustment in Africa include Ghana, Senegal, Rwanda and Cameroon. The Bank has also begun to involve NGOs in policy formulations. On the second initiative, the Bank has incorporated gender dimensions into the selection, design and implementation of agricultural projects,

¹¹⁴Women, Legal Reform and Development in Sub-Saharan Africa, World Bank website, <http://WWW.WORLDBANK.ORG>.

and reviews new projects on whether gender issues are addressed and rates them accordingly. On the third, the Bank has specific programmes directed to women and on the fourth initiative to increase women in its senior management, is taking institutional action.¹¹⁵

In assessing the failure of the law to ensure equality between men and women consideration needs to be given to where the fault lies. Failure might lie in the construction of the law, in its administration, entrenched custom or cultural practice which contravenes the law in that society or it might lie in the ignorance of those affected by the adverse effects of the law or a combination of all these. There are, certainly, weaknesses in substantive rule of law provisions. Marriage, succession and property laws are at times discriminatory and custom will abrogate certain statutory rights.

For example, in a Nigerian case, *Idehen v Idehen*,¹¹⁶ the provisions of the Wills Law (1958) of Western Nigeria, applicable in the states of Lagos, Ogun, Osun, Edo and Delta under section 3(1) states that "Subject to any Customary Law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in Law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator." There had previously been two conflicting views of the interpretation of this provision; that it rendered void any disposition of property by will inconsistent with customary law,

115 For full details of the Bank's gender initiatives see further, <http://www.worldbank.org/gender/how/report.htm>

¹¹⁶1991, 6 N.W.L.R Pt 198, 382. See also Sagay, I.E., "Customary Law and Freedom of Testamentary Power", *Journal of African Law*, 1995, vol 39, No. 2, 173 for an analysis of case law development on this particular area.

including intestate succession, or that it merely qualifies the property disposed of by will and does not render void testamentary disposition per se. When the case came before the Supreme Court, it was held by a majority of 5 to 2 that section 3(1) does not restrict testamentary power as such but merely qualifies the subject matter that can be disposed of by will. The issue to be considered is whether the property in question is subject to customary law and whether the testator can devise the property under customary law. If the testator is allowed to devise the property under customary law, then he may dispose of it by testamentary disposition.

The facts of the case involve the testamentary disposition of certain property, which under customary law would always devolve on the eldest son but which the testator had bequeathed to another. According to the decision of the Supreme Court, the testator had no authority to bequeath the property since under the relevant customary law he could not devise the property. While the parties involved in this case were both men, it was interesting to see that the judgement did not consider the substance of the customary law as to its discriminatory aspects. The customary law and its application were accepted in toto. The effect of this decision, in the context of the abrogation of statutory provisions is that when faced with actual and potential discriminatory customary law, its substance is not questioned. The statutory rules of interpretation are applied to the relevant provision without, in my opinion, sufficient consideration to its effects. This case serves to illuminate the difficulty of modifying entrenched customs and customary law even when their application would contravene statutory, constitutional and international non-discrimination provisions.

In a subsequent case, *Lawal-Osula v Lawal-Osula*, 1993,¹¹⁷ the Court of Appeal extended the subject matter to be subject to customary law to all the properties of the testator while

¹¹⁷2 NWLR Pt 274, 158.

purporting to follow the decision of the higher court. The case illustrates the lack of integration between modern laws and customs, the later Court of Appeal decision highlights the inconsistency in the application of rules in lower and higher courts and the whole process of administration of law, in this example, shows the detrimental effect to women. If custom prevents women from inheriting property and to evade this problem, testamentary disposition is made, which will be set aside, even on a qualified basis, it becomes impossible to reform the law both substantively and in its application. Further, the wishes of the testator are thwarted and the likelihood of improving the ability of women to develop is impeded.

Strategic means of obviating the problems include law reforms, empowerment of women through education, public education for organisations responsible for implementation of law reforms, the judiciary and law enforcement officers. Access to law needs to be improved and participation in the process of law reform, for example, of NGOs and other grass roots organisations, will aid useful development of the law.

Economic adjustment programmes or structural adjustment programmes (SAPs) have also had a detrimental effect on women.¹¹⁸ Linked with general development programmes, they have tended to omit women's economic contributions because they are not as valued as the economic contributions of men. SAPs are intended to improve trade regimes, allocation of resources and efficiency in the use of resources. They do not, however, pay sufficient attention to the social costs and neither did the economic measures consider gender as a distinguishing factor. Men and women participate in the economy in different ways because they have differing constraints and will therefore be affected differently by the economic measure. One of the ways in which they participate differently is in the allocation of resources such as land, labour, capital and access to capital, access to

¹¹⁸see World Bank, "Gender and Economic Adjustment in Sub-Saharan Africa", <http://WWW.WORLDBANK.ORG>.

credit, technology and training. Gender neutrality in underlying economic concepts makes women's economic and non-economic work invisible. Moreover, unpaid work is not considered economic and is not included in the national product which provides an incomplete picture of economic activity. Therefore, what may be considered in conventional economic analysis as efficiency improvements may merely mean a shift from the visible, male economy to the invisible, predominantly female economy. Economic adjustment programmes have realised the social costs of the measures and have begun to factor imbalances in gender divisions of labour and identify gender differentiated constraints into the design of the programmes. In the United Nations Secretary-General's Report on An Agenda for Development, he stated that structural adjustment programmes must have "a clear human focus".¹¹⁹ While the report affirms that development is a fundamental human right and is the most secure basis for peace, it goes on to say that societies must take into account in development decisions, amongst other things, "...cultural values and expectations."¹²⁰ This is an unfortunate inclusion since one of the primary reasons women have been so adversely affected in the development process is because cultural values impede or deny them the opportunity to acquire the means to fully participate in the process. Nonetheless, the Recommendation of An Agenda for Development states that

"...in virtually every dimension of development - whether political, social, economic, environmental or security related - the role of women is central. Policies and institutions that suppress the real potential of half of the Earth's people must be reformed. The empowerment of women must be recognized and utilized as a powerful tool for liberating the

¹¹⁹An Agenda for Development, 1995, United Nations, New York, UN Doc A/48/935, 6th May, 1994, para. 110.

¹²⁰ibid., para 64.

full creative energies of a society."¹²¹

CONCLUSION

As an illustration of the specificities of the rights discourse within an African context, the legal principles of self-determination and the right to development demonstrate how, in spite of the encompassing elements of these principles, their practical operation does not always fulfil their purpose. Women as part of the wider group are unable to have the genuine expression of their will expressed in terms of participation in the decision-making process and in their economic and social development. This is in addition to the cultural and economic marginalisation they suffer as part of the institutionalised discrimination within the society. Locating the principle of self-determination and the right to development within the rights framework, not just a social development framework, shows that their application in practice does not enhance women's position.

The right to development is expressed as a need to develop for the benefit of the whole society. There is little participation by women in the decision making process on projects specifically aimed at benefiting them or in those intended to benefit their society as a whole. Yet the key to making both the right to self-determination and the right to development work, are representation, transparency and accountability which are integral elements of the principles. Feminist legal theory as an inclusive theory can be used to make the operation of these principles more effective once the theory itself is informed by

¹²¹ibid., para 74, An Agenda for Development:Recommendations.

the issues of race and culture which adversely affect the realisation, promotion and protection of the human rights of women in an African context.

CHAPTER 4

WOMEN'S RIGHTS AS HUMAN RIGHTS: THE OMISSION OF RACE AND CULTURE

INTRODUCTION

Although the principle of non-discrimination on the grounds of sex is contained in the United Nations Charter,¹ the Universal Declaration of Human Rights² (hereafter UDHR), the two International Covenants³ and regional documents on human rights,⁴ the recognition of issues affecting women that act in concert to maintain their subordinate positions politically, economically and culturally in society as a direct result of their gender has only recently been recognised as issues of human rights.

There is a clear disparity between formal legal protection and reality. This has been attributed to the distinction between the public and private spheres in law making, the institutionalisation of gender roles, the complicity of communities and the state in maintaining social conditioning with

¹Adopted 26th June 1945, entered into force 24th October, 1945 (as amended by General Assembly Resolutions), 557 UNTS 143, article 1(3).

²1948, UN Doc A/811, adopted 10 December, 1948, General Assembly Resolution 217A(III), articles 2 and 7.

³International Covenant on Civil and Political Rights, 999 UNTS 171, 1966, articles 2 and 26, (hereafter ICCPR) and International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 1966, article 3 (hereafter ICESCR).

⁴African Charter on Human and Peoples' Rights, adopted 17 June, 1981 by Eighteenth Assembly of Heads of State and Government of the Organization of African Unity, OAU, entered into force 21 October, 1986, reprinted in 21 ILM 58, 1982, articles 2 and 3 (hereafter ACHPR), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), signed in Rome, 4 November, 1950, entered into force 3 September, 1953, 213 UNTS, 221, article 14 (hereafter ECHR) and the American Convention on Human Rights, 1969, signed 22 November, 1969, entered into force 18 July, 1978, 1144 UNTS 123, reprinted 9 ILM, 673, 1970, articles 1 and 24.

regard to gender roles, for instance with protective legislation, and the problems with the implementation of corrective legislation to ensure equal rights in the face of this institutionalisation of the subordination of women. Action in the private sphere, relegated by international law to domestic jurisdictions with certain exceptions, a notable exception being human rights law, is treated as purely private acts of the individual. Private action by the individual and areas that are considered private such as marriage are of course regulated. Yet there remains an area within the regulated sphere that is considered a private matter for individuals and it is more usually within such areas that the subordination of women is located and the complicity of communities in maintaining this subordination is apparent.

This public/private dichotomy is transferred to law-making internationally and existing international standards have been found demonstrably androcentric and exclusive of issues directly affecting women. This has to some extent been counter-acted by law-making within the United Nations although the problems of effective implementation remains; a problem which exists also within municipal jurisdictions.

Human rights law can only be implemented domestically although there exist monitoring bodies attached to treaties. The work of these monitoring bodies is limited to monitoring the implementation efforts of those States that have ratified the treaty and their effectiveness depends on States parties to the relevant treaty cooperating in producing and submitting timely country reports and responding to them. The right of individual application to the relevant body is restricted to States who have ratified the relevant optional protocol⁵ and further, the committees themselves are usually hampered by financial and time constraints. States participate in international law on a

⁵ for example, the Optional Protocol to the International Covenant on Civil and Political Rights, 1966 which came into force on 23rd March, 1976.

consensual basis and consequently, they retain the right to opt out or limit their treaty obligations through a variety of means such as denunciation, reservations as to certain treaty terms, derogations in specified circumstances and various accommodation clauses which require that the right of an individual must be protected in conformity with the rights of others and with due regard to morals or on public order and national security grounds.⁶

The use of reservations to certain treaty terms is a thorny problem, particularly with regard to human rights treaties. While they allow a greater number of States to accede to the treaty in question, the reservations may defeat the purpose of the treaty itself and in effect make a nonsense of the obligation. The United Nations, while it has contributed significantly to the development of international law, is a political organisation. Negotiation of treaty terms is a lengthy process fraught with difficulties and different ideological stances often have to be incorporated. This usually results in widely drafted open-ended terms to which reservations may be subsequently made. The large number of reservations made to the Convention on the Elimination of Discrimination against Women⁷ is demonstrative. The reservations made are typically those relating to customary law, including religious law, even though the object of the Convention is clearly to seek protection from the adverse effects on women from those laws. The reliance on relativity, cultural, religious or otherwise, by governments, political elites and religious bodies negatively impacts on the successful implementation of women's rights since the areas where relativity is claimed are primarily cultural and customary, prime areas for violations of women's human rights.

So, while women's rights are notionally accepted as human rights

⁶ See, for example, article 10(2), ECHR.

⁷ UN Doc. A/34/46, adopted 18th December, 1979, 1249 UNTS 14, reprinted in 19 ILM 33, 1980, referred to as CEDAW or the Women's Convention.

and are an integral and indivisible part of all human rights and fundamental freedoms, State parties' obligations to protect these rights in accordance with the provisions of CEDAW are circumscribed by reservations to core treaty terms and the implementation of these fundamental rights is curtailed.

Part I of this Chapter looks at the growth of the concept(s) of women's rights and the challenges it poses to international human rights law. Formal guarantees for the protection of women's rights within the United Nations system are discussed, followed by the inadequacies with formal guarantees of women's rights. Part II discusses the omission of race and culture in feminist legal theory and the use of essentialism as a tool of feminist theory. Efforts to theorise Black feminism are then considered. This is followed in Part III by a discussion of cultural relativism and how relativist arguments fail women. The Chapter aims to highlight how the omission of race and culture from feminist legal theory and the failure of cultural relativist argument to provide promotion and protection for women's human rights, marginalise African women in the rights discourse.

Essentialism assumes that the sole defining trait of a woman is her gender, itself a social construct based within her society. For a vast number of women, however, race and culture are equally important defining traits,⁸ not least because the perception of others in the identification of women of colour, or non-White women, rates their difference as a relevant factor. This difference, from the position of the onlooker and the perception of difference, from the position of the individual, has an impact and an effect in the lives of women of colour which essentialism ignores. In ignoring the difference of race and in my opinion, culture, and relying only on gender difference, essentialism can only offer a partial solution to the subordination of Black women from a differing culture because it relies on an ethnocentric view. This of itself is not problematic. To a large extent, we

⁸ other defining traits include age and sexuality and arguably, class.

all rely on an ethnocentric perception of the world. The reliance on essentialism is, however, problematic when a feminist viewpoint or theory, admittedly necessary to influence policy decisions on redressing the gender-based subordination of women is accepted as representative of *all* women. Subordination on the basis of race, *apartheid*, is not acceptable. Discrimination on the basis of race is protected in various international human rights instruments.⁹ For Black women, race is an issue as well as gender. For Black women inhabiting a culturally oppressive world, culture is an issue, race is an issue, gender is an issue. The accumulated effect of the difference these factors make cannot adequately be tackled solely on the basis of gender. Feminist discourse, because it inherently challenges the *status quo*, can be useful to address these additional factors. The discourse itself must be challenged on the basis of its omissions in order that it is fully representative of *all* women. Further, representative feminist legal theory with respect to women's human rights can aid a comprehensive policy formulation that will address and apply to all women. Western feminisms are dominant in the movement for women's human rights and are predicated on a Western approach to rights which silences African feminists. The danger, as it appears at present, is that issues which are assumed to be a priority of women may be a priority for only certain groups of women in certain parts of the world. These issues, given the status of women's human rights become the focus of well-meaning implementation strategies across the world with little reference to the immediate concerns of women in that environment.

The following section discusses cultural relativism or what I call gendered relativism and its adverse impact on women's rights. Cultural practices usually fall within the private sphere

⁹see for instance International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS, 195, 3 ILM 164, 58 AJIL, 1081 and the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, UN Res 3068 (XXVIII).

and while they may vary from country to country, they vary also within countries and within communities in the country. They include, depending on the laws of the country, religious law and practices. Cultural practices may be as egregious as female genital surgeries or as routine as obtaining a father's permission to marry his daughter. On the whole they tend to impact negatively on women, hence the reference to gendered relativity. Since these practices may be derived or seen to be derived, from religious practices and long-standing custom, they are extremely difficult to combat. Moreover, reservations to CEDAW, as mentioned earlier, often relate to customary, religious or cultural practices. While the spectrum of practices is wide, the effects are detrimental to women's rights in a number of ways.

Customary laws which deny women the right of inheritance or to own property ultimately deny them the right to development or independence. Financing of projects in the form of loans requires collateral which a lot of women will not have because they cannot own property. Efforts to improve women's rights in these situations require a prioritisation of issues that may differ from those of women in developed countries. Work is being done in these areas but discretely, often on an ad hoc basis; for example, in development studies or international development law, gender and development is an adjunct to main development studies issues. This approach is comparable to adding Black women's experiences to footnotes or referring to difference in parenthesis. It marginalises and ultimately it fails people. My argument is that a holistic approach, advocated indirectly in the Beijing Platform for Action¹⁰, which recognises the cumulative effect of race, gender and culture and the difference these factors make in law, access to opportunity and ability to develop, will enable feminist legal theory in its approach to human rights law to be truly representative.

¹⁰ A/CONF.177/20, 1995.

References to feminism in the context of this study is to feminist theory, that is written theory. While there exist examples of feminist activism in different countries across the world which are a valid illustration of the empowerment and the fight for the economic, social and political independence of women, this study is concerned with the theoretical development of feminist work as solipsism and how this methodology runs the risk of marginalising a large proportion of those it has come to represent. Since feminist action in many developing countries is primarily based on activism as opposed to theory, the foundation of feminist theory on which this work is based is the theory which has predominantly developed in the West, notably in the United States and Europe.

PART I. WOMEN'S RIGHTS AS HUMAN RIGHTS

1. The Concept(s) of Women's Rights

The application of feminist theory to law, initially within municipal systems and latterly within the international order has demonstrated that organisational and normative structures of law are essentially androcentric and exclusionary with regards to women. This has been attributed to the liberal construct of the public and private spheres of law making,¹¹ a political tool for the organisation of the state originating in the nineteenth century. The replication of the spheres of law-making in the

¹¹ "The fundamental problem women face worldwide is not discriminatory treatment compared with men, although this is a manifestation of the larger problem. Women are in an inferior position because they have no real power in either the public or private worlds, and international human rights law, like most economic, social, cultural, and legal constructs, reinforces this powerlessness."

Charlesworth, H., 'What are "Women's International Human Rights"?', in COOK, R., (ED), HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, University of Pennsylvania Press, 1994, 57 at 60, hereafter COOK, HUMAN RIGHTS OF WOMEN.

international legal order has resulted, particularly in the area of human rights, in the exclusion of issues of major concerns to women since they are marginalised in the policy making process.

Questioning why gender has not been an issue in international law, Hilary Charlesworth et al indicate the possibilities of feminist scholarship in international law.¹² One of the difficulties of developing an alternative feminist perspective to international law lay in the differing perspectives of feminist theory. The cause of women's subordination has been located in the absence of their life experiences in institutionalised societal structures. The identification of this dissonance, in law, for instance, although it applies in all disciplines, crystallised into attempts to devise an approach to develop a theoretical means of combatting institutionalised gender discrimination within existing structures.

Feminist theory initially approached the solution to societal inequities between men and women on an equality-based strategy.¹³ In the West, notably in the United States, an attack on the prevailing ideology enabled middle class women to move from the home into the workplace. Attention focussed on sexual crimes influenced policy in a number of ways; the requirement of corroboration of a rape victim's evidence was modified or repealed,¹⁴ shelters for battered women were set up, divorce laws were reformed to become gender neutral, no fault divorces were

¹²Charlesworth, H., Chinkin, C., & Wright, S., "Feminist Approaches to International Law", 1991 AJIL, vol 85, 613.

¹³Goldstein, L.F., "Can this marriage be saved? Feminist Public Policy and Feminist Jurisprudence." pp11-40, in Goldstein, L.F. (ed) with an introduction, FEMINIST JURISPRUDENCE:THE DIFFERENCE DEBATE, Rowman & Littlefield Publishers Inc., 1992, hereafter, Goldstein, L. THE DIFFERENCE DEBATE.

¹⁴The repeal of corroboration of a rape victim's evidence took place in the United States. See Goldstein, L.F. in Goldstein, L.F. THE DIFFERENCE DEBATE, op cit. Corroboration remains in other jurisdictions e.g. in the United Kingdom.

adopted and custody became characterised by the best interest of the child. The use of the law and non-discriminatory principles afforded some solution to the problems. If women were treated equally, on the same terms as men using existing law, the balance could hopefully be redressed. The equality rhetoric, however, caused other problems. Working mothers needed child care facilities and in divorce cases, the underlying economic inequities of society were not taken into account in calculating what was in the best interest of the child. The parent who earned more was assumed to be able to take better care of children economically and this usually meant men. Yet, gender stereotypes of women as carers and nurturers of the family meant women were more often given custody with little or no financial assistance to ensure that women could economically provide for the children. Moreover, equality based strategy did not help those women who were unable to compete on the same basis as men; it assumed socio-economic equality. Further, there was an underlying assumption that there were no differences between men and women that laws could not address.

Women are subject to restrictions on their aims and ambitions by cumulative factors. Deep-rooted societal expectation regarding their capabilities, what they ought to aspire to, limitations on their ambitions through parental and childcare responsibilities are the practical realities that may curtail the ability of women to achieve on equal terms with men. The equality-based strategy was incapable of addressing discriminatory practices dependent on biological differences between men and women, for instance in the workplace. A pregnant woman does not equate to a man incapacitated by illness and difficulties arose with the limits of formal legal equality. Tellingly, equality based strategy accepted the benchmark of men's terms of success as a measure for a woman's success in society¹⁵ and inevitably it failed to resolve the problem. The whole point identified by feminist theory in general is that the life experiences of women are missing from

¹⁵see Becker, Mary, E., "Prince Charming: Abstract Equality", pp99-146, in Goldstein, L., THE DIFFERENCE DEBATE.

the norms and regulations of society. It was bound to cause problems to try and fit a different life view into an existing structure which had identified shortcomings. Expectations of a woman's role in society had in certain instances the force of law in the form of protective legislation which aimed to protect women from certain types of work, for example, nightwork. This protective category¹⁶ is comprised of exclusionary provisions which reflect a societal concept of women as a group which should or should not engage in specified activities. Protective doctrines accentuated the difference between men and women, interpreting this difference, primarily biological, in a negative, restrictive way. It resulted in the exclusion of women from areas of the public sphere and from lucrative employment, instead of seeking a solution in practical terms to the difference between men and women such as the provision of childcare or tax breaks for childcare to enable those who wanted to work to do so. Equality rhetoric approached the problem with a view that if women and men were treated the same, the problem would be alleviated if not resolved. It did not address cultural inequality in the private sphere. The non-discriminatory category¹⁷ is a reflection of equal treatment between men and women and its application and implementation may be equated with equality rhetoric. In actual fact, equality rhetoric masked differences in women's experience. It did not adequately deal with inequality of opportunity nor did it obviate discrimination. Further, it did not enable solutions to the unique economic and social problems women faced.

A modification of the equality rhetoric accentuated a difference or accommodation theory within the equality rhetoric whereby women's difference from men would be taken into account.

¹⁶see generally Hevener, N., "An analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective", 8 HRQ, No. 1, 1986, pp70-88.

¹⁷Ibid, at 78.

Gilligan's¹⁸ work, based on a sample of White middle class women and girls, demonstrated that there is a different voice, most often associated with women; the voice of caring and connection. At the time, the limits of the equality based strategy were being identified and a theory of difference to accommodate women's perceived difference from men and highlight their point of view was being posited. This accommodation of difference may be equated with Hevener's corrective category¹⁹ which involves the identification of women as a separate group needing special treatment in order to alter specific treatment that women are receiving. While potentially empowering for women because it requires that differences between men and women be specifically redressed, this position is fraught with difficulties because attention to difference accepts it as a relevant defining factor which may ultimately be used to justify treating women differently and unequally without taking into account social and economic causes of inequalities.²⁰ The danger of a return to protectionism is obvious. Feminism of difference perhaps accepts institutional structures rather than attempting to dismantle these structures. It can fail to see gender difference as socially constructed rather than biologically determined. It accepts the standard as male and where a difference is noted it is because it is not male and accommodation becomes necessary. The problem of trying to accommodate women's differences without reverting to traditional gender roles remains.²¹

¹⁸Gilligan, C., IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT, Harvard University Press, 1982, reprinted 1993.

¹⁹Hevener, op cit. note 16, at 74.

²⁰see Fineman, M., "Feminist Theory and the Law", Harvard Jnl. L. & Pub. Pol., 1995, v18(2), pp349-368 on the limitation of equality rhetoric, the potential problems of difference and accommodation theory and the splintering of feminist theory into individualism which results in tokenism without challenging the foundational causes of inequality or coming up with a theory that can accommodate the chimera of the causes of women's subordination.

²¹see further Becker op cit., note 15 and Williams, J.C., "Deconstructing Gender", pp41-98 in Goldstein, L.F. THE DIFFERENCE

The accentuation of difference between men and women gives rise to the question of whose difference or whose voice speaks of this difference. Concern²² that questioning the difference women have to men, and between women, has been raised on the grounds that it may lead to splintering of feminism because greater reliance is placed on individual characteristics such as race or sexuality in defining difference. Ultimately, it has been argued²³ it leads to tokenism. This need not be the case. Feminist theory of difference in its location of social and economic inequalities between men and women within a systemic and institutionalised inequitable social structure has application in all societies and within all cultures. Once we begin to construct the impact of difference, be it between men and women, we begin to see its importance in the reality of people's lives in spite of formal legal protection which indicates otherwise. We begin to appreciate how that difference or cumulative differences have an impact, adversely or not, on people and note the omissions in how we organise our societies and in societies. This is a positive factor. To resolve a problem, we need to identify what is wrong. Individual characteristics, such as race, group identity, such as culture, are important differences. It is incumbent on us to seek to understand how these differences impact differently on individuals and groups and the effect they have. Certainly, it may lead to a 'splintering' but that is not sufficient reason not to explore the ramifications of difference. The overriding problem with societal organisation especially with respect to law and, for the purposes of this work, international law, is that the point of reference is by definition a male norm and a white, middle class, male norm at that. If that norm fails women on that basis, it doubly fails anyone with additional differences. In working towards an inclusive, representative feminist jurisprudence to eliminate the subordination of women, these

DEBATE.

²²see Becker op cit. note 15 and Fineman, op cit. note 20, for example.

²³ Fineman, M, *ibid*, 357.

differences are a valid constituent.

Notwithstanding the diversity of feminist approaches to law,²⁴ the issue of a differing perspective or voice²⁵ remains a valid consideration in a critique of law. Engle's critique of feminist approaches to human rights has been somewhat superceded by the proclamation of women's rights as human rights in the Vienna Declaration and Programme of Action²⁶ following the World Conference on Human Rights in 1993. The identification of problems with using the law to combat women's subordination, notwithstanding the human rights status of women's rights, remains valid.

Human rights as defined in international law are Western conceived and may, as a consequence of prioritisation, fail to address adequately the concerns of women in the Third World, a concern this work addresses. Human rights law has to give greater weight to economic or social rights and the rights that concern women of cultural and ethnic minorities. Identifying the approach to achieve this is difficult. In attempting to secure women's place within the international framework, a reliance on that framework is necessary. Yet, the framework itself has been challenged. The dilemma is whether to use the doctrinal or institutional approach i.e. use the language of the discourse to critique it²⁷ and thus to raise the preliminary question of the ability of the doctrine or institutions to protect women's human rights, or whether to take an external approach and critique the whole system for systematically excluding half of the human race

²⁴ Engle, K., "International Human Rights and Feminism: When Discourses Meet." 13 Mich. J. Intl. L., 517, 1992 for a critique of rights and human rights law.

²⁵ see Gilligan, C., op cit. note 18.

²⁶A/CONF.157/23.

²⁷Engle describes the proponents of these approaches as liberal feminists. See Engle, op cit. note 24, at 534 and 557 respectively.

while claiming to be representative.²⁸ The latter approach critiques the framework for being inherently based on male defined concepts and grapples with trying to achieve women's rights even if the framework itself has to alter to enable this. The international order has been shown to be impervious to women because of its organisational and normative structures and is consequently thoroughly gendered.²⁹ Problems identified within municipal structures exist within the international system because its organisational and normative structures are essentially replicated. This is problematic because issues of concern to women remain marginalised or relegated to a special category while issues of concern to men who are disproportionately represented in the international order become general human rights concerns. The objectivity of legal reasoning has also been challenged.³⁰ It is my opinion that the institutional approach is best placed not only to address the problem of women's marginalisation but to redress it.

This work represents an attempt to deal with doctrinal issues of cultural difference, it raises the issue of the role of institutions, particularly, African regional institutions³¹ in protecting rights relying on an African value approach while at the same time it relies on the existing international framework and the rights discourse as a valuable means of achieving the protection of women's rights. To do this, it accepts that human rights are universal, that women's human rights are an integral part of human rights and seeks to ensure that differences of race and culture and the effect and impact they have are a constituent of feminist legal theory in its attempt to redress the

²⁸Engle's radical or cultural feminists, *ibid*, p557.

²⁹Charlesworth et.al. *op cit.*, note 12 particularly pp621-634.

³⁰Romany, C., "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights law", 6 *Harvard Human Rights Journal*, 1993, pp87-125.

³¹see Chapter 2, Part II of this work.

institutionalised subordination of women.

"A feminist analysis must insert itself into the critique of the illusion of coherence projected by international law. By dissecting the structure of international legal argument and exposing its artifactual nature, a feminist critique can reveal how such construction serves to perpetuate the *alienation* of women within international law. By attacking the doctrinal framework, a feminist critique shows how the interplay of sources and process doctrines keeps women outside the boundaries of the legal argumentative framework".³²

Sources, substance and process doctrines comprise the structure of international legal argument. Substance doctrines are substantive rules about international conduct. These doctrines operate without reference to any derivative values and obscure the fact that the men formulated the values which underlie the doctrines.

"Exposing the political and moral choices encoded in sources doctrines require identification of the forces that forge the discursive and non-discursive conditions which give legitimacy to such doctrines. The "consensual story", which privileges state agreements, derives from a contract to which women are neither direct nor indirect parties. In the creation of international society, patriarchal values hide from the "social contract" the contract's sexual counterpart and thus imbue the terms and principles with male values."³³

Process doctrines delimit actors and their jurisdiction; two

³²Romany, C, op cit. at 94.

³³ibid at 93.

significant areas of which are participation and jurisdiction. Participation doctrines establish sovereignty and do so without reference to substance of law while in limiting sovereign authority, jurisdiction doctrines remain procedural, also without reference to substantive law.³⁴

"A critique of process doctrines which challenges their independence and which exposes their exclusions has great potential for a feminist reconceptualization of human rights law. Participation doctrines which establish sovereignty rely on facts and practices that encode women's exclusion. Women are the stateless subjects of international law according to such facts and practices. The construction of these facts and practices keeps the *alien* status of women entrenched. Under this construction, women are *aliens* within their states and *aliens* within an international society defined by participation doctrines which do not deem them to be actors. The jurisdiction doctrines - in charge of delimiting avenues of legitimate interchange where authoritative norms are elaborated, and which must remain procedural and free of sources that rely only on consent - also relegate the "subjectivity" of women to outer boundaries".³⁵

With the organisational, normative and structural foundations of international law flawed in gender aspects, the human rights framework has foundational problems that necessitates a reconceptualisation of the rights discourse. A prime candidate for this rethinking of the human rights framework is the challenging of the public/private dichotomy which is "the fundamental basis of the modern state's function of separating and concentrating juridical forms of power that emanate from the

³⁴ibid at 92-95.

³⁵ibid at 95.

State...[t]he distinction impl[ying] that the private world is uncontrolled."³⁶ Clearly this is not correct since the State regulates certain aspects of the domestic/private sphere, for example, there are laws on marriage, divorce, regulation of abortion and inheritance rights.³⁷ The public sphere is productive while the private/domestic sphere is [re]productive with a greater economic value attached to the former, primarily, male sphere. This construct has in certain instances been reproduced in certain principles of international law.³⁸ By its nature, international law is consensual, governing certain matters of 'public' importance such as international peace and security *inter alia* with a large remit of areas falling within the domestic jurisdiction of states.³⁹ Human rights law is a clear exception. Women's exclusion from the law making processes in domestic jurisdictions and their relegation to the private sphere marginalises their concerns. The exclusion of women from the processes delineating which rights constitute human rights renders insignificant their concerns. The drafting of the language of rights is limited solely to state action excluding acts by private actors which may otherwise amount to violations of human rights such as violence against women.

"The assumption that underlies all law, including international human rights law, is that the public/private distinction is real: human society, human lives can be separated into two distinct spheres. This division, however, is an ideological construct rationalizing the exclusion of women from sources of power. It also makes it possible to

³⁶Charlesworth et.al., op cit., note 12 at 627. See also Romany, C. *ibid*, p96ff.

³⁷see further Eisler, R., "Human Rights: Towards an Integrated Theory for Action" 9 HRQ 287, 1987.

³⁸Charlesworth et.al., op cit.

³⁹see Article 2(7) United Nations Charter on non-interference in domestic jurisdiction.

maintain repressive systems of control over women without interference from human rights guarantees, which operate in the public sphere."⁴⁰

The role of law and indeed the state in perpetuating gendered systems is key within feminist jurisprudence in addressing the entrenched subordination of women. Whose political power is represented in the definition of legal rights, the limitation on rights analysis and the life experience which underlie the substantive principles of human rights law to which the law ought to be committed?⁴¹ "To the extent that the state is viewed as genderless, as not implicated in the construction of gender subordination, state responsibility for the perpetuation of that subordination goes unrecognised. Therein lies the need to confront the gender stratification embedded in the liberal state."⁴² A reconceptualisation of the norms of state responsibility⁴³ within a feminist approach to human rights would require action to prevent abuses regardless of the loci, be it in the public or private sphere. State inaction would amount to complicity with private actors through systematically failing to provide protection for women from private actors who deprive them of their rights contrary to the state's treaty obligations.⁴⁴ An

⁴⁰Charlesworth et.al., op cit. at 629.

⁴¹see generally Binion, G., "Human Rights:A Feminist Perspective", 17 HRQ, No 3. 1995, pp509-526, especially at 514. See also Bunch, C., "Women's Rights as Human Rights:Towards a Revision of Human Rights", 12 HRQ 486, 1990.

⁴²Romany, C. op cit. at 100

⁴³See Cook. R., "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women", in COOK, HUMAN RIGHTS OF WOMEN, p228ff.

⁴⁴ "An illegal act which violates human rights and which is initially not directly imputable to a State (for example), because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of

alternative approach would ascribe responsibility to the state for failure to fulfil its obligations to ensure non-discriminatory protection of the law.⁴⁵

A further challenge to international law in terms of feminist approaches is that of restating sovereignty⁴⁶ through a critique of "...the ways in which State sovereignty sets the functional and allegorical parameters of international law."⁴⁷ The marginalisation of women from the organisational, normative and structural processes of international law needs to be remedied; the main means of doing this is clearly through increased participation by women in those processes. However, reliance on individual characteristics that define women, such as race and sexual orientation, in order to legitimate theoretical discourse may lead, it has been argued, to token representation in practice.

"...[A] notion of representation that is dependent on the individual poses serious difficulties. It carries with it not only the potential for divisiveness but also the certainty of exclusion within the hypothetically available community of feminists. Moreover, individual-based representation allows tokenism to flourish and nurtures continued resistance

due diligence to prevent the violation..."

Velasquez Rodriguez v Honduras, Inter-American Court of Human Rights, 1988, Ser.C, No.4., at para. 172.

⁴⁵The public/private distinction is being eroded with regards to fundamental rights in some jurisdictions; for example, certain states have been made responsible under the American Convention for private interference with freedom of expression using art. 13 of that Convention and CEDAW art 15(3). This example is quoted in Romany, C., op cit note 6 at 121.

⁴⁶Knop, K., "Re/Statements:Feminism and State Sovereignty in international Law", *Transnational Law and Contemporary Problems*, vol 3, Fall 1993, 293.

⁴⁷ibid at 296.

to the radical potential for change through the ideological and structural implications of feminism within institutions."⁴⁸

This argument is not convincing. The identification of various defining factors for women, instead of being divisive, is actually a bonus. In order for feminist theory to be a useful tool in challenging the status quo, it needs to be representative. To be truly representative, it must allow to flourish all the different voices of all women and it must take on board the issues they raise. Perhaps, of necessity, the movement needs a dispersion of views before it can coalesce into a truly global, representative theory. That ultimate goal is worth seeking even if at present the cacophony of multifarious voices seems deafening. Such an inclusive approach that will radicalise the core of the international legal order is necessary.

"Feminist jurisprudence provides very substantial challenges to human rights law as it is institutionally understood. These include both fundamental questions about the processes by which human rights are defined, adjudicated, enforced, as well as questions about the substance of what is thereby "protected". And, while the focus of analysis is on women's experience, a feminist approach might have immediate implications for the rights of all disempowered peoples and raise questions about social organizations generally. If it were necessary to offer one word to capture the essence of feminist jurisprudence, in general and in its significance for human rights analysis, it is *inclusion*. The enterprise critiques the experience of women as persons *excluded* from legal protection and from proportionate political

⁴⁸Fineman, op cit, note 20 at 358.

and economic power."⁴⁹

One such approach is identified by Knop⁵⁰ as statism; sovereignty as an aspect of political power. She argues for democratic government as a criterion for recognition of the state and indicates how a trend away from statism may be used to ground arguments for increased participation and representation in the law-making process by women. If the status of the state in international law rests on its respect for the right of participation in democratic governance, then it is open to women to insist that the right be interpreted, using feminist critique, in a way that affords women equal representation in government.⁵¹ If international status can be defined by a state's legitimacy in terms of its belief in the right to participation, its status could also be additionally considered on other gender-conscious ideas of representation and democracy.⁵² Clearly the equality rhetoric is insufficient to ensure women's participation and adequate representation. Women, as a group, should be able to participate in international decisions that affect them. A rejection of the 'centrality of the state' may enable the participation of non-state actors in the influencing of the development and implementation of international law.⁵³ The role

⁴⁹Binion, G., op cit., note 41 at 513.

⁵⁰Op cit note 41. See her footnote 21.

⁵¹ Knop refers also to the equation of the concept of internal self-determination with the right to representative democracy by scholars such as Cassese. See Chapter 3 infra for discussion of internal self-determination where a government gains legitimacy from proper representation of its peoples.

⁵²see Knop, p298ff.

⁵³Gunning, I., "Modernizing Customary International Law: The Challenge of Human Rights", Virginia Jnl. Intl. L., v31(2), 1991 pp211-247. Gunning questions the comprehensiveness of traditional formulations of national sovereignty and looks at the possibility of considering NGO and transnational participation in the creation of customary international law.

"[T]he traditional theoretical framework upon which customary international law has rested - certain

of non-state actors, particularly non-governmental organisations or NGOs, in the implementation of women's rights was acknowledged in the Beijing Declaration and Platform for Action, a non-binding but nonetheless influential UN document. References to implementation in the document under each of the heads of critical areas of concern, poverty, unequal access to education and training, violence against women, inequality in economic structures and policies, *inter alia* makes reference to the role of NGOs in achieving the stated objective.

The establishment of the concept of women's rights as human rights has been demonstrated by illuminating the exclusion of women from the organisational, normative and structural processes of the law, both national and international. Feminist theory has had to challenge the lack of a gender aspect to the differing layers that construct the autonomy, objectivity and impartiality of the law to highlight the omission of women's experience from the international legal order. The reconceptualisation that ensued challenged the public/private dichotomy, the norms of state responsibility, ideas of state sovereignty and the exclusion of participation by non-state actors; all of which in concert may operate to allow increased participation by women in legal processes.

2. Formal Guarantees of Women's Rights

Notwithstanding the relatively recent acceptance of women's rights as human rights, there has been international law-making on the issue of rights concerning women. Human rights law-making

selected assumptions about human nature and interaction and by analogy states' actions and interactions - are now only a partial description of what nations do in fact.

To reflect this shift in power in international relations, customary international law as well should look to non-state actors as having the ability to create custom."

ibid at 221.

in the United Nations⁵⁴ has tended to be restricted to non-discriminatory provisions within the body of human rights treaties in addition to specialised standard-setting that has been corrective of certain treatment of women, or protective of them.⁵⁵ The preamble of the United Nations Charter⁵⁶ reaffirms 'faith in fundamental human rights...in the equal rights of men and women'.

The Economic and Social Council (ECOSOC) established in 1945 a Sub-Commission of the Commission on Human Rights on Human Rights on the Status of Women which became a full Commission (CSW) in 1946 with a mandate to promote women's political, economic and social rights. In 1946 also, a Division for the Advancement of Women was set up in the Department for Policy Coordination and Sustainable Development. Article 2 of the Universal Declaration of Human Rights⁵⁷ (UDHR) states; 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex...' In 1949 the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, was adopted by the General Assembly.⁵⁸ In 1951 The International Labour Organisation (ILO) adopted the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.⁵⁹

⁵⁴The information on law making in the U.N. setting out milestones in the advancement of women was obtained from the UN Information Centre, Millbank Tower, London, SW1.

⁵⁵see Hevener, N., "An analysis of Gender Based Treaty Law:Contemporary Developments in Historical Perspective", 8 HRQ, No. 1, 1986, pp70-88, for the application of her analytical categories to treaty contents.

⁵⁶Adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December, 1948. See also Brownlie, I, (ed), BASIC DOCUMENTS ON HUMAN RIGHTS, Clarendon Press, Oxford, 1992.

⁵⁷1948 UN Doc A/811 adopted 10 December, 1948.

⁵⁸ Adopted 2 December 1949, entered into force 25 July 1956, 96 U.N.T.S.271.

⁵⁹165 UNTS 304, adopted General Conference of the ILO 29 June, 1951, entered into force 23 May, 1953.

The 1952 International Convention on the Political Rights of Women became the first global endorsement of equal political rights under the law, including the right to vote. It was also the first United Nations instrument in which states parties undertook specific legal obligations involving the principle of equal rights between men and women. In 1955 the ILO issued a Convention on Maternity Protection. In 1957 the Convention on the Nationality of Married Women⁶⁰ was adopted, granting women the right to retain or change their nationalities regardless of their husbands' actions. In 1958 the ILO Convention Concerning Discrimination in Respect to Employment and Occupation⁶¹ was adopted. UNESCO adopted in 1960 the Convention against Discrimination in Education.⁶²

The UN General Assembly finally recognised the dimensions of discrimination on the basis of sex and called for a Declaration on the Elimination of All Forms of Discrimination Against Women;⁶³ a first draft of which was submitted by the CSW in 1966. The General Assembly adopted the International Covenant on Civil and Political Rights⁶⁴ as well as the Covenant on Economic, Social and Cultural Rights⁶⁵ with prohibitions against discrimination based on sex. In 1967 the General Assembly adopted the Declaration on the Elimination of All Forms of Discrimination Against Women 'to ensure the universal recognition, in law and in fact, of the principle of equality of men and women'. In 1975, International Women's Year was celebrated with activities to promote

⁶⁰Adopted 29 January 1957, entered into force 11 August 1958, 309 U.N.T.S.65.

⁶¹362 UNTS 31, adopted 25 June, 1958, entered into force 15 June, 1960.

⁶²429 UNTS 93, UKTS No 44 (1962) Cmnd 1760, adopted 14 December, 1960, entered into force 22 May, 1962.

⁶³Adopted by the General Assembly 7 November, 1967.

⁶⁴ 1976, 999 UNTS, 171.

⁶⁵ 1976, 993 UNTS, 3.

recognition of women's contributions to society and equal rights. The first World Conference on Women was held in Mexico City and the Final Plan of Action called for the preparation and adoption of an international convention against all forms of sex discrimination with a recommendation on procedures for its implementation.

The General Assembly proclaimed the first Decade for Women: Equality, Development, Peace; 1975-1985, which officially paved the way for a wide range of actions to improve women's status. In 1976 the United Nations Voluntary Fund for Women was established to make financial resources available to further development projects aimed at women in developing countries. The United Nations International Research and Training Institute for the Advancement of Women (INSTRAW) was also established by the General Assembly with a mandate to support the fuller participation of women in the economic, social and political spheres. In 1979 the General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women⁶⁶ (CEDAW) which defines discrimination against women as any distinction made on the basis of sex which impairs women's equal enjoyment of fundamental rights. In 1980, the Second World Conference on Women was held in Copenhagen to review progress made in the first half of the Decade on Women. It adopted a Programme of Action. In 1981 CEDAW entered into force with the required ratification by 20 countries. In 1985 the Third World Conference on Women was held in Nairobi at the end of the UN Decade for Women. The Nairobi Forward-Looking Strategies⁶⁷ called for increased participation of women as equal partners with men in all political, social and economic fields, including their full access to education and training. The United Nations Voluntary Fund for the UN Decade for Women became a permanent and autonomous organisation in association with the UN Development Programme (UNDP) and has been renamed the United Nations

⁶⁶ UN Document A/34/46.

⁶⁷ A/CONF.116/28/Rev.1

Development Fund for Women (UNIFEM).

In 1993 the Declaration on the Elimination of Violence Against Women was adopted by the General Assembly.⁶⁸ It defines 'violence against women' as 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. In 1995 the Commission on Human Rights appointed a Special Rapporteur on violence against women. This marked a shift because it concentrated on protection for women who are subjected to gender based systemic violence. In 1995, the Fourth World Conference on Women took place in Beijing and adopted the Declaration and Platform of Action.⁶⁹

The extensiveness of law-making within the UN directed at improving the status of women indicates that an awareness certainly existed that issues directly impacting on them was not being adequately tackled. Hevener's categorisation⁷⁰ of protective, corrective and non-discriminatory legislation directed at women, indicates that while attempting to redress the imbalance, the foundational⁷¹ causes of this imbalance, including the limitations of the equality rhetoric⁷² and the philosophy underpinning the rights discourse was not challenged. What might be termed their failure to redress the balance is evidenced in the preceding section.⁷³ Without a rigorous challenge to the core

⁶⁸ Declaration on the Elimination of Violence against Women, GA Res 48/104, UN Doc A/48/49, 1993.

⁶⁹ A Conf 177/20, 1995.

⁷⁰ op cit., note 16.

⁷¹supra Part I(1), The Concept(s) of Women's Rights, of this chapter, pp156-171.

⁷²Fineman op cit., note 20.

⁷³see above for a discussion of feminist legal challenges to human rights and how women's experiences might be incorporated into legal framework of the international order.

underpinning the status quo, the plethora of law promulgated remained a panacea and accounted for a continued marginalisation of women in the legal order. Notwithstanding, the adoption of CEDAW, and its subsequent large number of ratifications, represented a milestone. However, the use of reservations by States Parties lays open the question of whether its purpose is capable of being achieved and the next section deals with that issue.

3. Inadequacies with formal guarantees for the protection of women's human rights - the Convention on the Elimination of All Forms of Discrimination Against Women and the use of Reservations.

States retain the right to opt out or limit their treaty obligations through a variety of means such as denunciation of a treaty in the extreme, reservations to certain treaty terms, derogations in specified circumstances and various accommodation clauses which require the protection of rights in conformity with the rights of others. 'Clawback clauses'⁷⁴ allow breach of obligations for specific public policy reasons and derogations allow suspension or breach of certain obligations in certain situations such as a state of emergency⁷⁵ or war⁷⁶ which has been defined as "an exceptional situation of crisis or emergency which

⁷⁴see Higgins, R., "Derogations under human rights treaties", 48 BYBIL, 1976-77, 281.

⁷⁵ see the *Greek Case*, 1969, 12 Yearbook of the European Convention and also *Lawless v Ireland*, 1961, E. Ct. H. R., 4 Yearbook of the European Convention.

⁷⁶The derogation clause in the ICCPR is article 4, and article 15 in the ECHR. Article 4 requires notification to the Secretary General while article 15 envisages derogations in times of national emergency. There is no derogation provision in the UDHR, the ICESCR, CEDAW or in the ACHPR.

affects the whole population and constitutes a threat to the organised life of the community...".⁷⁷ Core rights are protected from derogation.

Where states derogate from their treaty obligations, there may be procedural requirements such as under article 15 of the European Convention. This article requires the provision of full information about measures taken and why they are necessary necessary, the nature of the emergency, identification of legislation and orders which appear to derogate from the Convention and their significance with an additional requirement that the Secretary General be kept informed although there is no indication of a required time period. It was held in the *Greek case*⁷⁸ that the burden lies on the government to show that conditions meet article 15 with due regard being had to the state's margin of appreciation. There must also be a public emergency, actual or imminent at that date.

In general, qualification of rights tend to be weighed between the right of the individual and the rights of the community. When a right is restricted, it must be necessary,⁷⁹ proportionate,⁸⁰ for a legitimate reason i.e. the requirements of morality and public order or *ordre public*, and authorised by law.⁸¹ This is the state's margin of appreciation in implementation of rights, which has been most fully developed in Europe; the most advanced human

⁷⁷*Lawless v Ireland*, 1961, E. Ct H. R. 4 Yearbook of the European Convention, 4.

⁷⁸Derogations (Article 15 of the Convention) Greece, 1969, 12 Yearbook of the European Convention.

⁷⁹*Engel & Ors. v Netherlands*, 1 EHRR, 647, 1976.

⁸⁰*Klass v Germany*, 2 EHRR, 214, 1978.

⁸¹For instance, articles 8, 9, 10, 11, 17 of the European Convention on Human Rights, article 5 of the ICCPR. Article 29(2) of the Universal Declaration on Human Rights is a general clause which indicates the limitations on the exercise of rights which may be permitted.

rights regime. The margin of appreciation is the latitude the states have in implementing the law within their domestic jurisdictions having regard to national security and the rights of others *inter alia*.⁸² It is a matter of judgement whether this margin the states have tips the balance too far away from the rights of the individual because the states decide what is necessary in a democratic society and what is moral. That may diminish in certain respects the human rights as guaranteed within international documents.

The use of reservations in multilateral treaties is governed by the Vienna Convention.⁸³ Reservations allow states to be bound by the treaty while reserving the right not to be bound by certain specified terms. Factors inducing states to make reservations include those of a legal, political and practical nature. States make reservations for a number of reasons: where there exist inconsistencies in domestic statutory or constitutional provisions with treaty provisions; difficulty in maintaining constitutional balance between the jurisdiction of central and local authorities; inconsistencies with other treaty obligations; an unwillingness to enact new legislation on the part of governments; lack of expertise and resources in developing countries; compulsory dispute settlement clauses; an unwillingness to deal with certain states for political or ideological reasons and unforeseeable consequences of general ratification.⁸⁴

⁸²The European Commission said in the *Belgian Linguistic Case*, 1 EHRR 1968, 252, that a certain margin of appreciation is also allowed to contracting states under several articles which authorise restrictions on, or exceptions to the rights guaranteed.

⁸³Vienna Convention on the Law of Treaties, 1969, UKTS No. 58 (1980) Cmnd 7974, articles 19-23.

⁸⁴Coccia, M., "Reservations to Multilateral Treaties on Human Rights", *California Western Intl L. Jnl*, 1985 v15(1)pp1-51 at 18-22. See also generally, Piper, Catherine, L., "Reservations to Multilateral Treaties: The Goal of Universality", *Iowa Law Review*, v71(1), 1985, pp295-322.

A practical problem, particularly in human rights treaties, is how to ensure universal participation. Universal consent to a reservation was previously required by the State Parties to the treaty and a reservation was valid only if the treaty itself allowed it and other contracting parties had no objections to the reservation.⁸⁵ The present approach in international law, reflected in the Vienna Convention is more flexible. A reservation authorised by the treaty does not require acceptance by other contracting States although objections to the reservation may be made by other contracting States. This in itself does not preclude entry into force of the treaty between the reserving State and the objecting State unless expressly stated by the objecting State;⁸⁶ it simply means that the provisions to which the reservation relate do not apply between the two states to the extent of the reservation.⁸⁷ This reciprocity of reservations allows the maximum number of States Parties to ratify treaties. The test of a valid reservation is whether it is incompatible with the object and purpose⁸⁸ of a treaty which is a matter of subjective interpretation.⁸⁹

Core human rights are regarded as rights owed *erga omnes*.⁹⁰

⁸⁵ see Coccia, *ibid* and Clark, B., "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women", 85 AJIL, 1991, 281 at 289 ff. Clark notes that unanimity was not necessarily a settled rule of customary international law with American states using a flexible approach which is reflected in the Vienna Convention, following the judgement in the *Genocide Convention (Reservations) Case*, 1951 ICJ Rep, 15, which favoured a flexible system of reservations and established the 'object and purpose' test. See also generally, Lijnzaad, Liesbeth, RESERVATIONS TO UN HUMAN RIGHTS TREATIES: RATIFY AND RUIN?, 1995 T.M. Asser Instituut, The Hague, Martinus Nijhoff Publishers.

⁸⁶ article 20(4) (b), Vienna Convention.

⁸⁷ article 21(3), Vienna Convention.

⁸⁸ article 19(c), Vienna Convention.

⁸⁹ Coccia, *ibid* pp22-34.

⁹⁰ *Barcelona Traction Case (Second Phase)*, *Barcelona Traction, Light and Power Co, (Belgium v Spain)* 1970 ICJ, 3.

"An essential distinction should be drawn between the obligations of a State towards the international community as a whole and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved all States can be held to have a legal interest in their protection; they are obligations *erga omnes*...Such obligations derive, for example, in contemporary international law, from outlawing of acts of aggression, and of genocide, and as from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."⁹¹

The notion that reservations can be made to specific terms of human rights treaties or, in exceptional circumstances, that there may be derogations from these core obligations owed *erga omnes* is inherently contradictory. There is tension between the view that any form of derogation, reservation or qualification is incompatible at most, or inappropriate at least, with human rights and the right the contracting State retains to make reservations to treaties unless expressly prohibited. It seems anomalous to allow reservations to human rights treaties; "[i]ndeed, an argument may be made that all such reservations are void because every norm of a human rights treaty is *jus cogens*"⁹². However, while there exists consensus that certain rights, such as the right to life⁹³ are so fundamental that no derogations may be made, there exists no consensus that all rights are *jus cogens*. A human rights treaty is ultimately treated by states as

⁹¹ibid at paras 33-34, also quoted in Coccia, *ibid* at 17.

⁹²Coccia *ibid*, 16, footnote omitted.

⁹³Even this right is subject to reservation in countries where capital punishment is used as a form of punishment; the USA, which only recently ratified the ICCPR is a case in point.

any other multilateral treaty. Although the ethical meaning is different, the effect of the reservation is the same. While near-universal participation may enable general treaty obligations to be more readily invoked where there is a violation of the spirit of general treaty terms, specific reservations which are in fact incompatible with the object and purpose of the treaty considerably reduce the scope of a contracting State's obligations.

The issue of the use of reservations was addressed by the Human Rights Committee in its General Comment No. 24 (52).⁹⁴ It considered, *inter alia*, widely formulated reservations which render ineffective Covenant -ICCPR- rights which would require any change in national law to ensure compliance.⁹⁵ The Human Rights Committee's consideration of such widely drafted reservations is directly relevant in that most reservations to CEDAW tend to be of such a nature. Certain States,⁹⁶ for instance, have made reservations to the terms of the Women's Convention in so far as it does not conflict with domestic law. In real terms, this means that a number of the obligations have been effectively excluded and as such the reservations are contrary to the object and purpose of the treaty. In its consideration, the Committee considered that the provisions of the Vienna Convention are "inappropriate to address the problem of reservations to human rights treaties. Such treaties...are not a web of inter-State exchanges of mutual obligations. They concern the endowment of

⁹⁴The General Comment was adopted by the Human Rights Committee under article 40, paragraph 4, of the International Convention on Civil and Political Rights at its 1382nd meeting (fifty-second session) on 2 November 1994. The USA and UK responded to the General Comment in 1996. They were not entirely in agreement with the HRC on its role and also on the use of reservations in treaties. See further Supplement No 40, 1996 (A/50/40), Reports of the Human Rights Committee, Official Records, 50th session.

⁹⁵see para. 12, General Comment.

⁹⁶Egypt and Bangladesh are a case in point and is discussed *infra*.

individuals with rights."⁹⁷ They refer to the "special character" of a human rights treaty which requires that the compatibility of reservations with the object and purpose of a treaty be established objectively with reference to legal principles. An unacceptable reservation would be 'generally severable'.⁹⁸ The Committee recommended that reservations be specific and transparent and should not reduce obligations undertaken only to presently existing standards of domestic law.

In a report on the practice of reservations to treaties⁹⁹ presented to the International Law Commission, the Special Rapporteur had to consider *inter alia*, whether existing rules on reservations were appropriate for international human rights treaties. If they were not, how should they be adjusted to take account of the special characteristics of such instruments? The Special Rapporteur considered reciprocity inappropriate in human rights treaties. The competency of monitoring bodies attached to treaties to assess the validity of reservations to that treaty is not established, although the Human Rights Committee in its Comment No. 24 (52)¹⁰⁰ recognised its own competence, neither is the effect of the declaration of a reservation as invalid in that context. In *Belilos*, a case which came before the European Court of Human Rights, the court held that the State remained a party to the Convention because Switzerland's interpretative declaration on article 6(1) of the Convention failed to meet the requirements of article 64 and was therefore an invalid

⁹⁷see para 17, General Comment, op cit., note 94.

⁹⁸ Ibid, para 20.

⁹⁹First report on the law and practice relating to reservations to treaties, Preliminary report by Alain Pellet, Special Rapporteur, UN Doc A/CN.4/470, 30 May 1995 presented to the International Law Commission at its forty-seventh session. See especially paras. 138-142 on human rights treaties.

¹⁰⁰see above for details of Comment No. 24.

reservation.¹⁰¹ The final report and proposed draft resolution was presented to the ILC at the forty-eighth session. It affirmed the regime established by the Vienna Convention on the Law of Treaties and the application of this regime to all treaties, irrespective of nature or subject matter. It also reaffirmed the consensual nature of the way states bind themselves to a treaty.¹⁰² The wider concern that the flexibility of the Vienna Convention, in order to ensure widespread participation in treaty obligations, has been at the expense of the integrity of the treaties which have been subject to reservations¹⁰³ remains unresolved. The ILC report has simply maintained the status quo. It remains to be seen whether other treaty monitoring bodies will follow the example of the Human Rights Committee in its General Comment. That in itself does not resolve the wider question of enforcement of treaty obligations against defaulting states, a problem which plagues international law in general.

In terms of CEDAW, the effect of the approach in the Vienna Convention is a fragmentation of the extent of treaty obligations incurred by individual States Parties, given the treaty's comprehensive nature.¹⁰⁴

"By keeping the Convention in force between themselves and the reserving states, the objecting states are in effect allowing a reserving state to be a party without having to adhere to central tenets of the treaty, i.e. permitting a standard of adherence below

¹⁰¹ *Belilos v Switzerland* ECHR Ser.A, Vol.132, 29 April, 1988. See also para. 141. Special Rapporteur's report, *ibid.* and Lijnzaad *op cit* at 118 -123.

¹⁰²The ILC did not have time to consider the report. See *AJIL* vol 91, No. 2, April 1997, 365 at 373.

¹⁰³ see also Redgwell, C.J., "Reservations to Treaties and Human Rights Committee General Comment No. 24(52)" 46 *ICLQ*, April, 1997, 390.

¹⁰⁴ Clark, *op cit.* at 297.

what they consider acceptable."¹⁰⁵

There are a high number of reservations to the Women's Convention in comparison to other human rights treaties (except the Convention on the Rights of the Child) and the broad scope of some of them give cause for concern, in particular since some of the reservations go to the heart of the purpose of the Convention. Nine countries from Africa¹⁰⁶ have made reservations to the Convention, five from North Africa (Algeria, Egypt, Libyan Arab Jamahiriya, Morocco and Tunisia) and four from sub-Saharan Africa (Ethiopia, Lesotho, Malawi and Mauritius).¹⁰⁷ Algeria's reservations relate to article 2 on the elimination of discrimination against women, article 9(2) on equal rights with regard to the nationality of children, article 15(4) on equality between men and women relating to 'movement of persons and the freedom to choose their residence and domicile' and article 16 concerning equal rights in all matters relating to marriage. These provisions are to apply insofar as they do not conflict with the provisions of domestic legislation in those areas. Egypt's reservation to articles 9 is without prejudice to the acquisition of a child of the nationality of his father. Its reservation to article 16 is without prejudice to the provisions to Sharia provisions in all matters relating to marriage, family and dissolution. Ethiopia's reservation excludes the compulsory jurisdiction of the International Court of Justice. Lesotho's reservation relates to the restriction of article 2 where it conflicts with succession rights to the throne, it excludes application to religion and any legislative measures which would be incompatible with the Constitution of Lesotho. On 24 October, 1991, Malawi withdrew its reservation to provisions of the Convention which would require the immediate eradication of

¹⁰⁵ Clark, *ibid* at 307.

¹⁰⁶I have deliberately chosen to concentrate on reservations made by African countries although other contracting states have made reservations.

¹⁰⁷Text of reservations to the Convention as of 31 December, 1997.

traditional customs and practices. Mauritius' reservation excludes equal employment opportunities and the right to equal remuneration. It also excludes the provision of article 16(1) on taking all appropriate measures to eliminate discrimination against women in marriage and family relations. Morocco's reservation excludes the provision of article 2 where they conflict with Sharia law, article 9(2) because of conflict with existing law and article 16 based on conflict with Sharia. Tunisia's reservation is similarly based on conflict with existing legislation under articles 9(2), 16 (c) (d) (f) (g) (h) and article 15(4).

A few states have made objections to such reservations. Denmark made an objection¹⁰⁸ to Libya's reservation on 3 July, 1990 on the ground that 'a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.' Denmark's objection did not expressly state that it did not preclude entry into force between itself and Libya. In the absence of an explicit statement, it must be assumed that the treaty has entered into force between both states. Finland also made an objection to Libya's reservation on the ground that the reservation is incompatible with the object and purpose of the treaty without precluding entry into force of the treaty between both states. Germany lodged an objection to the reservations of Egypt regarding articles 2, 9(2) and 16 and Mauritius regarding article 11(1) (b) (d) and article 16(1) (g) as incompatible with the object and purpose of the Convention. The Convention, however, still applies between the reserving states and the objecting state. Further objections to Mauritius' reservations were lodged by Mexico on 11 January, 1985 on the grounds of incompatibility and by the Netherlands on 14 July, 1994 on the same grounds. Mexico's objection did not expressly preclude entry into force of the treaty between itself and Mauritius. The Netherlands also made objections at the same time to the reservations of Egypt, Tunisia and Libya on the same grounds without precluding entry

¹⁰⁸Again, I have chosen to concentrate on objections made to reservations by African countries.

into force of the treaty between the Netherlands and the reserving states. Norway's objection to Libya's reservation is based on its incompatibility with the object and purpose of the Convention. There is no statement that this objection does not preclude entry into force of the treaty with Libya. In lodging its objection to reservations made by Tunisia, Egypt and Mauritius *inter alia*, the Government of Sweden stated:

"[T]he reservations in question, if put in practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to everything the Convention stands for...the reasons why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations, made in respect of the Convention on the elimination of all forms of discrimination against women, do not only cast doubts on the commitments of the reserving states to the objects and purpose of this Convention, but moreover, contribute to undermine the basis of international contractual law."¹⁰⁹

An attempt to discuss reservations to CEDAW which appear to be contrary to the Convention was effectively stymied by a hostile response from the countries concerned.¹¹⁰ The debate was essentially reduced to allegations of cultural imperialism and

¹⁰⁹ Text of reservations to CEDAW as of 31st December, 1997.

¹¹⁰ Egypt and Bangladesh, for example, exclude the application of the Women's Convention insofar as it is contrary to Shari'a. An attempt to focus on these two countries was strongly resisted and the discussion was reduced to politicking without appreciating the legal aspects of the extent of the reservations; what value attach to treaty obligations if a state can make a reservation that limits its obligations to the core purpose of the treaty? See Clark, 282 ff for the details of the debate on the reservations to the Women's Convention and the poor response of states parties to the Secretary General's request.

an attack on Islam by the states concerned. Nonetheless, the fact that reservations in connection with the Women's Convention, were discussed, even if inconclusively, in addition to the CEDAW Committee's consistent encouragement to reserving states to review their reservations with a view to withdraw them means overall that "its establishment as a major normative treaty and its assimilation into the body of standard-setting instruments of public international law seem nonetheless assured."¹¹¹ The use of the argument of culture has a two-pronged effect; it halts discussion and deters probing into what states deem to be their area of domestic jurisdiction and it also precludes discussion into what constitutes culture; itself a non-legal open-ended term. Yet it is within the definitional realm of 'culture' that most acts which impact negatively on the rights of women occur.

Having discussed the concept(s) of women's human rights, formal guarantees for the protection of women's human rights and the inadequacies with those formal guarantees, Part II discusses the omission of race and culture in existing feminist theory and the detrimental effect this has for the representation of all women in feminist theory. Part III, which follows, discusses cultural relativism to establish if there is a notion within African values which may serve to protect women's rights through indigenous traditions.

PART II. EVERYWOMAN'S HUMAN RIGHTS?

1. Race and Essentialism - A Feminist Oversight

Law is regarded as without colour, without gender and without race. Feminism is by its nature only concerned with the gender aspects of societal structure. Legal feminism is primarily concerned with demonstrating that the law is not without gender and has concentrated, quite rightly, on illuminating that the substance of law is imbued with a specific viewpoint aimed at

¹¹¹Clark, 318.

maintaining a certain societal structure. In highlighting the marginalisation of women it has presented women essentially as a homogenous group, while accepting that there may be certain differences in terms of, for instance, race or ethnicity. The salient and only issue for this purpose has been the gender of women to the neglect of any other factors which might negatively impact on the rights of a woman in a society that has institutionalised inequalities. While this has to a certain extent facilitated a cohesive approach, it has resulted in an incomplete method for tackling effectively the problems of women whose rights are adversely affected and compounded by factors other than gender. For a truly coherent approach, race and class cannot be factored out of the equation for a large number of women.

This section discusses the colourless nature of feminist approaches and how, in effect, it has succeeded in excluding a core and integral part of the oppression of many women - race. Race is as important a factor as gender in any approach to assert rights. The concept of the 'essential'¹¹² woman obscures that fact. Oppression of women is discussed solely in terms of male versus female. Yet, in a societal order where racial hierarchy exists, race is clearly an issue of oppression for black women. While the race as a whole suffers from prejudice, women also suffer from gender discrimination within the race, in addition to racial oppression - an accumulative multiple form of oppression. It is not sufficient for commentators to concede that while there are differences between women, the oppression suffered across the board by all women is sufficiently similar for the problems to be tackled in a discrete matter. The crux of the matter is that it is not possible to separate in any meaningful way these issues. They impact on one another and are compounded by one another. Race is consequently a very important

¹¹² see generally Angela P. Harries, "Race and Essentialism in Feminist Legal Theory", *Stanford Law Review*, vol 42 pp581-618, 1989-90 on representations of the essential women in feminist legal theory.

and salient issue that needs to be factored into the discourse.

In a seminal work on black women and feminism, *Ain't I a Woman*¹¹³ bell hooks lends a historical perspective to the discrimination and oppression of black people, particularly black women, in the United States and thereby delineates the exclusion of black women from discourses on feminism and discourses on racial matters.

"No other group in America has so had their identity socialized out of the existence as have black women. We are rarely recognized as a group separate and distinct from black men, or as a present part of the larger group of "women" in this culture. When black people are talked about, sexism militates against the acknowledgement of the interests of black women; when women are talked about racism militates against a recognition of black female interests. When black people are talked about the focus tends to be on black *men*; and when women are talked about the focus tends to be on *white* women. No where is this more evident than in the vast body of feminist literature."¹¹⁴

While the work is concerned with rights and race issues within the United States, attitudes and prejudices identified within the work are applicable to issues of race and women's rights across the board. Prejudicial attitudes to black people, in the United States of America, stem from the slave trade and slavery. Until their separate abolition, the slave trade and slavery were attractive economic options. To justify the treatment of people in this way, they were characterised as savage and amoral, regarded as other than human. This dehumanisation meant that further violations such as rape and sexual abuse of women, whenever it occurred, could be more easily justified on grounds

¹¹³bell hooks, Pluto Press, 1982.

¹¹⁴bell hooks, *ibid* at 7. Author's italics.

that the women were inherently sexually flagrant and wanton. It also meant that the gender role structures of the dominant culture did not apply among the slaves - thus there was no distinction in the roles given to male and female slaves; women did field work the same as the men with no allowances made for pregnant or nursing mothers. Women did have an additional economic reproductive value. On manumission, the newly freed slaves wanted to emulate the societal status quo but the myths used to justify slavery and oppression remained entrenched in society and negated against the full and equal participation in society. Participation in society meant an acceptance of the patriarchal system which the men favoured. To women who had been worked hard, it was an attractive option - the emulation of the role of the mistress which indicated to them a life spent simply running the household.

"Black activists defined freedom as gaining the right to participate as full citizens in American culture; they were not rejecting the value system of that culture."¹¹⁵

Participation in the value system of wider American society, however, could not by definition be possible. Endemic racism, which had been used to justify slave owning and trading persisted. It was therefore difficult for former slaves to participate fully within that system. Men could not be the providers in the accepted sense of the American way because they had to rely on former owners, and other members of society who had been complicit in their slavery for paid work. It was highly unlikely that they would receive payment for work that had previously been done for free save for the initial purchase price. Further, mythology about the savagery and violence of the black male, in fact all black people, inevitably resulted in a fear and mistrust of them and this contributed to the difficulty in obtaining employment. Women, however, were able to get menial

¹¹⁵ibid at 5.

work usually in households. The apparent role reversal existing in black families in America today - the myth of the black matriarch - although the causes may differ and the complexities of the situation are outside the scope of this work - perhaps dates directly from the problems faced by slaves on manumission on integrating into wider society. Black men could not play the role of men as determined by society; patriarchy did not benefit them in the way it did white men. This situation within black families led to erroneous assertions in later works on black families that there existed matriarchy without taking into account racism's effects on black family relationships.¹¹⁶

The exclusion of black women's issues from the feminist agenda is glaring when the platform against which it is set is examined. The feminist movement operated on the basis of obtaining equal rights for women compared with men; the equality rhetoric. It still operates on that basis with some modification or accommodation for the difference between men and women. This is a valid approach and not an incorrect one, but it is an incomplete approach. The assumption is that this approach and the identified problems for women within industrialised, developed countries are the same for women across the world. If we take, for instance, early feminist activism for the right to work it is possible to show that working or having to work has not been an issue for black women regardless of context; that is, African or African-American. Black women in America have always worked, whether as slaves or through economic necessity. Black African women have always worked, be it in the fields, on the farms, as hawkers of goods, as entrepreneurs and latterly as professionals within the burgeoning middle class fields of banking, law, accountancy and medicine. African-Americans are, I would say, more concerned about institutionalised racism which limits their opportunities and restricts their progress economically and socially. African women are certainly very concerned about traditional cultural structures that operate to keep them from

¹¹⁶ibid, chapters 1, 2 & 3.

fulfilling their potential. On the one hand they can work and do work. On the other they are hampered by societal expectations, of their own society as well as colonial society and the resulting amalgamation of expectations, as to a woman's role. The latter affects all women. On that ground feminist theory succeeds. It highlights the waste of potential of women across the globe through artificial constructs of gender roles.

African women are also very much concerned about the absence of rights in the areas of inheritance law, custodial rights marriage and divorce which culture and customary law manages to traduce in spite of formal legal equality in statutory laws. The right to choose one's marital partner for a Muslim woman is of overwhelming importance. Child care, which is a problem in industrialised countries for working mothers is not the pressing problem in African societies; the extended family network, however onerous in specific instances, provides child care.

The feminist movement claims to be representative of issues affecting women and it is but it is representative of a specific group of women - white women. It assumes that all that is required to improve the system is the acceptance of women into its structure because underlying that is the fundamental assumption that the foundational bases of that society is fully representative and applicable to all. Further, it uses the benchmark of its own society, it takes a Eurocentric view, is biased by its perceptions of other societies through its own values and assumes those values are applicable to all societies. Feminism accepts the notion of the dominant culture save in its gender aspects. Certainly, there are values which ought to be applicable to all individuals irrespective of national boundaries. Human rights are such values. The importance of rights and the rights discourse is unassailable. To use it effectively, however, particular with regards to women's human rights, we must accept that difference makes a difference and the acknowledgement of the nuance that difference highlights has a valid contribution to make to the implementation of women's

rights across the globe.

"...[T]he potential radicalism of feminist ideology was being undermined by women who, while paying lip service to revolutionary goals, were primarily concerned with gaining entrance into the capitalist patriarchal power structure. Although white feminists denounced the white male...they made women's liberation synonymous with women obtaining the right to fully participate in the very system they identified as oppressive."¹¹⁷

It is this very aspect of feminism, its claims to be representative, whether silent or not, that gives cause for concern. Gender seems to be the sole self-defining trait of white women and this denies the existence and experience of non-white women since they are specifically defined by their race. They are specifically defined by their race because gender is not the sole defining factor in their lives.

"The force that allows white feminists authors to make no reference to racial identity in their books about "women" that are in actuality about white women is the same one that would compel any author writing exclusively on black women to refer explicitly to their racial identity. That force is racism. In a racially imperialist nation such as ours, it is the dominant race that reserves for itself the luxury of dismissing racial identity while the oppressed race is made daily aware of their racial identity. It is the dominant race that can make it seem that their experience is representative."¹¹⁸

¹¹⁷ *ibid* at 188-9.

¹¹⁸ *ibid* at 138.

If the experience of one race is made to seem representative, it is without doubt at the expense and at the exclusion, whether intentional or otherwise, of other races. If that is the case, any theory that develops can be of only limited applicability because it is relational to a specific type of woman. Further, it is based on and relies on gender essentialism;¹¹⁹ the notion that there is an essential woman's experience which can be isolated and described independently of race, class, sexual orientation or other experiences. To achieve this some voices are silenced to privilege others and the silenced voices are those same voices silenced by the mainstream legal voice, including the voice of black women.

In its endeavour to represent all people, law silences those without power and feminist legal theory is in danger of silencing those who have either been kept from speaking or ignored when they spoke, black women included. Feminist legal theory challenges the status quo but "...to be fully subversive, the methodology of feminist legal theory should challenge not only the law's content but its tendency to privilege the abstract and unitary voice, and this gender essentialism also fails to do."¹²⁰ The need for multi vocal description of women's voice is historically apparent but the pull for a unitary voice has been stronger to the detriment of the variegation that exists among feminists. Harries argues that the voice of the dominant culture has so prevailed that for instance, in feminist legal theory, it is mostly "white, straight, socioeconomically privileged people who claim to speak for all of us."¹²¹ In essence and in reality, feminist legal theory is white feminist legal theory and black feminism is on the periphery trying to fit into and challenge the status quo. There is no realisation or rationalisation of a reality where black women's experiences influence or determine

¹¹⁹ Harries, Angela P., "Race and Essentialism in feminist Legal Theory", Stanford Law Review, Vol 42, 1989-90, 581.

¹²⁰Harries, *ibid* at 585.

¹²¹Harries, *ibid* at 588.

the solipsism of feminist theory except as a footnote or addendum or reply or challenge to the extant theory. The prevailing starting point is that of the dominant culture within which black women have to fit. "...[B]y defining black women as "different", white women quietly become the norm, or pure essential woman."¹²² Therein lies the problem with gender essentialism in feminist legal theory. By falling into the use of a unitary voice for the ease of academic accessibility, by distilling women's experiences into that of an essential woman, feminist legal theory tends to be without colour. Defining black women as different or acknowledging them in footnotes leaves their experiences and lives and issues important to them on the margins. Their voices remain peripheral. They are other, never the norm. In a critique of Catherine Mackinnon, Angela Harries notes that

"Mackinnon's essentialist approach recreates the paradigmatic woman in the image of white woman, in the name of "unmodified feminism". As in the dominant discourse, black women are relegated to the margins; ignored or extolled as "just like us, only more so". But "Black women are not white women with color." Moreover, feminist essentialism represents not just an insult to black women, but a broken promise - the promise to listen to women's stories, the promise of the feminist method."¹²³

While Harries' aim is not to introduce a gender essentialism based on the experiences of black women or others excluded from the mainstream, it suggests that where categorisation is necessary it must of necessity be tentative and relational. Not every woman has the luxury of having gender as the sole self-

¹²² Harries at 595. See 595ff for details of her 'nuance theory'.

¹²³ Harries, *ibid* at 601, footnotes omitted. Harries' article critiques the work of Mackinnon and Robin West. She does not charge them with racism but illustrates how notable feminist works limit black women to the periphery - by relegating them to footnotes or not mentioning them at all.

defining trait.¹²⁴

"Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender - of being enmeshed always in multiple, often contradictory, discourses of sexuality and color. The challenge to black women has been the need to weave the fragments, our many selves, into an integral, though always changing and shifting whole: a self that is neither "female" nor "black" but both - and."¹²⁵

2. Theorizing Black Feminisms¹²⁶

The identified divergence in life experience and perception of reality between black women and their white counterparts, particularly that of the "simultaneity of oppression",¹²⁷ has given rise to a burgeoning school of black feminist theory. Of necessity, "Black Feminisms" must be contextualised as a Western

¹²⁴ "The various intersections between gender, race, class, sexual orientation, and other differentiating characteristics affect *how* and *when* all women experience sexism. We are able to ignore the experience of our race because it does not in any way correlate with an experience of oppression and contradiction."

Kline, Marlee, "Race, racism and feminist legal theory", *Women's Law Journal*, 1989 v12, pp115-150 at 123.

¹²⁵ Harries at 604.

¹²⁶ The title for this section is taken from James, Stanlie, M. and Busia, Abena, P.A., (eds), *THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN*, Routledge, 1993, hereafter, James and Busia, (eds), *THEORIZING BLACK FEMINISMS*.

¹²⁷ This phraseology is used by Brewer, Rose, M., "Theorizing race, class and gender: the new scholarship of Black feminist intellectuals and Black women's labor" in James and Busia, (eds) *THEORIZING BLACK FEMINISMS*.

based feminist theory in which race and the experience of the difference race makes is a predominant factor. Depending on the locus of a woman, race may be the factor that separates and excludes her from the full benefits of "White", mainstream feminisms or it may be culture in a locus where race is not an exclusionary factor but where, perhaps, ethnicity is. 'Black Feminism' could be, in fact, also regarded as a misnomer, in its reference to colour, being as it were an all encompassing term to include all those, who on the basis of their difference, are excluded from mainstream feminism.¹²⁸ Its importance may lie in its identification, inclusion and experiential reliance on factors other than gender which compound the oppression of women to develop a new approach to combat that oppression.

Clearly, gender as the self-defining trait of women, primarily relied upon in mainstream feminist works, has been an inadequate and indeed, an ineffective approach to reducing gender oppression. The recognition that race is a compounding factor in the oppression of women, will enable a more cohesive and holistic approach to tackling gender oppression. Further, this may enable identified inequalities in the world order to be addressed more effectively. Race is not only important in gender issues, it is also equally important in the institutionalised, structural hierarchies of the world order. We speak of the dominant culture in a given municipal society, it is also possible to speak of a dominant culture in the international order.¹²⁹ The needs of the dominant societies will invariably dictate policy decisions on the basis of economic and other forms of power including military power and that factor itself will have ramifications for gender relations in those countries without a commanding position. Theorising black feminisms has two important possible effects;

¹²⁸I term as mainstream feminism, 'feminisms' as a whole without comment on the different strains. The important factor in black feminism is its inclusive element; the element which acknowledges race as a composite factor together with gender in the oppression of women.

¹²⁹For example, see Chapter 3 on the NIEO.

(i) the identification and reliance on race as a defining factor in gender oppression at the individual level, (ii) the corresponding realisation that the omission of race by the dominant culture, be it locally or internationally, on a wider, community level is a direct result of race not being considered by them a defining trait. This makes the dominant culture experience representative and consequently marginalises those who do not have the same experience.

3. Differences within commonalities: African vs African-American experience.

The discussion of race and gender essentialism in the preceding section identified how race and gender are inextricably linked in the oppression of Black women. I stated above that 'Black Feminisms' may be a misnomer. That is because it encompasses the experience of all women of colour, irrespective of nationality or ethnicity, and identifies that experience as distinct from mainstream feminism which is based primarily on the experience of white women. The common factor is that of race. Yet, there exist differences in the experiences of Black women - the Black African experience of gender oppression differs in aspect from the African-American experience of gender oppression or the immigrant experience. Again, the common factor is the systemic, institutionalised hierarchy of race which affects the social construct.

"[G]ender as a category of analysis cannot be understood decontextualized from race and class in Black feminist theorizing. Social constructions of Black womanhood and manhood are inextricably linked to racial hierarchy, meaning systems and institutionalization. Indeed, gender takes on meaning and is embedded institutionally in the context of the racial and class order: productive and social

reproductive relations of the economy."¹³⁰

It is therefore imperative that there is recognition, not only of race as a qualitative difference in the reality of the lives of Black women, but also of the inequality on which these constructs are founded upon. The global institutionalisation of this racial hierarchy affects the economic realities of women worldwide and determines their social position vis a vis men within their society and other women in other societies.

In an African context, the globalisation of the racial hierarchy, has severe adverse effects on many countries, not least because of the economic inequities which result from this institutionalised hierarchy of race.¹³¹ Colonialism distorted social relations within African extended families. The importation of a capitalist mode of production separated the workplace and the home. Women's role in economic production was diminished with urban waged jobs restricted to men. Colonialism also sanctioned and institutionalised the political and legal status of African women as minors/dependants subject to male control.¹³² European constructions of femininity and domesticity decreased the legal and social status of African women.¹³³ The structure of women's oppression under colonialism was shaped

¹³⁰Brewer, Rose, M., in THEORIZING BLACK FEMINISMS, *ibid* at 17.

¹³¹Of course the actions of autocratic, profligate governments and of economic globalisation exacerbate these problems.

¹³²Courville, Cindy, "Re-examining Patriarchy as a Mode of Production." in James and Busia, THEORIZING BLACK FEMINISMS, at 36 ff.

¹³³see Mama, Amina, "Sheroes and Villains: Conceptualizing Colonial and Contemporary Violence Against Women in Africa", in Alexander, Jacqui, M. & Mohanty, Chandra, Talpade, (eds), FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES, Routledge, 1997, hereafter, Alexander & Mohanty, FEMINIST GENEALOGIES. Mama looks at the impact of colonial gender ideologies in African societies and the transformation of forms of violence.

using household structure and familial ideology¹³⁴ and it changed the form of oppression of women with the introduction and development of the coexistence of dual political systems, dual patriarchal systems and dual modes of production.¹³⁵

"The cultural, familial and political reality of African women was restructured with the introduction of commodity production based on monopoly of the means of production, racist ideology, and a policy of separate political and economic development. Under colonial capitalism African women experienced three forms of exploitation based on African women's position in production, African women's position in the family and African women's racial position in colonial society."¹³⁶

Comparison of African women and African-American women shows that two key factors have determined their subjugation; economics and race. Economics is defined as slavery in African American terms, it is defined as colonial exploitation of women's production in African terms. Underlying both forms of exploitation is racist ideology. This ideology enabled the exploitation of *both* men and women. Yet, patriarchy, even within the blanket of racism discriminated against women on the basis of their gender. bell hooks notes¹³⁷ that on manumission, men favoured the patriarchal society in their efforts to emulate social mores. In pre-colonial African society, notwithstanding the contribution of women economically, they were assigned an inferior position socially. Colonialism brought its own form of patriarchal ideology based on a capitalist mode of production. The same problems faced by

¹³⁴id at 39.

¹³⁵ibid at 40. See also Chapter 5 of this work for Nigeria case study example of changes wrought by colonialism.

¹³⁶ibid at 42.

¹³⁷see AIN'T I A WOMAN, op cit., p137

freed slaves in trying to fit into society still exist among African-Americans. Prejudices used to justify exploitation and oppression still remain in the consciousness of society at large. In a multicultural society, it may be covert or even overt, but the racist ideology that underpinned for so long the maltreatment of a racial group still remains. Non-acknowledgement of this position fails to acknowledge the structurally unequal world order, the exploitation of resources, initially under colonialism and subsequently under institutionalised hierarchies which factor race out of the equation and make their experience representative.

Race, thus, is a relevant and integral definitional trait in the oppression of Black women. It is of no surprise, therefore, that feminist movements emerge generally in the wider context of social and political change. Within these movements for political change, particularly for independence, there is invariably tension between patriarchal ideology and women's call for a fuller emancipation encompassing both race and gender.

"Larger processes of globalization make it both difficult and necessary to talk about the nation-state, to talk specifically about nationalism and, for our purposes, the problematical relationship of Third-World women to it. Anti-colonial nationalism has always mobilized women's labor in order to help consolidate popular nationalism, without which state nationalism would never have been able to solidify itself. It is no accident, therefore, that feminism often emerged within anticolonial movements. But the state mobilization of the feminine is contradictorily inflected. While, as Heng has argued, "women, the feminine, and figures of gender have traditionally anchored the nationalist imaginary", certain women, prostitutes, and lesbians are now being disciplined and written out of the nation's script; they have been invested with the power to corrupt otherwise loyal

heterosexual citizens, positioned as hostile to the procreative imperative of nation-building, and, therefore, invested with the ability to destroy it. It is not only around questions of sexuality and gender that nation-states have structured their exclusions, however, but also in relationship to race and class hierarchies. It is these exclusions, as well as the state's ambivalent and conflictual relationship to sovereignty, that help to explain the failures of anticolonial nationalism..."¹³⁸.

Alexander and Mohanty's position is interesting because not only does it acknowledge the role played by women in nationalist struggles, it goes further to identify the exclusion of women in certain aspects in society. This exclusion is not restricted to sex-workers or homosexual women. The threat of exclusion applies to all women who challenge the status quo in any way; women who do not accept the compliant feminine role applied to women in these societies, women who demand their rights. It is a failure of anti-colonial nationalism because the right to self-determine, once independence was achieved, no longer applied to specific groups such as women. The state or nation, once free of the shackles of colonialism became the arbiter of societal mores; further social transformation was no longer deemed necessary by the new elites. Culture or 'this is how we do things' became the response to any attempts to effect social change. Further, the complicity of the post-colonial state with interventionist policies of trans-national corporations into its economy undermines its power and more importantly, leads to the suggestion of forfeiture of sovereignty because the state then becomes complicit in its recolonisation.¹³⁹ For activist fighting

¹³⁸Alexander & Mohanty, *FEMINIST GENEALOGIES*, Introduction, xxiv.

¹³⁹ibid at xxiv. Interventionist economic policy by trans-national corporations, TNC, and the question of undermining sovereignty is linked to the whole question of an inequitable world economic order which is discussed in Chapter 3.

for the determination of the rights of women, quests for social change within a nationalist context were disappointing as once independence was achieved, women were expected to return to gender roles which may have been stifling, unfair and unfulfilling. Cultural expectations inform the role women are expected to assume in society. These expectations, transformed into practice and ultimately law are not without discrimination and seriously affect the rights of women.

The next section looks at cultural relativity and the question of women's rights to illuminate the adverse effects of discriminatory customary law.

Part III. GENDERED RELATIVITY

Culture has an undisputed impact in human rights issues. The desire to retain cultural difference in the globalisation of the language of rights results in an anomalous situation with regard to assuring human rights for women since they are adversely affected by the application of cultural or customary norms. There is a definite male bias in all societies, western or non-western and this is manifested in a variety of ways. Societal norms invariably ascribe a subordinate role to women which is reflected in law, customary or statutory, and that in turn consolidates the oppression of women. Women are discriminated against in property, inheritance, marriage, divorce, custody, maintenance provisions, *inter alia* on the basis of their gender. While there may exist statutory provisions stating that there should be non-discrimination on the basis of gender, the reality is entirely different.

The conceptual problem of human rights is enduring. Can human rights be perceived as absolute? Is there a concept of human rights or are there visions of particular cultures? It has historically been the cry of African countries that the concept of human rights promulgated in the International Bill of Rights

is Eurocentric in its inception and neo-colonialist in enforcement.¹⁴⁰ There is a degree of consensus that human rights conceptions embodied in various instruments are of Western origin and that their conceptual framework and philosophical basis have their roots in the specific circumstances of western society. Proponents of cultural specificity on the contrary argue that human rights as conceived in the west are rejected in the developing world and Africa precisely because their philosophical basis is not only different but opposite. Whereas western conceptions are based on the autonomous individual, African conceptions do not know such individualism. In traditional Africa, the human being found worth within the community to which he/she related in terms of obligations and duties. This view is given a measure of force in the African Charter of Human and Peoples' Rights.¹⁴¹ Article 18(1) states that the family shall be the natural unit and basis of society, refers to community and peoples and emphasises duties and obligations to a community. This may be problematic in the context of women because it does not take into account the possibility that sections within a group may be disadvantaged. Moreover, it presupposes that there has been no dynamism in any African society which may have altered indigenous states and that whatever concept of rights existed, whether attached to obligations, was without discrimination.

The location of human rights specifically within a cultural relativist paradigm proceeds typically by asserting that African societies had concepts of human rights which differed from the western model and that western societies may do well to learn

¹⁴⁰For a detailed discussion on cultural relativism see Chapter 2. This objection was raised at the World Conference on Human Rights in June 1993 by a number of Asian countries; notably China. The Conference itself witnessed many of the problems scholars and practitioners have for years trying to solve; what is the modern meaning of human rights? It also witnessed abuses of rights that the International Bill of Rights try to protect when China refused the Dalai Lama the right to exercise freedom of speech.

¹⁴¹Chapter II, articles 27-29 ACHPR.

from some of these concepts. The usual emphasis is on the communal nature of rights; social harmony and an emphasis on obligations and duty to a community. I do not agree with the notion of community based rights. Indigenous African societies may have been organised communally but it is not a natural progression that individual rights were sublimated to community rights.¹⁴² In any event, it is this very nature of communal organisation and socialisation that enables the subordination of women and allows the negation of rights that they may be entitled to both under statutory legislation in the domestic arena and under international treaty law. This is compounded by an under-developed jurisprudential theoretical foundation of human rights in Africa. The conceptual/theoretical foundation of human rights discussion has largely been confined to positivist legal questions on two levels; national and international. The national has pertained to the nature of the constitutions in Africa; the extent to which they do or do not protect human rights and if they do, how far these are respected and enforced. On the international level, the debate has taken the UN instruments as a point of departure and generally argued on the relevance or lack thereof of to Africa, the mechanisms for their protection and the desirability of a regional system of protection of human rights.

The Africanist concept of human rights,¹⁴³ thus, values communitarianism and social harmony over individual rights. The preference for social harmony could be regarded as the stifling of individual rights. It is oppressive for a general group right to override individual rights constantly in the maintenance of the status quo. As noted, earlier, in terms of the protection of women's rights, it is the foundational values which underpin these notions that act in concert within communities to oppress women. Arguments of cultural relativism do not take on board

¹⁴²see Chapter 5 on indigenous structures of the Egba of Abeokuta in Nigeria.

¹⁴³ See for example, Shivji, THE CONCEPT OF HUMAN RIGHTS IN AFRICA, op cit.

these underlying issues and do not challenge discriminatory practices within cultures as such. Cultural relativism is concerned with the exclusion of alien influences from a society, it is concerned in a broad way with the protection of the rights of a people to maintain their form of civilisation, however imperfect or discriminatory and finally, it is concerned with the maintenance of the status quo.

Customary practices forming culture are, however, not static. They vary, for instance in Nigeria, from ethnic group to ethnic group and within such groupings they vary according to demarcations of class and religion. Moreover, cultural practices are modified by their adherents over a measure of time due to factors such changing attitudes to religion and indeed, education. A liberal view on the issue of culture is that of Nwokedi, a judge of the Nigerian Supreme Court, who said in *Agbai v Okogbue*:

"Customary Laws were formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the courts the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the courts are there to enact customary laws. When however customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment."¹⁴⁴

Such views are not as commonplace as one would wish. The argument

¹⁴⁴(1991), 7 N.W.L.R. Part 204, p391, S.C. This was a family law case on the rights of inheritance between spouses on the issue of testamentary disposition by wives.

of culture in the area of human rights is however compelling for its advocates. If, as I noted above, cultural relativism may at times be seen as a manifestation of the sovereignty of a people to protect its customs, it is also worthwhile to maintain an awareness of *who* is putting forth the argument. If culture is dynamic and variable within the wider society, political mileage may be got out of its use.

"...we must examine the resonance of the word "culture" at all levels of society, acknowledging that various groups have different degrees of participation in culture and that participation occurs in multiple contexts. When women's groups or individual women talk about culture, we must remind ourselves that there can never be a purportedly popular notion of culture that is unmediated by the positionality of the speaker; we must look at the claim for exemption on cultural grounds in relation to the axes of class, ethnicity, race, sexuality, age, and so on. We need to listen with care, but also with skepticism, to sweeping definitions of this thing called culture, forged as they are in a world of constantly expanding difference and complexity."¹⁴⁵

The disparity between formal legal guarantees, domestic and international, and actual protection for women's rights is clear. Implementation can only be effected within domestic jurisdictions although the international system can, and in certain instances does, influence domestic protection particularly through case law decisions where national systems are inadequate or fail to protect women's human rights. The following section looks at select case law about women's rights from Africa. International standards were persuasive in some of these decisions but the

¹⁴⁵Rao, Arati, "The Politics of Gender and Culture in International Human Rights Discourse", 171 in Peters, Julie & Wolper, Andrea, (eds) *WOMEN'S RIGHTS, HUMAN RIGHTS:INTERNATIONAL FEMINIST PERSPECTIVES*, Routledge, New York, 1995.

issues which gave rise to the disputes themselves demonstrate discriminatory cultural practices which adversely affect women's rights.

In the case of *Karimatu Yakubu*,¹⁴⁶ the issue at stake was the right of a young girl to choose her marital partner. The case was governed by Muslim law which in Nigeria is considered as customary law.¹⁴⁷ Three suitors expressed their desire to marry her. While she was away to consult family friends about her choice, her father married her off to one of the suitors, Umaru Gwagwada. Karimatu was 19 years old. On learning of the marriage, Karimatu proceeded to dissolve the marriage, after trying, unsuccessfully, to enlist the assistance of family members in making her case. She then married a suitor of her choice. Her father, together with Gwagwada sued her in the local area court where she lost the case. Her appeal to the Shari'a Court of Appeal to assert her right to choose her marital partner was also unsuccessful. On appeal to the Court of Appeal, she won the case on a technical point of Shari'a law. The Court's opinion, however was that "...[O]ne conclusion on which there is consensus of opinion in the Maliki School of Islamic law is that a father has the right to compel his virgin daughter in marriage without her consent and even if she has attained puberty (defined by the Court to begin at 14 years)..." This judgement contradicts section 39 of the 1979 Nigerian Constitution which prohibits discrimination on the basis of sex.¹⁴⁸ It also directly contradicts the right of a woman to choose a spouse under CEDAW

¹⁴⁶Court of Appeal, Nigeria, Appeal No.CA/K805/85. A summary of the case is on file with candidate.

¹⁴⁷"Moslem (sic) law is religious law based on the Moslem faith and applicable to members of the faith. In Nigeria, it is not indigenous law; it is received customary law introduced into the country as part of Islam.", Obilade, A.O., *THE NIGERIAN LEGAL SYSTEM*, Sweet & Maxwell, London, 1979, 83.

¹⁴⁸ Women suffer discriminatory practices in a number of areas in Nigeria; marriage, child custody laws, inheritance rights, property rights etc. These will be discussed in more depth in Chapter 5.

in article 16 (1) (b) which provides that 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women...[t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent.' Further, the decision, by not taking into account the discriminatory effect of the right of a parent under Islamic law to marry off to a suitor of one's choice one's daughter and not one's son, the decision fails women by refusing to consider, as it may have done, Nigeria being a party to CEDAW without reservations, an appropriate modification of existing customary laws which constitute discrimination against women.¹⁴⁹

In contrast, in a Tanzanian case, *Ephraim v Pastory*,¹⁵⁰ the High Court ruled unconstitutional a customary law rule which prevented women from alienating clan property. In the case, the respondent, Holaria Pastory, who had inherited clan land from her father by a valid will, sold the land to the second respondent, who was not a clan member in 1988. The appellant Ephraim filed a suit for the declaration that the sale was void as women under Haya customary law have no power to sell clan land. At first instance, the Primary Court held that the sale was void. Haya Customary Law provides that, "Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership."¹⁵¹ Mwalusanya, J. noted that courts are not impotent to invalidate laws which are discriminatory and unconstitutional and cited case law to support the position that discriminatory

¹⁴⁹Article 29(f), CEDAW.

¹⁵⁰*Bernado Ephraim v Holaria Pastory and Gervazi Kaizige*, in the High Court of Tanzania at Mwanza, (PC) Civil Appeal No. 70 of 1989 (From District Court of Muleba District at Muleba in Civil Appeal No. 89/88 and Original Case No. 63/88 of Primary Court of Muleba District at Kashasha), on file with candidate.

¹⁵¹Laws of Inheritance of the Declaration of Customary Law GN. No. 436/1963, para 20., on file with candidate.

laws can be declared void for being unconstitutional. As a matter of fact, the court found the customary law on inheritance discriminatory to women and henceforth took it to be modified and qualified to the extent that both males and females could sell clan land.

In *Unity Dow v Attorney General*,¹⁵² the application was for an order to declare Section 4 of the Citizenship Act of Botswana, 1984, *ultra vires*. The applicant, a citizen of Botswana married a citizen of the United States of America. Prior to the wedding in 1984, they had a child and after their marriage they had two more children. Laws in force prior to the Citizenship Act conferred citizenship on the eldest child born before the applicant's marriage but the terms of the Citizenship Act conferred no citizenship on the other two children because their father is not a Motswana; whereas, had they been born outside marriage and their mother was a citizen, citizenship would have been conferred at birth.¹⁵³ The Court's reasoning made reference to the OAU Convention on Non-Discrimination (while noting that

¹⁵²High Court of Botswana held at Lobatse, MISCA. 124/90, on file with candidate.

¹⁵³Sections 4 and 5 of the Citizenship Act of Botswana read:

"4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth-

(a) his father was a citizen of Botswana; or
(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

5. (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth-

(a) his father was a citizen of Botswana;
(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement."

the signing of the Convention does not give it the effect of law in Botswana), the U.N. Declaration on the Elimination of Discrimination against Women as well as the Constitution of Botswana in holding both sections (4) & (5) of the Citizenship Act discriminatory. On appeal,¹⁵⁴ based on whether there had been a proper interpretation of the relevant parts of the Constitution on discrimination, *inter alia*, the Court upheld the decision of the first instance in holding that section 4 of the Citizenship Act infringed the fundamental rights and freedoms¹⁵⁵ of the respondent with regards to freedom of movement¹⁵⁶ and protection from discrimination.¹⁵⁷ No pronouncement was made on section 5. Direct reference was made to the principle of non-discrimination as included in international law and it was persuasive in the court's decision.

In *V.E.W. Otiena v Joash Ochieng Ougo*,¹⁵⁸ a Court of Appeal case in Kenya, the right of a widow to bury her husband was at issue as opposed to burial under Luo customary law by his relatives in his village. It was initially held that the deceased should be buried in his clan home according to tradition. Submissions on behalf of the appellant included the contention that denial of the body of her deceased husband, according to his wishes, for burial would be discriminatory against her as a woman. The Court said, "At present there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal." The Court went on to state that the deceased was born and bred a Luo and under Luo customary law his wife on marriage becomes part of the deceased's household as well as a member of her husband's clan. Upon death

¹⁵⁴Court of Appeal Civil Appeal No. 4/91, on file with candidate.

¹⁵⁵section 3, Constitution of Botswana.

¹⁵⁶section 14, *id.*

¹⁵⁷section 15, *id.*

¹⁵⁸The Nairobi Law Monthly, April, 1988, 10.

of a married Luo man, customs dictate that the clan takes charge of the burial as far as taking into account the wishes of the deceased and his family. A Luo who has not established his own home in accordance with custom (such as the deceased) will be buried in his father's home. Under Luo custom, the widow has no right to bury her husband and she does not become the head of the family on the death of her husband. On the issue of discrimination against the widow, the Court referred to section 82(3) and (4)(b) of the Kenyan constitution which allows for discriminatory rules respecting burial. Further, the Court considered there was nothing repugnant to justice and morality in the applicable Luo customary law. It went on to say, "[t]he elders, who are custodians of African customary law...owe it to themselves and to their communities to ensure that customary laws keep abreast of positive modern trends so as to make possible for courts to be guided by customary laws."

These select cases illustrative the sporadic influence of human rights law on women's human rights in domestic jurisdictions, sometimes in direct contradiction to States Parties legal obligations under treaty law. They also demonstrate the difficulty of eradicating cultural practices. Culture, including its negative aspects from the perspective of an outsider, is a defining factor in the identification of a group. Identification with a culture, at present, can entail identification with all its aspects, however adversely they impact on sections of the community. While human rights remains suspiciously regarded as a form of imperialism in some sectors, the tendency will be to rigidly adhere to culture, whereas, in the normal course of events, some practices may have become modified.

Discriminatory practices against women are endemic and cut across state boundaries. While the select case law above is restricted to African countries, there are other examples of discriminatory cultural practices, some of which have come before the

international system.¹⁵⁹ They illustrate the difficulty in implementation of women's human rights while cultural and customary practices remain unchanged. This difficulty and the problem will remain as long as any challenge to cultural practices is resisted. The reality is that, for the most part, cultural relativity is *gendered* relativity and if the basis and practice of culture are not continually revised and questioned, as required of States Parties by CEDAW under article 5, what is being said is that women as a class are not deserving of the full protection of human rights and that can never be acceptable. Further, we need to question always whose culture is being protected and who benefits from the maintenance of a cultural *status quo*.

"[T]he notion of culture favored by international actors must be unmasked for what it is: a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top. We need to problematize all of culture, not just the perceived "bad" aspects. When we limit our inquiry to egregious violations, we limit our capacity to ameliorate human pain to just that one instance of a "bad cultural practice." Without questioning the political uses of culture, without asking whose culture this is and who its primary beneficiaries are, without placing the very notion of culture in historical context and investigating the status of the interpreter, we cannot fully understand the ease with which women become instrumentalized in larger battles of political, economic, military, and discursive

¹⁵⁹ See for example; *Lovelace v Canada*, 2 HRLJ 158 (1981), *Aumeeruddy Cziffra v Mauritius*, 2 HRLJ 139 (1981), both of which came before the Human Rights Committee, for European and American cases see Cook, R., "International Human Rights Law Concerning Women", 23 Vand. J. of Transn'l L., (1990) 790 - 811.

competition in the international arena."¹⁶⁰

CONCLUSION

While feminist legal theory has certainly posed a challenge to normative law and made some gains, implementation has been fraught with difficulties. The gains made are by no means complete; feminist legal theory itself faces some challenges, not least, the fact that it fails Black women by not taking into account their experiences in its reconceptualisation. Its omission of the impact of culture as a defining factor needs also to be redressed. If legal feminism is to be representative of all women especially in influencing policy changes in human rights law and imbuing women's human rights with the moral imperative that it deserves, if it is to speak with one voice, it must address the issue of gender essentialism and race, it must address the issue of culture and it must acknowledge the difference these accumulated factors make in the lives of women. It needs to do this because any gains made, particularly when it influences policy changes that may result in treaty obligations, will affect women all over the world. Failure to do this will only result in the marginalisation of women in the developing world because the issues which have given rise to the changes will only have limited applicability to their lives. Race and racial discrimination is as important a defining trait to Black women as their gender. Culture and cultural practices are important in their socialisation. Theorisation based exclusively on gender will only result in an incomplete solution. An incomplete solution will marginalise and any form of marginalisation will merely replicate the existing normative order.

It is important also to be aware of the limitations of the rights discourse, particularly with regard to developing countries such

¹⁶⁰ Rao, Arati, op cit. at 174.

as Nigeria. Core rights - democratic rights - which would enable the protection of human rights are restricted. There is no enforceable right for the people to self-determine; no representative government. Sovereignty is restricted to governmental sovereignty. The human rights discourse is inherently challenged by cultural relativism. Yet women's rights are more adversely affected under the guise of culture. By not taking into account race, feminist legal theory fails Black women; by not taking sufficient note of culture, feminist legal theory fails Black women and in its assumption that the legal discourse is the foremost tool in the implementation of rights, feminist legal theory fails Black women. Race and racism will affect access to justice, culture will restrict access and authoritarianism will negate access. While feminists are not directly responsible for these difficulties, the presumption is that feminist legal theory represents *all* women. While this presumption subsists, it is imperative that feminist legal theory makes all necessary efforts to be truly representative by recognising and incorporating these differences in their theory otherwise feminist legal theory will simply replicate the international legal order in its marginalisation of Black women.

CHAPTER 5

THE REALITIES OF CULTURE: THE STATUS OF EGBA YORUBA WOMEN WITHIN THE STRUCTURE OF YORUBA SOCIETY

INTRODUCTION

This Chapter looks at the status of women within the structural organisation of the Yoruba people as an illustration of the realities of cultural tradition and to illuminate the argument that culture and cultural values are specifically gendered. It demonstrates that gender discrimination is institutionalised within the political and social organisation of the Yorubas specifically, and more generally within Nigeria.

In the normal course of events, developments within society might have modified these discriminatory elements but colonialism has, somewhat contradictorily, enabled the fossilisation of certain customs, perhaps in rebellion against external influence. In the establishment of a detached central government authority over diverse ethnic groups on independence, colonial influence has ensured that primary identification with ethnic rather than national identity serves as a claim of allegiance, together with all the customary mores that entails. This means, in practice, that the laws and customs people identify with is that of their ethnic group rather than statutory federal or state law, particularly with regards to personal matters.

Further, reflecting practice, the Constitution relegates the regulation of personal laws to the customary law of the individual concerned. In terms of rights protection, although human rights are regarded as rights against the state, this primary allegiance to custom along ethnic lines means in effect that the state is not regarded in any meaningful sense as the arbiter and protector of rights. Customary law within the community fulfils that role. Institutionalised gender discrimination within the customary laws and customs of the

various communities need to be addressed at a localised level even though it is possible to ascribe imputability to the state.¹ The disconnection between the role of the state and the local communities renders the rights discourse fraught with complexities in the enforcement of international human rights law in this milieu.

Part I of this Chapter begins with a brief history of the Yoruba people and its means of organisation, both social and political; it then proceeds to look at the impact of colonialism and the influence it has had on indigenous modes of organisation. Part II looks at the status of the rights of women under personal laws, in particular, the parallel system of customary and statutory rights. Part III discusses feminist critiques of cultural relativism and looks at how feminist legal theory might be useful in the promotion and protection of women's human rights in any cultural setting.

PART I HISTORICAL BACKGROUND²

1. Political Organisation

The Yoruba people predominantly occupy the south western part of Nigeria although groups of them may be found in neighbouring African countries following demarcation of territory along state lines. Historically, Yorubaland consisted of various kingdoms based on territory although the same language is spoken with a variation of dialects. It consists primarily of Egba, Oyo, Ondo,

¹ see Chapter 4 supra, especially pp167-168.

² There are several anthropological studies on the Yoruba people. Some concentrate on parts of Yorubaland which this work is not directly concerned with but are generally useful for information on the Yorubas. See Bascom, W., *THE YORUBAS OF SOUTHWESTERN NIGERIA*, Holt, Rinehart and Winston Inc., USA, 1969, which concentrates on Ile-Ife and also, Johnson, S. Rev., *THE HISTORY OF THE YORUBAS FROM THE EARLIEST TIMES TO THE BEGINNING OF THE BRITISH PROTECTORATE*, Routledge & Kegan Paul Ltd, London, 1966, 1st published in 1921, for a comprehensive history. See also Biobaku, S.O., *THE ORIGIN OF THE YORUBA*, University of Lagos, 1971.

Egbado, Awori, Ijebu, Ekiti, and Ilorin people.³ This thesis concentrates on the Egba Yorubas of Abeokuta although comparison and references may be made with other Yoruba people. They are essentially the same people ethnically although groups make distinctions between localities; for instance an Egba Yoruba may make a distinction between an Egba and an Oyo Yoruba person.

The political organisation of the Yoruba people is monarchical. It is headed by a King or *Oba* if entitled to wear a crown or *baale* if not. The *Oba* of a particular town or kingdom⁴ had a specific title, for instance the *Oba* of the Yoruba Egba people is the *Alake* of Ake, later the *Alake* of Abeokuta. Until 1800,⁵ the key unit of political organisation was the town or *ilu*. At central or local level, the system of government was monarchical, headed by an *Oba* or *baale*. The *Oba* as head of the kingdom had absolute powers but in practice he was not an absolute ruler. He ruled, usually in consultation with a council or *igbimo* which had specific names depending on the kingdom. In Egba towns, the *igbimo* was called the *Ogboni*. *Igbimo* in specific towns consisted of the most senior chiefs who were usually representatives of certain lineages but in some towns they were also required to be members of associations such as the *Ogboni*. In some towns, the role of the *Oba* was formalised in their unwritten constitution.⁶

³see Fadipe, N.A., THE SOCIOLOGY OF THE YORUBA, Ibadan University Press, 1970, Chapter 2 on ethnic history.

⁴ see generally Smith, Robert, S. KINGDOMS OF THE YORUBA, James Currey, 1988, especially Part I.

⁵ see Atanda, J.A., AN INTRODUCTION TO YORUBA HISTORY, Ibadan University Press, 1980, Chapter 3 from which most of the information on political organisation until 1800 was drawn, hereafter, Atanda, YORUBA HISTORY.

⁶ an example is that of *Old Oyo*, the capital of the *Old Oyo* Empire. The *Oyo Mesi*, the council of state, could reject an *Alafin*, the ruler, who acted *ultra vires* or became an oppressive ruler. A sentence of rejection would be pronounced by the *Basorun* and head of the *Oyo Mesi* on behalf of the *Oyo Mesi* and ran as

In Ijebu and Egba, the *Osugbo* and *Ogboni* cults respectively dominated the governmental structure. Other areas which lacked formal constitutional power of rejection had an understanding that the *igbimo* could organise a general uprising of the people to get rid of an oppressive ruler. There was representation of people through expression of their wishes to chiefs who were members of the *igbimo* who would raise the issues in council meetings. They then reported back to the people through the *baale*. Chiefs chosen by cult, or age-grade served the interests of those members as those chosen on lineage served their lineage interests.

The *Oba* was also checked by religious duties and rituals. The Yoruba people believe that the well being of the community was bestowed by *orisa*, deities and their ancestors. To appease these deities and ancestors sacrifices and festivals were held in their honour. It was the duty of the *Oba* to see that these festivals were observed. In addition, priests of the *orisa* prescribed taboos which the *Oba* had to obey.

1.1 The role of women in politics⁷

Women played various roles in the political organisation of Yoruba society in the middle to late nineteenth century.⁸ In Old Oyo and New Oyo kingdoms, women had certain roles. The women of

follows, "The gods reject you, earth rejects you, the people reject you." Any *Alafin* rejected had to commit suicide. Atanda, YORUBA HISTORY, at 20.

⁷ see generally Mba, Nina, NIGERIAN WOMEN MOBILIZED - Women's Political Activity in Southern Nigeria, 1900-1963, Berkeley, University of California, 1982, hereafter, Mba, NIGERIAN WOMEN MOBILIZED, where the information on this section on women in the political structure was taken.

⁸ written records of the organisation of the Yoruba tend to date from this period, perhaps a reflection of the colonial influence.

the palace were called in general *iyaba* but they were of various rank and grade. The highest in rank were the *iya afin*, who were usually the wives of the preceding *alafin*, next in rank were the *ayaba* of the present *alafin*, then the female *ilari* (slave officials), then the ordinary slave women. The *iya afin* were priestesses of *orisa* both in the palace and in town i.e. *iya naso* of *Sango* and *iya nkolara* of *ogboni* who had charge of the room where the rite of *orun* was performed. The *iya oba* was present with the *basorun* when the *orun* rite was performed and she was the feudal head of the *basorun*. The *iya kere* was in possession of the paraphernalia used on state occasions and could withhold them to demonstrate her displeasure thereby preventing state receptions. The *iya afin* were the official mothers of male *iwarefa*, who could only approach the *alafin* and arrange festivals and communal labour through them. They acted as political and religious advisers to the *iwarefa* and people in the town approached them for political favours. People gave their daughters to the *alafin* through the *iya afin*.

There were many women *ilari* who besides their palace functions, carried out administrative duties in the town. The *eni-oja* had charge of the *alafin's* market; the *olosi*, one of the three eunuchs, was under her control and shared responsibility with her for the market. One of the female palace officials, the *obagunte*, attended all *Ogboni* meetings on behalf of the *alafin* but could not take part in discussions. The head of the *Ogboni* had access to the *alafin* through this woman official who linked the *Ogboni* to the *osi efa* and *otun efa*, two of the top three *iwarefa* palace officials. There were also female *Ogboni* in their own right, one called *Erelu*.

In Egbaland and particularly, Abeokuta, the *Ogboni* were part of

the *Oba's* council. In each township *Ogboni* there was at least one woman member known as the *Erelu* and often there were others known as *Otun Erelu*, *Osi Erelu*, *Ekerin Erelu*. These women members were selected, as were new male members by the senior *Ogboni* chiefs, on the basis of merit in terms of leadership ability, wealth and contributions to the well-being of the town. Women generally made *Erelu* in their natal not marital towns. At times, the *Erelu* was also a member of the *iwarefa*. Beside the *Erelu*, who were members of the *Ogboni* in their own right, one wife of an important *Ogboni* chief could be initiated into the society with her husband at his installation. When the spokesman of the *Ogboni* came out to announce their decisions, bells were rung summoning people to listen. The townspeople could discuss and question the decisions and women were as free as men to do so.

Aside from the women members of the *Ogboni*, each township had its own *Iyalode* society which was concerned with running the affairs of women. The *Iyalode* was never a member of the *Ogboni* because the *Iyalode* title was the female equivalent of the warrior line of titles, the *ologun*, who were not *Ogboni*. The *Iyalode* was originally an Oyo title adopted by Ife, Ibadan and Abeokuta. The powers of the Oyo *Iyalode* were quite limited as it was undercut by the powers of the women in the palace such as the *Enioja*. In Ife, before introduction of the title of *Iyalode*, there was the title of *Ojuma* for the head of the women in town and the *Yeyeloja* for the head of the market. These women had seats in the *geru*, the courts of justice; were in charge of the market women and settled disputes among them. They were fulfilling the role of the *Iyalode* but the actual title, when introduced, was not regarded as an important office.

In Ibadan,⁹ government was by chiefs who were selected on merit. In the nineteenth century, merit was largely determined by military prowess. The introduction of the *Iyalode* title in the 1850s was in recognition of the contribution to the military success of the town made by a wealthy woman trader, Iyaola, who gave liberal credit facilities to war chiefs and fielded her own soldiers. In Abeokuta, founded as a result of the movement of population during the Yoruba wars, the *Iyalode* title was adopted after 1830. Each township had its own *Iyalode* society but the title of *Iyalode* of all Egbaland was first bestowed in recognition of the contributions made by a woman, Madam Tinubu, to the defence and military prowess of Abeokuta. In the 1864 Abeokuta-Dahomey war, Madam Tinubu was largely responsible for providing Egba warriors with guns and ammunitions. The *Iyalode* is a town chieftaincy based on merit and its office was more important where chiefs rather than the *Oba* wielded more executive power and where chiefs appointed on merit rather than lineage. The institution of the *Iyalode* was circumscribed; women were given only one chief in council. Female *Ogboni* chiefs were not seen as representing women as such. Women played little part in the administration of the *Oba*'s palaces but selected women were involved in the rituals of installation, death and ceremonies. Two women were very important; the *Iya Oba* or official mother and the *Moshade*, who actually crowned the *Oba* and had to be present at the installation of any chief. Both women were selected by the *Ogboni*.

Women's roles were largely ceremonial and they were selected for their roles; therefore there was no real representative element. Female *Ogboni* chiefs were not seen as representing women as such. Their participation in the governance of the community with other female chiefs, however imperfect or unrepresentative, afforded a mode for issues affecting women to be taken into account by

⁹the chief city of Oyo, formerly Oyo kingdom.

society within the existing organisational structure. The *Iyalode* societies which existed to run the affairs of women were not the loci of power, political power was vested in the council of the *Oba*. They afforded a forum for issues affecting women to be discussed and for representations to be made on their behalf before the king. While there was no sex segregation in Yoruba government, the participation of women in government was circumscribed. There was inequitable gender representation, limited participation which was primarily ceremonial and issues affecting women were regarded as separate and not a part of the mainstream. Discrimination based on gender was part of the political structure.

The civil wars of the mid-nineteenth century between the Yorubas¹⁰ led to some modification of the governing structure. The influx of refugees into towns meant that it was no longer possible to run them on the existing basis, particularly since some of the refugees brought with them intact their own machinery of government to organise their part of town. A modified system evolved to accommodate this development. It consisted of a council of the head chiefs of the refugee groupings with one or two of the senior chiefs of the previous inhabitants - a sort of federal system. The head chief of the host town was the overall head of the head chiefs. The individual councils of the enlarged towns still functioned and looked after the affairs of their respective peoples.

¹⁰ for detail of the war years see Ajayi & Smith, *YORUBA WARFARE IN THE 19TH CENTURY*, Ibadan University Press in association with the Institute of African Studies, University of Ibadan and Cambridge University Press, 1971, Smith, R.S, *KINGDOMS OF THE YORUBA*, James Currey Press, 1988, particularly Part III, pp109-140, Falola, T. & Oguntomisin, D., *THE MILITARY IN NINETEENTH CENTURY YORUBA POLITICS*, University of Ife Press, 1984 and Atanda, *ibid*.

2.Social Organisation¹¹

The basic unit of social organisation was and remains the *ebi* or family. Seniority played a great factor. The oldest man was regarded as the head of the family, the *baale* or literally, the father of the house. Although he took counsel with other senior members of the family his decision was expected to be final. He settled disputes and because of deference to age, each member of the family was required to respect and obey his or her immediate and other elders. On the death of the *baale*, the most senior male kin took over the role.

3.Dispute Resolution and Administration of Justice

Administratively and judicially each town was divided into wards or *adugbos* which were named. The head of the *adugbo* was an *ijoye* or *olori itun*. Each *adugbo* was made up of a number of *agbo ile*, compounds, headed by a *baale* or *olori ebi*, that is, the head of the compound or the head of the extended family. *Baale* is an informal title while the *ijoye's* appointment must be confirmed or approved by the *Oba*. The *baale* saw to the general welfare of his compound and informally settled disputes. The *ijoye* saw to the welfare of members of his ward. As he usually had a larger and more complex area to govern he had his own *igbimo* assisting him in the administration of the ward. He also performed judicial functions and had a formal court. The court tried all civil cases involving persons belonging to different compounds and within his ward and imposed punishments. The highest court in town was the court of the *Oba*. Apart from judicial functions, the *Oba* and his *igbimo* had legislative functions with implementation being the responsibility of the *Oba*.

¹¹ further details of social organisation is contained within later parts of the chapter as invariably it forms an intrinsic part of personal laws and customs. See later sections on traditional marriage and inheritance and succession.

The approach to administration of justice in traditional Africa differs to that of the Anglo-American.¹² Individuals related to one another in accordance with kinship patterns. Administrators of justice in communities were usually elders and rulers. There was no effective distinction between executive and judicial functions. The primary aim was to promote the welfare of their communities. In dispensing justice, the elders saw themselves essentially as peacemakers called upon to reconcile divergent interests, not to apply strict legal rights of one party or the other; the objective was to seek genuine settlement that would disperse feelings of rancour. Peacekeeping was the distinguishing feature of African traditional jurisprudence. The administration of justice did not have to be formal; an adult witnessing a dispute could, if the disputants agreed, settle it on the spot. A serious dispute involving members of two or more different families required a formal hearing.¹³

The Yoruba gradation of courts was initially the *baale's* court i.e. the head of the compound would try and settle disputes, following that it would proceed to the village Chief's court where a settlement could not be reached, after that the district chief's court and finally the *Oba*, that is, the *Alake's* court on appeal. The procedure was and remains that the disputants would state their case before the elders with the plaintiff stating his/her case first. While the case is being stated the elders can interrupt and ask questions and both the plaintiff and the defendant can also interrupt each other. Witnesses are called on both sides and can be questioned by the parties to the dispute and by the Chief. In order to reveal all the relevant facts, the parties are allowed to speak more than once, refuting or corroborating evidence submitted by anyone concerned in the dispute. Remembrancers, or those who recall customs and social

¹²Adewoye, Omoniyi, THE LEGAL PROFESSION IN SOUTHERN NIGERIA, 1863-1943, Columbia University, PhD Thesis, 1968, Modern History, preface.

¹³ *ibid*, see generally Chapter 1 on indigenous dispute resolution mechanisms.

norms, may be used. There were no professional advocates in traditional southern Nigeria but a system of quasi-representation was not unknown. For instance, *babaogun* (literally father-in-battle), may be used to represent one informally and behind the scenes, in very grave matters. The applicable law was unwritten and generally what was accepted through custom by the community as binding. After hearing the opinion of the lesser chiefs, the presiding chief will pronounce judgement. No one is usually judged wholly right or wholly wrong. In cases of disagreement of opinions between the elders, the presiding Chief has the final say. Proverbs are used.¹⁴ The guilty party is expected to apologise and the acceptance of the apology means forgiving and forgetting the cause of the dispute. The closing ceremony may involve the sharing of kolanut to symbolise and illustrate the spirit of reconciliation which underlies the whole process. It is meant to indicate a burying of the dispute. As the disputants are genuinely reconciled, there is usually no need for an appeal.

To a certain extent, religion and status regulated the conduct of men and women. For instance, in a dispute between a head of family and a minor not belonging to that family, the latter had to be represented by someone of the same status as the former. A poor member of society aggrieved by injustice suffered at the hands of a powerful Chief would be best represented by another Chief as powerful in order to have any chance of redress.

Elders are deemed to derive authority because of their role as guardians of the society and also because of the belief that ancestors are watching. Religion was, and remains, very important and laws derived some of their strength from religion. A belief in the supernatural acted also as a regulator of behaviour and administration of justice. Ordeals such as *juju* were used to prevent perjury. Justice and morals were considered coterminous

¹⁴"[T]o the Yoruba, 'the proverb is the driving force in a discussion'", Fadipe, N.A., THE SOCIOLOGY OF THE YORUBA, Ibadan University Press, 1970, hereafter, Fadipe, SOCIOLOGY OF THE YORUBA, at 302.

and the Chief was both the dispenser of justice and keeper of the public conscience.

The merits of the traditional system lie in its simplicity, its speed, its relative informality, its inexpensiveness and in its accessibility. It derives its legitimacy and authority from the values, moral and religious, underpinning the social and traditional political organisation of the society. There was no charge for a *baale* since he was doing his duty in maintaining harmony in the compound. At the village chief's court, a small hearing fee was paid by both disputants depending on wealth and this could be paid in kind before the cash economy i.e. in *kolanuts*. At the end of the 'trial', the successful party had his deposit returned. The loser may be required to pay a fine in addition to losing his fee. Any money paid to the court is shared by the chief and his supporters. The defects of the system lie in the use of ordeals which were a poor substitute for thorough investigation. The interference of status did not allow for parity.

The system was subsequently undermined by the colonial administration. Powers that were previously shared and therefore checked each other were vested in one person which caused an imbalance. The system was further weakened by a number of factors; ultimate power rested with the British resident and District Officer; in addition, Christianity and western education served to foster individual independence which weakened reliance on the old system.

4. Colonialism and its impact

Customary law in Nigeria has been characterised by three factors; it is unwritten, it is accepted by the community whose affairs it regulates being an expression of behavioural patterns among a people and its sanctions may either be centralised in the hands of one person - a chief - who exercised that customary law on

behalf of the people or the community acted as a whole.¹⁵ Muslim law,¹⁶ although largely written, is in practice regarded as customary law. Customary law sources lay in tradition which may be interpreted differently by its subjects so there exists a real element of uncertainty. In addition, customary law ranges over social as well as legal matters; there are obligatory norms and there are discretionary norms. Legal norms were discretionary insofar as they did not impinge on an important aspect of community life.

Prior to the introduction of British institutions, customary law was the sole governing law, and the machinery for its administration was customary tribunals which varied from one area to another. For example, in the north of the country, the so-called Northern Territories, the judicial system consisted of the Emir as supreme judge acting with the advice of his Executive Council. Routine judicial work was entrusted to legal officers - the Alkali. In the West, the Foremost Chief and the rest of his chiefs sat in council to decide administrative and executive matters.¹⁷ In the East, the machinery of justice was a council also, but one which in theory consisted of all adult males but in practice was a council of family heads and other elders. Generally, throughout the Southern states disputes occurring within the family were often settled by the family or family head with the assistance of elders. Minor disputes involving parties of different families might be settled by elders of both families. In cases of serious disputes, perhaps matrimonial, a gathering of elders agreed upon by the parties would form to mediate on the issues.

¹⁵see Nwabueze, B.O., THE MACHINERY OF JUSTICE IN NIGERIA, Butterworths African Law Series, 1963, especially Chapter 6.

¹⁶ references will only be made to Muslim law in passing since it is classified as customary law. It is not possible to deal in any depth with variations that result in rights ad status of women under Muslim law.

¹⁷Yoruba people occupy the south west of Nigeria and details of political, organisational and social structure has been discussed in more detail above.

In 1900 the British government assumed complete "power and jurisdiction" over the entire country. The legal consequences were acute. "In all cases [of change of sovereignty] the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through its officers, recognised. Such rights as he had under the rule of predecessors avail him nothing."¹⁸ Had this rule been applied strictly, customary law would have been completely abrogated but British colonial policy of indirect rule was to refrain from altering personal laws and to a certain extent favoured preservation of certain indigenous structures which ensured that customary law was given due consideration.

There are obvious definitional problems with customary law since there is no one set of customs prevailing all over the country or region.¹⁹

"The customary law system is made up of those rules of customary law and practices of the various peoples of Nigeria and there are estimated to be over 250 ethnic groups in the geographical area known as Nigeria. These rules and practices have been given the force of law by virtue of some local legislation and are enforceable in the ordinary courts of the land subject to the qualification that they should not be repugnant to natural justice, equity and good conscience, contrary to public policy or inconsistent with any law for the time being in force."²⁰

¹⁸Lord Dunedin in *Vajesingji Joravarsingji v Secretary of State for India* (1924)L.R. 51 I.A., 357, quoted in Nwabueze op cit.

¹⁹see further, Park, A.E.W., *THE SOURCES OF NIGERIAN LAW*, Lagos African University Press:Sweet & Maxwell, 1963.

²⁰Hon Justice Augie, "Women's Rights in Law and Practice:Social Welfare", in Obilade, A.O.(ed) *WOMEN IN LAW*, Southern University Law Center and Faculty of Law, University of

Customary law is expressed as "...a mirror of accepted usage."²¹ A particular customary law must therefore be in existence at the relevant time and must be adhered to by the community. Speed Ag C.J. said in *Lewis v Bankole*²² that the native law and custom which the courts enforce must be "existing native law and custom, and not that of bygone days". Implied in both these statements is the view that customary law is not a frozen and rigid system but one which develops and modifies itself in order to accord with changes. For instance, the traditional Yoruba rule to deal with a situation where a man has died leaving a number of wives and a large number of children is to divide his property into as many portions as he had wives and distribute it accordingly. This custom is known as *idi-igi*. It gave rise to a number of disputes and to avoid the expense of litigation in the newly established courts, there evolved an alternative custom known as *ori-ojori*, whereby, if the head of the family so directed, the property could be divided into as many parts as the deceased had children. When such a situation came before the courts in *Dawodu v Danmole*²³ it was held that *idi-igi* should be used since repugnancy to British law did not equate with repugnancy to justice.

In 1900, statutory native courts (statutory courts to administer justice among indigenes supposedly along the lines of traditional indigenous tribunals) created by the British were empowered to make rules embodying customary law to minimise any perceived vagueness. This had a procedural as well as substantive impact on the application of the law. Once such rules were made, they had the force of law. Subsequent changes in the content of customary law were due to four factors (i) repugnancy to the

Lagos, 1993, at 251.

²¹Bairamian F.J., *Owonyin v Omotosho*, 1961, 1 All NLR 304 at 309.

²²1908, 1 NLR 82 at 83.

²³1962 1 WLR 1053 and 2 SCNLR 215

British principles of natural justice, equity and good conscience, (ii) incompatibility with local enactments (several enactments were passed to outlaw what were considered to be undesirable practices such as trial by witchcraft or *juju*. In this way, certain customs were expressly abrogated. The supremacy of these enactments over local law almost led to the abolition of trying customary criminal cases in native courts in 1933²⁴), (iii) the influence of British law in a number of areas such as marriage, inheritance, land tenure and succession and (iv) modification in the process of adaptation into rules.²⁵

4.1 Historical Development of British and Native Courts

British Courts

There were three distinct administrations in Nigeria in 1900; the Colony and Protectorate of Lagos, the Protectorate of Northern Nigeria and the Protectorate of Southern Nigeria. Southern Nigeria was served by the British Supreme Court, a court of law and equity. It was organised as three organs; divisional courts, full court and district courts. Northern Nigeria also had a Supreme Court but its jurisdiction was confined to certain areas. Outside the designated areas, the court only had jurisdiction in matters involving foreigners or indigenous people in the service of the colonials. Northern and Southern Nigeria were amalgamated in 1914 and a Supreme Court was established for the whole country, and for each province a Provincial Court. In 1933 the Provincial courts were abolished. The Supreme Court was retained under the Supreme Court (Amendment Ordinance) 1933 but its jurisdiction was reduced. It was confined primarily to the township of Lagos where it exercised exclusive unlimited jurisdiction over all classes of people and matters. It also possessed concurrently with the Protectorate High Court, established to replace the Provincial courts, unlimited criminal jurisdiction over foreigners throughout the Protectorate and over

²⁴see further Nwabueze, op cit. p.7.

²⁵see generally Nwabueze.

indigenes in the townships. This particular jurisdiction was to be exercised by the High Court. The Protectorate Courts Ordinance, 1933 established the Magistrates court in addition to the High Court. Together with the native courts they were charged with the administration of justice in the Protectorate. In 1943 the High Court was abolished. As a consequence the Supreme Court was given unlimited civil and criminal jurisdiction throughout the country, subject only to the jurisdiction of native courts in land tenure, family status, guardianship of children and testamentary disposition of property under customary law.²⁶ Again in 1954, under the Federal Constitution, Nigeria was divided into three regions. In each there was a legislature with power to make laws for peace, order and good governance of that region within the field reserved for that region. A federal legislature having unlimited legislative competence within the federal territory was based in Lagos although with powers limited to certain specified matters in the rest of the country.

Native Courts

These were statutory indigenous courts established in each of the three Colonial Administrations in 1900; that is, the Protectorate of Lagos and the Protectorates of Northern and Southern Nigeria.

Native Courts in Southern Nigeria 1900-1914

These were initially created in 1900 as inferior courts with a jurisdiction concurrent with that of the Supreme Court. Each court's base was a territorial native court area formed by grouping a number of contiguous villages or towns together without any regard for tribal or cultural affiliations. There were two types of native courts; a higher and lower grade called native councils and minor courts respectively. A native council consisted of the District Commissioner as President and Africans appointed by warrant to represent the various villages or towns served by the court. "The type of people who got appointed were

²⁶Apparently, the reason for the frequent change was the shortage of qualified English lawyers to be appointed as judges.

those who impressed the District Commissioner with their courage to come forward and meet the Europeans. The traditional rulers seldom passed this test, and so were, for the most part, left out."²⁷ This statutory native court did not depict the traditional native court. The court was dominated by its president whose presence deprived the African members of any say in the formation of the court's decision which was delivered and recorded in their names. They played an advisory role, consulted only when the President needed assistance on points of customary law. Although the court was to apply customary law, as President, the District Commissioner was wont to apply law that he was familiar with, English law.

Prior to colonisation, traditional courts had unlimited authority and were supreme. Their apparent defects lay in the lack of efficient enforcement methods. There was no incarceration system; it is unclear whether this was a result of social cohesion or simply a lack of such a system. Statutory native courts were granted enforcement mechanisms such as power of arrest or by levying of execution as in the English practice. Prisons were also built. The only thing statutory native courts had in common with traditional pre-colonial courts was their jurisdiction over indigenes; jurisdiction over foreigners could only be exercised with their consent. Supervision of the courts fell to the Supreme Court which revised the cases monthly and reviewed the cases on appeal. The intention in setting up the statutory native courts was to oust traditional native tribunals. Nevertheless, the traditional native courts continued to function in the background.

Native Courts in Northern Nigeria 1900-1914

The Native Courts Proclamation of 1906, in line with Lord Lugard's policy of indirect rule, took note of the traditional system of dispute resolution in Northern Nigeria in establishing statutory native courts. Three types of courts were established;

²⁷Nwabueze, at 70.

(a) the Emir's court, consisting of the Emir and some members of his council, (b) the courts of the Alkalis, composed of Alkalis as sole judges, sitting with or without assessors, (c) in non-Muslim areas, where a Chief or Council existed, they constituted a court; in default, any number of persons might be appointed to form a court.

The native courts lost part of their territory to British courts but the subject-matter of the jurisdiction was left largely to customary law. In the Muslim North the Maliki code was used. Maliki code applied only in the native courts. It was applied dually with the Nigerian Criminal Code. Except in appeals from native courts, British courts exercised their criminal jurisdiction only under the provision of the Criminal Code which applied generally throughout the country. Any sanctions could be imposed by the courts as long as they were not repugnant to natural justice nor involved mutilation. Powers of imprisonment, absent generally in customary law, were granted to the courts. There was no provision for appeal by the British Courts nor for supervision by either the Supreme or Protectorate courts. The native courts established in Northern Nigeria more or less reproduced existing traditional courts.

Amalgamation of Southern and Northern Nigeria

After amalgamation in 1914 a Native Courts Ordinance was enacted for the establishment of native courts throughout the country. The underlying principle was the preservation of existing structures and in the South, this meant the removal of the District Commissioner, now to be called the District Officer, DO, from the Presidency of the native courts. In the Western provinces, on removal of the DO, the composition of the court was based as far as possible on traditional native tribunals. The Chief's court was recognised; other courts were also established consisting of minor chiefs and family heads but no court was granted unlimited jurisdiction. In the Eastern provinces, there was little change except the removal of the DO. In fact, the courts' powers were reduced.

Overall, though, the powers of the native courts were reduced by two changes; the declaration of fifty-two townships in the country over which no native court could have jurisdiction and restriction of jurisdiction over indigenes in British colonial government service or who lived in a township without their consent. Thus, while the 1914 Ordinance tried to reinstate a situation of minimum disruption of traditional dispute resolution mechanisms, it also reduced considerably territorial and corporeal jurisdiction. There were a number of further minor changes to the native court system until the Constitutional changes of 1954 when federal government was introduced in the country. Each region enacted its own native or customary courts law, under which it established its own native or customary court. A Federal Supreme Court was directly established by the Constitution Order in 1960.

Any fusion of law has invariably been at the expense of indigenous customary law. Traditional courts had to conform to British laws and British concepts of equity and good conscience. The law of Nigeria is a diversity of laws - federal and regional statutes, customary laws, the Maliki code in the North and the principles of equity and statutes of England and Wales.

5. Women and Colonialism²⁸

Women had little contact and liaison with British administrators, so their roles as chiefs and contributors went unrecognised and they were not considered in the setting up of administrative bodies. There were three different types of administration in Southern Nigeria from 1914, the Sole Native Authority, SNA, system in South-West provinces, Warrant Chief system in South Eastern provinces and local township government in the colony of Lagos. Women were affected differently under each type of administration.

²⁸see Mba, N., NIGERIAN WOMEN MOBILIZED, op cit. in particular, Chapter II, 'The Effects of Colonialism in Southern Nigeria'.

Sole Native Authority, SNA

Power became concentrated under a SNA and the traditional systems of chiefs and kingmakers who had acted as checks and balances were considerably weakened. This had an impact on power and real relations within the communities and also on relations with the colonial powers. The choice of a SNA was dictated by whom the colonial authority considered acceptable, not a person who had legitimate authority within the community. This meant that in turn, the roles and powers of women were weakened and in some cases lost. Some chiefs were members of the native authority councils with SNAs being responsible for their appointments. The councils were largely advisory but male chiefs were able to participate in the power structures such as the native authority councils and courts while women were not granted access. Female titles rapidly became vacant and meaningless. In Abeokuta, under the SNA system, no woman was ever a member of the advisory Egba Native Authority Council and no woman ever served on the native courts.²⁹ The township *iyalode* societies remained and provided the basis of women's organisations on a township basis. There was introduction of Christian titles, for instance *Iyalode* of all Christians, and a channelling of female activity into the Christian church and this new network provided a means of organising women on a mass basis. At the celebration of the centenary of the founding of Abeokuta, women's titles were restored, but for ceremonial purposes only.

Warrant Chief

Under Warrant Chiefs, traditional societies and age grades lost their executive and judicial responsibilities which were absorbed by warrant chiefs and native courts. Warrant chiefs were chosen in what seemed an arbitrary manner³⁰ and until 1929, no woman was ever chosen nor were they made members of the native courts. Not only were women excluded from the administration but courts also

²⁹see *ibid* at 40 for further details.

³⁰*ibid* at 41

interfered with their traditional judicial responsibilities. Women were not allowed to discipline offending members of their associations. Under the warrant chief system, there was no consultation with men, let alone women.

Colony of Lagos

In the colony, traditional political order was retained and coexisted with the colonial administration.³¹ Women had been involved in the traditional government of Lagos through their leader, *Erelu*, the only high ranking female chief appointed by the *Oba*. This title was retained under the colonial administration. The *Oba's* council organised a committee known as *ilu* which was a unit of the palace, *iga* and was responsible for maintaining law and order in town. The Lagos market women's associations were represented on the *ilu* and they were in charge of the markets. Representatives of the market women from each market were invited to attend these meetings. The *ilu* committee played an important role as the link between the indigenous traditional elite and the modern elite. Lagos Town Council, LTC, was responsible for markets and parks amongst other things. From 1920 onwards, the market women and LTC were in conflict over allocation of stalls, fees, market sites and the maintenance of order and despite the connectedness of the market women and LTC, the colonial administration did not bring women into the council until 1944 when a woman called Mrs Abayomi was appointed to represent the "unenfranchised classes". In 1950, LTC was fully elected by adult suffrage and one woman, Mrs Henrietta Lawson, was elected. From 1953 to 1962, six women were elected but none were market women.

In general, women were excluded from the decision making process under the administration although the indigenous system was left intact and this excluded the influence of those disaffected by the administration until changes were made. What little

³¹ibid at 42.

participation women had in the political process was reduced further and left them disaffected.

5.1 Political Activity³²

In Abeokuta, the issue which rallied and politicised the women was taxation. In the whole of Nigeria, only women in Abeokuta and Ijebu native authorities paid poll tax.

The Egba United Government, EUG, was forced to propose direct taxation in 1914 after being threatened with the withdrawal of the British Government's support of the import duties on traders bringing goods from Lagos to Abeokuta. This proposal was a contributory cause to the Ijemo uprising in 1914; a mass demonstration against the oppressive policies of the EUG which required the calling in of troops from Lagos. The British government seized the opportunity to end the independence of EUG as a result of the ensuing massacre and on 1st October, 1914, Abeokuta was absorbed into the indirect rule administration consequent on amalgamation of the Northern and Southern Provinces in 1914. As part of this, direct taxation was introduced in Abeokuta in 1917 to replace tribute and forced labour and it was also introduced into the other South-Western provinces by the Native Revenue (Southern Provinces) Ordinance No. 29 of 1918.

The attempt to carry out this ordinance in Abeokuta involved reorganisation of the administration and triggered an uprising in Adubi in June 1918. This uprising, in which hundreds were killed and railway and telegraph lines destroyed, was directed not only against taxation but also against the Egba administration and the changes introduced by the British authority. In the inquiry which followed, the most common complaint by witnesses was that after the men in the districts were conscripted for forced labour, their homes were investigated

³²see Mba, *ibid* pp135-164. I concentrate on activity by women in Abeokuta although there was political activity in other regions of the country, most notably the 1929, women's war in the East.

by police and their wives arrested and fined for sanitary regulations. The general feeling was that the absence of men was used to exploit the women and raise additional levies. This mistreatment of women was one of the precipitating factors in the 1918 rebellion but it does not seem as if the women were directly involved.

Tax collection in Abeokuta was the responsibility of the *Ogboni* chiefs who were paid N1000.00 per annum. in return. The collection process was often brutal. Women were often stripped naked by tax collectors to see if they were old enough to pay tax. Such harassment was resented by the women and was severely criticised by the people of Abeokuta. The Abeokuta Society of Union and Progress, led by Reverend I.O. Kutu, complained to the Alake that "The way in which our women are being treated, hunted down and dragged about on public streets by the alopea(sic) [native authority police] for non-payment of tax reflects unfavourably against the reputation of [Abeokuta] for progress."³³ In fact, in 1937, the society proposed that women be exempted from tax and men's tax increased.

The Abeokuta Women's Union, AWU, emerged from the Abeokuta Ladies Club, ALC, run by Mrs Olufunmilayo Ransome-Kutu, to represent the interest of women following the wider problems of price controls in the market and taxation of women. Membership consisted of both educated women and market traders. One of the first problems dealt with was the seizing of rice from the market sellers in 1945 by a government contractor without payment.³⁴ The traders had complained to the Assistant District Officer, ADO, who responded that the government requirement was for 1,800 tons of rice needed for Lagos and that no one in Abeokuta could sell rice until that need was met. The DO supported the ADO's position. A delegation of three members of the ALC and three members of the Nigerian

³³P64:File No. 49. Important societies in Abeokuta. Cited in Mba, *ibid* at 138.

³⁴ see pp143-145, *ibid*.

Union of Teachers returned to the ADO and demanded that the seizure of rice be stopped. An investigation of the complaints resulting in the contractor being told that only the police could seize rice and that any seized rice must be taken to the police station. The delegation, with 25 rice sellers, went to see the Resident who insisted that all Egba people must do without rice until the government had fulfilled its quota and that the confiscated rice would not be paid for. The ALC continued to lobby on the issue despite the refusal of the *Alake* to discuss the matter in council as controls were imposed by the government. The women went to press and published an appeal on 12th November, 1945 in the *Daily Service*. As a result of the appeal, the rice control was lifted six days later in Abeokuta.

In early 1946 the ALC compiled a list of demands they termed resolutions on a wide ranging number of matters including improvements in the sanitary conditions and water supply of Abeokuta, financial support to adult education and importantly, taxation of women in Abeokuta. In the same year ALC became the Abeokuta Women's Union, AWU. Its diverse membership meant that its objectives "transcended the alleviation of hardship to the elimination of the causes of hardship."³⁵ The aims and objects of the AWU, *inter alia*, were:

"To defend, protect, preserve and promote the social, economic, cultural and political rights and interests of the women in Egbaland.

To co-operate with all organisations seeking and fighting genuinely and selflessly for the economic and political freedom and independence of the people."³⁶

In 1947 the Abeokuta Women's Union, AWU, demanded the abolition

³⁵ at 145

³⁶The Constitution, Rules and Regulations for the Women's Union, Abeokuta (Abeokuta: Bosere Press, 1948), p.1, quoted in Mba, *ibid* at 146.

of the flat rate tax on women because they argued that women were already helping the men pay their taxes, women were usually responsible for the feeding and education of their children and women were already paying water rates and other SNA fees and therefore most of them could not afford the additional burden of the flat rate tax. The Alake and the British officials argued that the women could afford to pay the three shillings per annum, that exemption was given to deserving cases and that Abeokuta could not manage without revenue from the women's flat rate tax. By 1946 the market women in Abeokuta felt alienated from the Alake and SNA Administration because of the damage done to their interest by the flat rate tax and food price controls. With no representation under the SNA system, they could only appeal to the Alake either individually or collectively.

The crux of the women's opposition to the flat rate tax was that there should be no taxation without representation. The AWU demanded that women should be represented by members of the Union on the ENA council and all other committees that were concerned with Egba affairs. The AWU believed that only women representatives would protect the interests of women. The AWU rejected the use of violence as a tactic. They used civil disobedience, press releases, and demonstrations to the *afin*[palace]. The AWU considered that women's rights, interests and freedom were being trampled on by the SNA and sought the abdication of the Alake who was the SNA and the SNA system. The person of the Alake took a great deal of criticism in his role as SNA. The strategy of the AWU was to put as much pressure on the Alake, Ademola II, to force him to abdicate and elicited support from those, including men, opposed to the Alake and the SNA system. In November, 1947 the Alake increased the flat rate tax. Following the demonstration outside the palace on 29th and 30th November, 1947, he ordered the arrest of Egba women for non-payment of tax. The women mounted a 48 hour vigil on 9th and 10th December after a mass meeting of the Majeobaje Society, a men's

society, expressed support for the women and urged the *Alake* to increase the men's tax and abolish that of the women. The *Alake's* response was that he was bound by the Ordinance of 1918 and that Abeokuta needed the revenue. The Resident supported the *Alake*. Mrs Kuti was banned on 12th February, 1948 from the palace after an altercation there with the DO. In response to a five hour demonstration through the streets on 28th April, the *Alake* finally agreed to suspend the tax on women, to appoint a committee to examine the tax issue and to admit to the ENA council, women.

Following these events, the *Alake* went on holiday to Jos. In his absence the *Ogboni* chiefs who had been his strongest supporters joined forces with the women for their own ends. They passed a resolution on 4th July which rejected the SNA system as "not in accordance with native law and custom",³⁷ repudiated Ademola as the *oba*, charging that he had usurped their powers and privileges especially tax collection rights and criticising him for specific abuses such as oppressive land and building policies and finally, called for an end to women's taxation.

On the *Alake's* return, the *Ogboni* signalled their rejection of him by the traditional method of sounding the bell and beating the drums. The *Alake* accepted all their demands, including the end of the SNA system except for his abdication. The *Ogboni* boycotted the meetings of the ENA Council and the women held mass demonstrations. The SNA administration came to a standstill after a third meeting of the council had to be cancelled and violence broke out on 26th July, when a group of young men demonstrated against the supporters of the *Alake*. On 26th July, Ademola II relinquished his status as SNA administrator to become chairman of the ENA council. The women demonstrated again on 28th and 27th July, insisting on the *Alake's* abdication. The Resident and Chief

³⁷quoted in Mba, NIGERIAN WOMEN MOBILIZED at 156.

Commissioner for the Western Provinces advised him to leave Abeokuta after consultation because his presence was a threat to further disorder. Ademola left Abeokuta without formally abdicating and both the AWU and Majeobaje Society continued to agitate for his abdication.

After Ademola's departure, an Egba Interim Council was formed to replace the Egba Native Authority Council. Membership of the council was extended to include four women who were nominated to represent the four sections of Abeokuta, two of whom were executive members of the AWU; Mrs Kuti and Mrs Soley. Four additional members were drawn from the Majeobaje Society. The first act of their interim council was to abolish all taxation for women, including water rates and to increase the flat rate for men to compensate.

A key rationale for the abolition of taxation put forward by both the AWU and the Majeobaje Society was to ensure that women would no longer bear the burden of taxation and the men were willing to have their taxes increased to offset any monetary loss caused by abolition. Clearly, protectionist ideology underpinned the political activism of both the women and the men. It was discriminatory and inequitable to have women pay more tax than the men; but perhaps a more far-sighted approach would have been to agitate for equal taxes for both men and women. The aims and objects of the AWU resonate with ideals of equality and political representation of women which are still key issues today. Their fight for representation, centred on the platform of unfair taxation, was activism that is comparable to action for women's rights to this day. However, the fundamental difference lays in the fact that these women, while fighting for equal rights, accepted the complementary but secondary role ascribed to women by the society in which they lived. This is evidenced through the acceptance of a solution which allowed men to be solely responsible for taxation. This accords with cultural values, not specific to Yoruba society that men, as heads of households, are the primary breadwinners and bear responsibility for the costs

of the family. Nonetheless, despite what may be considered a flawed approach to the abolition of taxation of women, the AWU managed to challenge, with the support of other groups who had their own agendas, the existing political structure and agitate for change. They wanted recognition that women need to participate and be represented in issues that directly affected them as women, and more generally, in issues that affected them as citizens.

However, the alliance between the *Ogboni*, the AWU and the Majeobaje Society soon disintegrated. Some of the former began to agitate for the return of the *Alake* and a society was formed, *Egbe Atunluse*, for that purpose. To counter the AWU, a women's section was formed which remained in existence until its objective, the return of the *Alake* was achieved in 1950. The *Ogboni* in the Egba Central Council objected to the representation of the Majeobaje Society and the AWU on the council and worked against the interests of the women at every turn; for instance, they consistently opposed the proposal to admit women into the Appeal Court.³⁸

Alake Ademola finally abdicated on 3rd January, 1949 in view of his continuing unpopularity and unrest in the area but returned in December, 1950 with renewed *Ogboni* support. The Egba Central Council was constituted as the native authority and comprised 13 ex-officio chiefs, 69 members elected by adult males and four women appointed by the four local councils into which Abeokuta was then divided. The four women were Mrs Kutu, Mrs Soley, Mrs Odusola and Mrs Osimosu; all executive members of the AWU. By the admission of women into council, Egba women were re-integrated into participation in the executive organ of government for the first time since pre-colonial days and gained a power base in their society although it was a power base unequal to that of men.

³⁸see Mba, *ibid*, p.58.

The composition of the Egba District Council was changed at the end of 1950 in accordance with a new constitution drafted by the Egba Constitutional Council. In the newly constituted Abeokuta Urban District, the AUDC, the number of ex-officio members was increased from 13 to 19. It had originally been proposed that the number be increased to 23, four of whom were to be female title holders; the *iyalode*, *otun iyalode*, *osi iyalode* and *ekerin iyalode*. Since these titles were vacant it was decided to eliminate women ex-officio members rather than create new title holders. On the new council there were 52 elected members from Abeokuta town, four from Otta native authority, one from Imala and 35 from the districts, totalling 69. The number of women elected to the council remained four and this number was objected to.³⁹

On 30th November, 1950 the AUDC decided by a narrow majority to recall Ademola as *Alake*. The AWU and the Majeobaje Society directed terms under which he was to return which included non-interference with the administration of ENA beyond executing duties as chairman of Egba council. There was further conflict over the payment of water rates by women from which they had been exempted since August 1948. In March 1953, a group of women were arrested for non-payment. Agitation over payment continued until the Western Region government introduced a new system of taxation and took over levying of water and electricity in the whole of the western region. Still, only women in Abeokuta and Ijebu had to pay the rates. The AWU continued to campaign against this and in 1959, Mrs Kuti was arrested for non-payment although the case was later discharged. The government eliminated water rates for women in 1960, the official explanation given by the Premier of the Western Region, Samuel Akintola was that "socially and economically, the earnings of the vast majority of women in the Region are so intertwined with those of their husbands that

³⁹Ibid at 60.

accurate assessment of women for rates is impossible."⁴⁰

Elsewhere in the country, other groups of women were protesting against payment of tax. In Lagos, market traders also complained against payment of income tax by women on the grounds that they were already supporting families, were paying water and improvement rates and they also contended that taxation of women in Lagos was against native law and custom. As a result of campaigns, the minimum taxable income was raised from N50 to N100.⁴¹

"The Lagos market women - like women in Abeokuta and the Eastern Provinces - did not accept the colonial administration's argument that if women earned as much as men, they should pay tax along with men. Nor did they accept the doctrines of their feminist sisters in Europe and America at that time, who insisted that women were the same as and equal to men, possessing equal rights and obligations - that is, that they were entitled to equal work for equal pay, with an obligation to pay equal tax. The Nigerian women believed rather that women were equal but separate - that they had special interests which must be protected, and that because of their place in society and their particular problems, they should not pay taxes."⁴²

Indigenous Yoruba society enabled representation of various groups such as women who had a forum for addressing the issues

⁴⁰quoted in Mba, NIGERIAN WOMEN MOBILIZED at 160.

⁴¹ ibid, p202ff for further details of activism by Lagos women. It was possible to tax women on their earnings because most women traded in markets. At the time, there was a small but growing elite of professional women who perhaps were teachers but in general, women tended to earn an income or supplement any maintenance from their husbands, if married, with some form of petty trading.

⁴²ibid at 204.

which affected them in the *Iyalode* societies. Nonetheless the society was essentially patriarchal. Women's roles in society were considered secondary and complementary to men's roles and it appears that women themselves concurred with this. The political activity described above illustrates the fact that women were prepared to take a secondary role. It will be shown in the next section, however, that institutionalised discrimination against women in Yoruba society takes a complex form. As women and individuals, Yoruba women inherit and own property on equal terms. Yet, as wives, their rights become limited.

The political activity described above took place at the time leading up to independence in 1960. The description of societal organisation, application of British laws and the uneasy mix between the two was well in place by independence and in fact this structural organisation remains to date in essence with various amendments to laws as and when necessary. The implication of this for women lies in the fact that indigenous structures provided representation, however imperfect. Colonialism with its importation of different political structures reduced the importance of these societies, introduced a different system of laws and organisation and detached indigenous structures of representation from the new locus of power; the centralised state. The reality is that these problems and conflicts exist to date.

PART II PRESENT CONFLICTS:WOMEN'S RIGHTS ⁴³

1. Empowerment vs Traditional Roles.

The previous section looked at political activism by women, in particular, Yoruba women, under colonialism in asserting their rights to representation and equality. This activism was marked by an acceptance of the societal role ascribed to women and while this resulted in a limited success, the principles they campaigned to achieve are of relevance today. The legal system in existence during that period leading up to independence in 1960 remains in essence. Family matters; inheritance, property, divorce, custody, are still governed primarily by customary law.⁴⁴ A statutory system exists also and it is the conflict and potential for conflict between the two systems, particularly in the area of family law that impacts heavily on women and undermines their rights.

⁴³In addition to academic texts, there are a number of reports on women's rights in Nigeria by local NGOs. See Atsenuwa, A.V. (ed) "Human Rights:The Nigerian Experience", Legal Research and Resource Development Centre, 1995, "Unequal Rights:Discriminatory Laws and Practices Against Women in Nigeria", Constitutional Rights Project, 1995 and "Eliminating Discrimination Against Women - The Report of a Conference organised by Constitutional Rights Project, CRP, and the Friedrich Naumann Foundation", Constitutional Rights Project, 1995. Obilade, A.O., (ed) WOMEN IN LAW, Southern University Law Center and Faculty of Law and University of Lagos, 1993 and Kalu, A.U. & Osinbajo, Y., (eds), WOMEN AND CHILDREN UNDER NIGERIAN LAW, Federal Ministry of Justice Law Review Series, Vol 6, General Editor, Prince Bola Ajibola, n.d, are excellent, comprehensive accounts on the status of women in Nigeria. See further, Oyajobi, A., "Gender Discrimination and Fundamental Rights of Women in Nigeria", 1991, JHRLP Vol 1, No. 1, 75, Karibi-Whyte, A.G., JSC, "Customary Law of Succession in Nigeria and Wills Law" and Augie, A.A., Hon Justice, "Women, Children and Nigerian Law", both in All Nigeria Judges Conference Papers, 1993 at 162 and 223 respectively.

⁴⁴ section 69 of the Matrimonial Causes Act 9(Laws of the Federation of Nigeria, 1990 rev. ed; Cap 220(formerly MCA 1970)) expressly excludes the application of its provisions on maintenance and settlement of property to spouses married according to customary law. See also Uzodike, E.N.U., "Women's Rights in Law and Practice:Property Rights", chapter 13 in Obilade, A.O., (ed) WOMEN IN LAW, Southern University Law Center and Faculty of Law, University of Lagos, 1993.

As with the issue of women's rights world-wide, in Nigeria, formal legal guarantee of non-discrimination does not equate with reality. Section 39 of the 1979 Constitution of the Federal Republic of Nigeria⁴⁵ provides for equality of treatment or non-discrimination on the basis of sex. Yet examples of discriminatory practices, at times supported by legal enactments, abound. The nature of the discrimination against women is coloured by cultural and religious practices and varies from region to region and within regions. On the whole, the overview of the position of women in Nigeria is that of a group subjected to variable and often arbitrary discrimination despite formal statutory protection. For example, it is only a misdemeanour to indecently assault a girl or a woman and it is punishable by up to two years imprisonment while indecent assault of a man is a felony punishable by up to three years imprisonment.⁴⁶ Covert discrimination in the form of administrative barriers erected to prevent the enjoyment of equal rights also exists; for example, the police do not allow women to stand bail for accused persons, women are not allowed tax relief on the upkeep of their children even when principally responsible for them whereas men are allowed this tax relief and a husband's consent is required to issue a passport to a married woman or to add the names of the children to her passport.

These barriers are clearly coloured by a societal perception of the role and value of women vis-a-vis men in society. In the eastern states, women cannot own land other than for use for farming, the principle of primogeniture in inheritance is

⁴⁵ the 1989 Constitution, which was supposed to replace the 1979 Constitution never came into force. When General Abacha took power in 1993, Decree 107 of 1993 was passed which reverted to the 1979 Constitution. A new Constitution, the 1995 Constitution is expected to come into force at some point in the future. At various points during the struggle for power in the country, the Constitution is usually suspended by the incumbent military administration although Chapter IV on fundamental rights may remain in force.

⁴⁶see further Omorogbe, O.O., "Perspectives on Urban and Rural Women", at 86ff in Obilade, WOMEN IN LAW, op cit.

applied. The eldest male in the family holds and shares farm land for cultivation. Women cannot inherit land from their father or their husband but may be allotted land for cultivation. In the north, young female children may be married without their consent with serious health implications consequent on sexual activity at such an early age being endemic.⁴⁷

These discriminatory practices against women are influenced to a certain degree by cultural and religious practices as mentioned above. The situation is compounded by the fact that regulation of family law, the site of most of these practices is, under statutory law, governed by the customary law of the particular region. Custom, a mirror of accepted usage, is not easily legislated against, assuming there exists the will to outlaw certain practices. Therefore, while the Constitution contains guarantees on equality of rights and principles of non-discrimination, the ambit of its protection is effectively limited since a large area where its jurisdiction would be most useful has effectively been excluded.

Further, state ratification of international instruments is of limited usefulness. In order to be able to rely on certain legal principles, awareness of these principles is a prerequisite and access to justice a necessity. Legal discourse as a fulcrum for change is still very much a growth area. Indigenous mechanisms for dispute resolution still subsist and are considerably cheaper and more accessible for the majority of people. The recognition of instances of discrimination against women, however, is a useful starting point. It is useful in identifying the core areas, the problems, and the ways in which people have chosen to redress these problems is invaluable in seeking to identify the way forward to incorporate the language of rights into the most frequently used methods in combatting discrimination.

⁴⁷see discussion of the case of *Karimatu Yakubu* in Chapter 2.

The next sections will look at the nature of Yoruba women's rights under marriage, custody rights and property and inheritance rights.

"We...need to appreciate that the issue of women's rights (within the family as with anywhere else) is much affected by the competing values of [the] multi-systems of law."⁴⁸

2. Personal status laws⁴⁹

2.1 Marriage

Marriage under traditional Mores⁵⁰

There are four forms of Yoruba marriage; marriage by mutual consent of the parties, marriage through levirate (of a brother's widow), the gift of a girl child in marriage by her father and marriage by mutual consent of the parties' relatives with payment of a dowry. The latter is the most typical even though social changes mean that the parties may have come to a mutual agreement to marry before the relatives' consent is sought. Where the family is either Muslim or Christian, the religious ceremony is performed in addition to traditional arrangements. The Muslim *Nikai* ceremony is performed in the case of Muslims. This of course will give rise to certain consequences under Shar'ia law. In the case of Christians, the traditional ceremonies add nothing to the validity of marriage under English law.

Once it becomes clear that the parties intend to marry, both

⁴⁸Atsenuwa, Ayodele, V., "Women's Rights within the Family Context: Law and Practice", in Obilade, A.O. (ed), *WOMEN IN LAW*, Southern University Law Center and Faculty of Law, University of Lagos, 1993, at 117.

⁴⁹ see for instance, Kasunmu, A.B. & Salacuse, J.W. *NIGERIAN FAMILY LAW*, Butterworths, London, 1966.

⁵⁰see further Fadipe, N.A., *THE SOCIOLOGY OF THE YORUBA*, op cit at 65ff.

family's relatives are involved to a large degree. They make enquiries to ascertain that the parties are not related, however distantly and they enquire to ensure that the other family is of good stock, for example, that there are no hereditary diseases in the family and that the family is morally sound. The girl's family is approached initially for their consent and they in turn consult their kin in addition to making the enquiries noted above. After a suitable time has elapsed they inform the boy's family whether the match is favourable or unfavourable. If favourable, the formal betrothal takes place at the *ijohun* celebration which publicly marks the betrothal and it takes the form of the boy's parents sending on his behalf the bride price or the first instalment of the bride price, the payment of which is considered symbolic. The couple need not be present at this ceremony since it represents the consent of both families to become one family through their children. The girl's parents and relatives will usually be present although neither the boy or his male relatives will be present. The activities of both families do not hinder the continuation of the relationship although of course, if consent were withheld by the girl's family there would be great difficulty in continuing it since it could not result in marriage. Once betrothed, the male is considered the *oko* or husband and the female the *iyawo* or bride with both sets of relatives treating them as such. The male assumes certain obligations to his wife's family such as gifts of goods and services and manual labour when most families farmed.

Between the *ijohun* celebration and the day the bride is taken to her husband's house the *idana* takes place. This is an important payment by the *oko* equivalent to the dowry and the word itself means the making of legal kinship. In Abeokuta, the dowry which is mostly symbolic, includes kolanuts, *orogbo*, the last syllable of which means to reach an old age, honey to symbolise sweetness or happiness, gin to symbolise ardency and *ata*, ground chilli, perhaps for those who do not include alcohol in these matters to symbolise the spice of life. Traditional woven cloth is also

included as is money the amount of which varies from district to district.⁵¹

After the *idana*, the date is fixed for the bride to go to her husband's home by mutual agreement between both relatives although the father of the bride would usually set a date. The actual ceremony is *igbeyawo* which means literally the carrying of the bride. This happens at the date the groom's family come to collect or carry the bride to her new home and is the nearest equivalent to the wedding ceremony. Of course, prior to that date a lot of negotiations and kinship links are established with consequential rights and obligations. Both parties will have been treated as husband and wife by their families and friends following the *idana*; the *igbeyawo* is simply the last act in a line of actions to be taken by both families in ensuring that not only are their children compatible, but that both families are able to become one family. Yorubas say that you do not marry an individual, you marry the family. A husband is, however, not restricted to only one wife. It is regarded as a mark of distinction to have as many wives as he can afford. Each subsequent wife is married with the same ritual and the first or senior wife, and subsequent wives, if applicable, will approach the father and family of the intended wife for consent. She would also performed duties, carried out by her husband's relatives on the taking of the first wife, for the new bride. The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women prohibits polygamy, except with the consent of both parties, under article 6(2)(a). It is interesting to note that traditionally, the existing wife or wives play an integral part in the process of taking a new bride and in participating may be assumed to have concurred. Of course, there is no sanction traditionally for taking more than one wife and it is hard to envisage how an existing wife could refuse her consent unless she is prepared to leave the husband and any consequences that may follow from that course of action.

⁵¹see Fadipe, footnote 1 at 79, *ibid.*

Once married, division of labour within the familial home consists of the wife being responsible for all household work. She is free to follow her own trade independently of her husband and he is obliged to supply her with the means for doing this. Her earnings remain her property. Her husband is obliged to feed her and give her a separate room in the compound. The wife retains exclusive enjoyment of her room or apartment. The right to remain in the home lasts only as long as the marriage. The right is not proprietary. This position is confirmed by the 1939 case of *Oloko v Giwa*⁵² which held that an allotment of a house or room by a man to each of his wives did not vest the house or room so allotted in the wife as her separate property. She is however entitled to her own property whether real or personal which she acquired through her own efforts before or during the marriage. She provides herself with clothing. Customary obligations of the husband include responsibility for protecting his wife against assaults and insults and responsibility for her debts. He is also directly responsible for her care.

Changes in society has meant an increase in marriage by mutual consent of the principal parties without payment of the bride price and abandonment of betrothal of girls in infancy without their consent. Levirate still occurs. In a recent case which came before the Supreme Court, *Akinnubi v Akinnubi*⁵³, which was concerned with whether the widow of a Yoruba intestacy could participate in the administration of her husband's estate, it was noted in the pleadings of the deceased's brother that the wife had been bequeathed to one of the deceased's brothers according to customary law. No pronouncement was made on this issue but it was mentioned also that the plaintiff wife did not agree or reject this decision to bequeath her but simply remained in Lagos where she lived.

⁵²15 N.L.R. 31, 1939.

⁵³1997, 2 N.W.L.R, 144.

Statutory Marriages

Marriage under statutory law or non-traditional marriage is simply marriage under received English law. In 1863 the first ordinance on statutory marriage was enacted. It confirmed the existing practice of contracting Christian marriages and provided for the granting of licenses for marriages in Lagos. There was no specific provision for monogamy. This ordinance was replaced in 1884 by the Marriage Ordinance which was based on the same principles of monogamy as the English law of marriage. The ordinance was extended to the Protectorate in 1914. Under the ordinance a statutory marriage could not be celebrated if one of the parties was married by native law and custom to another person.⁵⁴ Statutory marriages are regulated by the Marriage Act⁵⁵ which has application throughout Nigeria and it establishes the conditions and formalities for a valid monogamous marriage. These include the giving of notice to the registrar in the district the marriage is intended to take place,⁵⁶ the publication of that notice,⁵⁷ the fulfilment of residency requirements in the said district,⁵⁸ the consent of the father or mother if the father is dead in the case of minors under 21 years old,⁵⁹ the ceremony to be carried out within three months of the notice given⁶⁰ in a

54 See KASUNMU, A.B. & SALACUSE, J.W., NIGERIAN FAMILY LAW, London, 1966 at 48ff.

55 Cap 218, Laws of the Federation of Nigeria rev. ed., 1990, commencement date, 31/12/1914 (as amended). This is essentially the same Act as the Marriage Act 1914 with amendments. Periodically, Laws of the Federation are compiled in one volume at a particular date and are cited under that reference irrespective of the date of the Act itself. The Marriage Act was previously updated in 1958 as Marriage Act, Cap 115, 1958, as amended.

56 Section 7.

57 Section 10.

58 Section 11.

59 Section 18.

60 Section 12.

licenced place of worship⁶¹ or under licence.⁶²

Lord Lugard's indirect rule dictated that "[t]he British courts shall in all cases affecting natives (and even non-natives in their contractual relations with natives) recognize native law and custom when not repugnant to natural justice, and humanity or incompatible with any ordinance, especially in matters relating to marriage, land and inheritance."⁶³ Section 35 of the Marriage Act provides that nothing in the Act shall affect the validity of any customary marriage. The Matrimonial Causes Act⁶⁴ also excludes the application of ancillary relief under the Act to customary or Muslim marriages. The repugnancy test was an area of tension. Whether or not a customary law is repugnant is decided on an ad hoc basis. However, it has been held that repugnancy to English law is not equivalent to repugnancy to natural justice.

In *Dawodu v Danmole*⁶⁵, a case involving the distribution of the estate of the deceased who left nine children by four different wives, the Federal Supreme Court in 1958 and the Privy Council upheld the Yoruba custom of *idi-igi* which provides that a deceased's property for purposes of distribution should be divided into the number of parts as there are wives, each part to be further divided by the number of children had by that particular wife. The lower court, which was reversed, had held that *idi-igi* was not in accordance with modern notions of equal treatment of children and was repugnant to natural justice. But, according to the Privy Council, "The principles of natural

61 Section 21.

62 Section 13.

⁶³Lord Lugard, Political Memoranda, 1913-1918, p83 quoted in Kasunmu & Salacuse, NIGERIAN FAMILY LAW, 18.

64 1970, Cap 220, Laws of the Federation of Nigeria, 1990, commencement date 17/3/70.

⁶⁵1962, 1 WLR, 1053.

justice, equity, and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy."⁶⁶ Conversely, in *Edet v Essien*⁶⁷ an action by the plaintiff to claim the two children by his former wife on her remarriage on the grounds that they belonged to him as she had not paid the bride price was disallowed on the ground that it outraged notions of justice.

Nevertheless, the situation continues as it is with both customary and statutory methods of marriage co-existing. Many parties will perform both forms of marriage - traditional and civil - and if both parties are Muslim, the *Nikai* ceremony will be performed also, since a Christian wedding fulfils both the religious and legal criteria. It is possible that many parties to a marriage may perform up to three ceremonies to fulfil traditional, legal and religious requirements. Each of course give rise to different rights, obligations and responsibilities and on dissolution different rights accrue. It is therefore difficult to ascertain which law to apply on dissolution. It has been held⁶⁸ that a Church marriage supercedes a prior or subsequent customary union. It has also been held, in *Jadesimi v Okotie-Eboh*,⁶⁹ that a second marriage under the Marriage Act to the same woman under customary law converts a potentially polygamous marriage to a monogamous marriage and all that ensues.

Should customary law, which includes Muslim law, be applied or statutory law? This potential conflict was not so easily resolved. "Marriage, whether under English or customary law, works a transformation of status and creates extensive legal

⁶⁶ibid at 1060.

⁶⁷1932, 11 N.L.R. 47.

⁶⁸ *Salubi v Nwariaku*, 1997 5 N.W.L.R., 442 per Akintan JCA at 463, para C, a Supreme Court case.

⁶⁹ 1996 2 N.W.L.R. 128, Supreme Court decision.

consequences fundamentally affecting not only the spouses but their children and relatives as well."⁷⁰ Should a man and woman, and their children, ordinarily subject to customary law on contracting a marriage under the Marriage Act thereby become subject to the entire body of received law or should only particular acts be so governed? The courts have decided that English law of intestate succession is to be applied to the estate of a deceased person who married under the Marriage Act⁷¹. They also seem to indicate that the English law of legitimacy will govern the status of children born during the existence of an Act marriage.⁷² The problem is that the English family law in force in Nigeria developed in response to social and economic conditions of England. Is it rational, therefore, to apply English law completely to an Act marriage where, except for the monogamous nature of the union, spouses and their children are living a customary and traditionally African way of life?⁷³ The tendency has been to apply customary law unless there is an intention, either express or implied, that English law is to apply, evidenced perhaps by a written will. Yet that will may be the only non-customary action of the deceased.

Nowadays, where marriage is contracted according to statutory law under the Marriage Act, the terms of the Matrimonial Causes Act

⁷⁰Kasunmu & Salacuse, NIGERIAN FAMILY LAW at 27.

⁷¹see *Administrator-General v Egbuna*, 1945, 18 N.L.R. 1.

⁷²*Cole v Akinleye*, 1960, 5 F.S.C. 84.

⁷³Kasunmu & Salacuse argue that in deciding what law to apply, the opinion of Van Lare, J.A in the 1959 case of *Coleman v Shang* should have a bearing:

"We are of the opinion that a person subject to customary law who marries under the Marriage Ordinance does not thereby cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters, save and except those specifically excluded by statute, and any other matters which are necessary consequences of marriage under the Ordinance."

1959, G.L.R. 390, at 401.

apply on dissolution and it governs custody and property settlement.⁷⁴ The relevant statutes are generally received English law; that is, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st January, 1900.⁷⁵ Where within a customary union there is evidence, express or implied, that English law is to apply, then it will apply. In *Jadesimi v Okotie-Eboh*⁷⁶, the issue was whether a 1947 will executed by the deceased was revoked by operation of the law following marriage in 1961 under the Marriage Act to the same woman he had married under customary law in 1942 and to whom he remained married until his death in 1966. The marriage under the Marriage Act was valid as a monogamous marriage and converts the customary marriage into a monogamous marriage, the sort of marriage contemplated by section 18 of the Wills Act 1837, the statute of general application. Revocation of a will by marriage under section 18 could not possibly have been envisaged in a situation of a remarriage by the same two persons. It was held that statutes of general application could be curtailed by local circumstances and if it had been the deceased's intention to vary or revoke the will he would have done so. Since he did nothing, he must have intended the will to remain in place.

74 See below on dissolution, custody and property rights.

75 Section 32 of the Interpretation Act, Cap 192 Laws of the Federation, 1990 which states:

(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter with the legislative competence of the Federal legislature, be in force in Nigeria.

(2) Such Imperial laws shall be in force only so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.

(3) For the purposes of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

76 1996, 2 N.W.L.R., 128

For our purposes, tension between the two systems is relevant because of the precedential nature of existing case law prior to the establishment of an element of certainty in the applicable law. The application of statutory law in certain instances has led to a significant improvement in the rights of women and at the same time, dismissal of certain customs on the grounds of repugnancy to natural justice will not have taken into sufficient account the societal structure which gives rise to the custom or the organisational and indigenous political structure that may exist to validate such customs. This in no way supports clear instances of discriminatory or blatantly unjust customs but it is important to identify that well-intentioned legal changes may leave a vacuum and deprive the parties, who are intended to benefit from the changes, of support within their society.

2.2 Dissolution

Yoruba custom does not recognise divorce within the meaning it has in English law. Under custom, a Yoruba woman cannot, or rather, should not be married more than once. Separation and ultimately estrangement is keenly discouraged and both parties' kin will always intervene to reconcile the parties however bitterly the reasons for separation are felt. Parties are expected to overcome any disagreements to make the marriage work and are under severe pressure to remain married. The pressure to remain married is further maintained because children are regarded as belonging to their father. A wife who feels compelled to leave her husband would also have to leave her children and so many women remained married despite any unhappiness they may feel. Exceptionally, a wife may divorce her husband for "habitual laziness, drunkenness, bad company (such as associating with burglars) and infectious disease."⁷⁷ Divorce, when unavoidable, was effected by *ife*, refund of what was paid during courtship.

On divorce, the woman loses the right to be provided with a home and she must vacate the matrimonial home. Where a Muslim marriage

⁷⁷Fadipe, N.A., op cit note 3 at 90.

has also taken place it is possible that divorce will be affected by requirements under Islamic law. It is debatable which customary law will take precedence and the reality is that estrangement and ultimately dissolution will be affected by both Yoruba custom and Islamic law. Dissolution of a Christian marriage is in essence dissolution of a statutory marriage and is governed by statutory law. Section 15 of the Matrimonial Causes Act⁷⁸ lists the ground for dissolution of marriage which is irretrievable breakdown of marriage. This may be demonstrated in certain ways, including, non-consummation, unreasonable behaviour and adultery. Section 69 of the Act expressly excludes the application of its provisions on maintenance and settlement of property to spouses married according to Muslim law or customary law. The Supreme Court has also held that the Married Women's Property Act, 1882, a statute of general application, does not apply to Muslim or customary marriages.⁷⁹

2.3 Custody

Under statutory law, section 71 of the Matrimonial Causes Act provides that the best interest of the child is paramount and the court may make such an order as it considers proper. Under Yoruba customary law, the mother has no custodial rights on dissolution. Under Islamic Law, priority is given to the mother as long as she remains unmarried. Custodial rights do not automatically revert to the father were the mother to remarry; female maternal relations in the order prescribed in the Qu'ran would have custodial rights.

⁷⁸Laws of the Federation of Nigeria, 1990 rev.ed., Cap 220 (formerly MCA 1970).

⁷⁹*Amadi v Nwosu* , 1992, 5 N.W.L.R. 273 at 282.

2.4 Inheritance and Property Rights⁸⁰

The economic organisation of the Yoruba, particularly, with regards to control of land, is essentially communal. Allocation was according to need, a young man on marriage is allotted a portion to farm or use as he wishes and he has considerable rights over it.⁸¹ There have been changes in this form of communal ownership, influenced by modernisation and industrialisation but no doubt there still exist within communities, the understanding of communal access and control over familial land.

Succession⁸²

Historically, no wills were made. On intestacy, real property devolved on the children as family property. However, oral deathbed dispositions were not unknown. The general requirements were that the gifts should be made in the presence of capable witnesses, the beneficiary need not be present and dispositions were not limited to property. It is possible to create family property by will⁸³ although it is not necessary since the children who are supposed to benefit would in any case take by operation of the law. A will, may however, be useful to vary the operation of the law and custom on participation by members, to include other members or designate a different head of the family.⁸⁴

Yoruba custom dictates that the eldest son succeeds the father after death. Responsibility for and care of, younger siblings

⁸⁰see Fadipe, N.A., op cit note 3, pp134-146. See also Coker, G.B.A., FAMILY PROPERTY AMONG THE YORUBAS, London and Lagos, 1966, especially chapter 2 on and tenure in Nigeria and Lloyd, P.C., YORUBA LAND LAW, Nigerian Institute of Social and Economic Research, Ibadan, OUP, 1962.

⁸¹see further, Fadipe, N.A., op cit, pp169-180 on traditional Yoruba land ownership principles.

⁸² see Coker, G.B.A, op cit., Chapter 11.

⁸³ *Ceaser A.A. Young v Benjamin A. Young*, February, April-May 1953, W.A.C.A. Cyclostyled Reports, p19, cited in Coker at 250.

⁸⁴ see Coker, G.B.A, op cit., at 251.

will devolve on him. Any matter to which the family would look to the father, such as the resolution of the marital problems of his married sisters or half-sisters, would be brought before him. He is followed in line by the second eldest son. Within the extended family, seniority is the governing factor and the most senior male member of the family is made the head. He is responsible for the maintenance of peace, order and stability within the community of the extended family. This invariably also necessitates the material means to support and maintain the status of the family within the wider community.

Inheritance

Traditional Yoruba⁸⁵ custom stipulates that the principal beneficiaries⁸⁶ of the deceased are his mother's children, male and female. His children have no right to their father's property which can be asserted against his siblings. The latter had a duty to provide for the deceased's widow(s) and children. The children are generally allowed to remain undisturbed in the compound and use and possession of farm land was undisturbed. Adult children who are married and had previously been allotted land for maintenance during their father's lifetime had land he left divided up among his sons. Property left by a woman are governed by the same principles; her siblings are her principal beneficiaries. This custom remains valid but the rights of the deceased's children to be principal beneficiaries of their parents is now recognised in Yorubaland. In a recent case, *Rabiu v Abasi*⁸⁷ it was held that real property of the deceased under Yoruba customary law goes to his children to the exclusion of the other blood relations; therefore the grandchildren of the deceased whose children predeceased her do not share in family

⁸⁵ There are variations to this among the different Yoruba groups.

⁸⁶ Kasunmu & Salacuse, op cit, chapter 15 on succession under customary law.

⁸⁷ 1996 7 N.W.L.R. 505

property.

Family Property⁸⁸

The Yorubas have a system whereby the immoveable property of the head or founder of the family, usually the father/husband, becomes family property for the use and possession of his descendants, both immediate and future, on his death or intestacy. Family property is created by the act of the parties or by operation of the law. Historically, people did not create family property as such, it was understood that the property of the founder of the family becomes family property for the use and possession of future generations. The nature of title of the original owner is immaterial to the creation of family property.⁸⁹ The founder may buy it, inherit it or simply dedicate the property as family property.

All the children, male and female become owners of the property and possess the absolute title to the property. It is not possible to alienate one's share or interest in family property; it is a possessory right. Improvements to property by a family member does not divest it of its original character as family property.⁹⁰ Should partition or sale of the family property occur, the children take per stirpes, the share of their deceased ancestor. Family property should exist for the benefit of the family as a whole, every member of the family has a right of enjoyment of the property including residing in it and it cannot be disposed of by will, although it may be created by

⁸⁸ see generally, Coker, G.B.A., op cit., note 80. Succession and inheritance has been modified by religion, particularly Islamic law and the devolution of family property as described in the following pages may differ from family to family, Yoruba group to Yoruba group.

⁸⁹ ibid at 71.

⁹⁰ *Rabiu v Abasi*, 1996 7 N.W.L.R, 505

testamentary disposition.⁹¹ Where rents are collected from the property by a child of the family from a part of the property allocated to her, the action does not convert family property or that part thereof into the property of the child. Family property is inalienable either inter vivos or by testamentary disposition. However, it is possible to effect sale of family property⁹² through the head of the family with the consent of the principal members of the family. Sale by one or more members of the family without the consent of the rest is voidable. The interest of family members is limited in size not duration.⁹³ Alienation of a limited interest in family property is not recognised in native law and custom.

The general rule is that the eldest son, Dawodu or heir, becomes the head of the family on the death of the father. He assumes the management and control of the affairs of the family for himself and the other children.⁹⁴ This is in accordance with traditional custom. It has been held that a woman can be the head of a family.⁹⁵ It was held recently, however, that the right to be appointed head of a family is not a civil right under section 33(1) of the 1979 Constitution.⁹⁶

The head of the family is required to carry out his duties fairly

⁹¹ Coker, op cit. at 71.

⁹² Coker regards sale of family property as an innovation brought about by impact of other systems, ibid at 51.

⁹³ as per *Lewis v Bankole*, 1 N.L.R 82.

⁹⁴ see *Olowu v Olowu*, 1985, 3 N.W.L.R. 372.

⁹⁵ *Lewis v Bankole*, 1908 1 N.L.R., 1929, 82. This decision was further confirmed in the 1986 case of *Folami v Cole*, 1986, 2 N.W.L.R. Part 22, p367. So, if a female is the eldest child she becomes the head of the family.

⁹⁶ *Okechukwu v Etukokwu* 1998 8 N.W.L.R, 513. This case had no gender aspects but rather turned on who had the right to be appointed head of the family and whether it was a right that could be protected under the Constitution. The court held that it was not a civil right.

and equitably. While he is not liable to account to the family for rents and profits derived from the family property, if he squanders funds and does not use them for the management of the property, he may be removed as head of the family.⁹⁷

Family members' rights⁹⁸ in family property is as follows:

1. Every member has the right to reside in the family house.⁹⁹
2. Every member has the right to be consulted in any dealings with the family property.¹⁰⁰
3. Every resident member has a right of ingress into, and a right of egress, from the family house, and non-resident members have no such rights.
4. No member has any alienable interest in the family property.
5. Males as well as females have equal rights in the family property.
6. No one has a right to build his own house on family property without the consent of the others.
7. Every member has a right to ask for partition of the property if his rights are denied him.
8. Every member has a right of entry into the family house for the purpose of attending family meetings and, if a member of the family council, also for the purpose of viewing its state of repair.
9. The different branches of the family are entitled to be represented per stirpes on the family council and to share the proceeds of any alienation of the property in such proportion.

⁹⁷ see further Coker FAMILY PROPERTY AMONG THE YORUBAS at 174-75.

⁹⁸ Coker, *ibid* at 132.

⁹⁹ The right to occupy is not of de facto residence. The right may be attached to rents, for instance. See Coker at 133. However, the rights of the children and wives of the founder of the family to reside on family property are fundamental. *Ibid* at 135.

¹⁰⁰ The right to be consulted is qualified as 'the right of the principal members of the family to be consulted'. *Aganran v Olushi* 1 NLR 67 per Pennington J. at p69, quoted in Coker at 139.

10. The management of the family property and control of all its affairs are powers vested in the head of the family.

Family property can be determined¹⁰¹ by alienation, partition or destruction of the whole property. A court may order sale of the family property where such a sale would be advantageous to the family and where the property is incapable of partition and there is no other way of providing a remedy for the claimant. Any member of the family can ask for a partition but there needs to be strong reasons, such as interference or obstruction in the exercise of rights attached to family property, given for the request. Where the property is partitioned, each part becomes the absolute property of the grantee. Allotment of rooms or premises for use by the head of the family does not vest absolute title in the allottee.¹⁰² The death of a family member determines his or her interest. Any children of the deceased member entitled to succeed to family property do so by operation of the law not through the parent. Forfeiture of a family member's interest affects the whole of that person's family unit. Forfeiture may occur through misconduct bringing the family into disrepute such as criminal acts or attempted alienation of an interest in the property without consent.

Women's rights under family property¹⁰³

A man's affluence was measured by the number of wives he had¹⁰⁴ and are guarded as part of his property. Wives are considered to constitute part of the founder's immoveable property since they continue to be attached to the family after death. A widow with children is entitled to stay in the family property as long as her children are there and she is not obliged to leave by any

¹⁰¹ see Coker Chapter 5.

¹⁰² *ibid* at 113.

¹⁰³ see Coker at pp178-185 on women.

¹⁰⁴ To some extent, this still remains an indication of affluence.

rules of native law and custom. A widow without children is not entitled to any portion of the husband's property. She could be taken on by any junior male member of the household and thereby remain as a member of the family on that basis, but otherwise, she has no rights to remain. While succession to family property is substantially patrilineal, women as daughters and sisters are entitled to participate in family property together with males.¹⁰⁵

An essential characteristic of the right in family property is that of the right to possession (although may be attached to rents etc) and participation in family meetings and councils. However, possession is difficult for women to exercise on marriage as she is considered to be a part of her husband's family and will moreover, be living elsewhere. Further, practical problems of distance from the natal home may preclude participation in family meetings and involvement in family affairs. This will restrict in practice a woman's right to enjoy her share of the family property. In law, however, it is established that "[b]oth sons and daughters inherit certain rights in their father's land".¹⁰⁶ Men and women have equal rights to reside on the family property. "All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband."¹⁰⁷ In *Thomasia Ayoola Ricardo v John Lajorin Abal*,¹⁰⁸ it was held that a woman's sex does not deprive her of her fundamental rights as a senior member of the family in relation to junior members in age of the family. On partition

¹⁰⁵ *Nimota Sule and others v Ajisegiri* 13 NLR 146, quoted in Coker at 44, footnote 14.

¹⁰⁶ Coombe C.J. at 54 in *Mariana Lopez v Domingo Lopez* 5 NLR 50, 1904, quoted in Coker, *ibid* at 144-5.

¹⁰⁷ Carey J. at 86 in *Frank Akiremi Coker v George B. Coker and others*, 14 NLR 83, quoted in Coker at 145.

¹⁰⁸ 7 NLR 58, Coker at 145.

men and women take in equal proportions.¹⁰⁹

A woman is not barred from inheriting from either parents or from siblings under Yoruba custom.¹¹⁰ As members of the family, daughters and sisters, women enjoy in theory full rights in the use and enjoyment or the proceeds thereof of family property. However, on marriage, their rights are de facto curtailed because they are considered full members of their husband's family and are expected to participate and concentrate their efforts on their new family. Obligations that are a corollary to the rights of family property membership such as participation in family meetings and councils, consultations on family matters may not be capable of being fulfilled and, in practice, this may be regarded as curtailing the rights. Fundamentally, the most important right of family property membership is possession and by residing elsewhere, most women, on marriage, unless they have returned on divorce or separation, will not be able to fulfil the most fundamental right.

As wives, women do not inherit from their husbands nor do men inherit from their wives. It has been said that, "a wife could not inherit her husband's property since she herself is, like a chattel to be inherited by a relative of her husband."¹¹¹ The customary law position has been further supported in case law which confirmed that Yoruba native law and custom deprived the wife of inheritance rights in her deceased's husband's estate because devolution of property followed blood.¹¹²

Widows in effect have no rights and such rights that they do have

¹⁰⁹ *Nimota Sule and Others v M.A. Ajisegiri*, 13 NLR 146, cited in Coker at 145.

¹¹⁰ see *Adedoyin v Simeon*, 1928 9 N.L.R. 76 at 77-78.

¹¹¹ *Jibowu, F.J. in Suberu v Sunmonu*, 1957, 2 F.S.C. 31.

¹¹² see *Sogunro-Davies v Sogunro-Davies and Ors*, 1929 2 N.L.R. 79 at 80, statement of Beckley J.

are dependent on the right of their children, if any, to residency in the family property. The rationale for this lack of rights may be attributed to the whole notion of family property. All women will have some rights in the family property of their natal home. However, having not exercised that right during the duration of their marriage, they may be estopped, not in law (since they are entitled to return to the property by law) but in practice, from exercising that right after the death of their husbands because they will not have been able to perform the obligations of family property membership. Consequently, upon marriage, women's rights with regard to family property falls into the interstices between law and practice.

Yoruba native law and custom previously discriminated against women in that rights in the family property favoured men. This was confirmed in *Marina Lopez v Domingo Lopez*¹¹³ when Combe C.J. said that originally, "the rights of the daughters of Yorubaland were not the same as those of sons with regard to their father's property." But in *Salami v Salami*¹¹⁴ it was held that the plaintiff's right to inherit her father's estate along with her two brothers was not diminished by her sex. Under present Yoruba customary law, daughters have the same rights as sons over their father's property. They are entitled to remain in the family house. These rights do not terminate on marriage and in the case of divorce they may return to the family house with their own children.¹¹⁵

As noted above, under indigenous law and custom, wives and children succeed to real estate as family property. In order to be entitled to live on family property, the woman must have been married to the man according to traditional rites.¹¹⁶ The

¹¹³1924 5 NLR 50.

¹¹⁴1957, W.R.N.L.R 10.

¹¹⁵see *Coker v Coker*, 14 N.L.R. 83.

¹¹⁶ see supra, p251-254 of this work.

important essentials of a valid customary marriage are the consent of the bride and her family and the giving and acceptance of *ano* or dowry.¹¹⁷ The legitimacy of the children is not an issue and does not affect succession. There is no essential difference in Yoruba law between children born out of wedlock and those born within (although the concept of illegitimacy¹¹⁸ exists) as long as paternity is acknowledged.¹¹⁹

"...Under native law, a child's right of succession to his father's property can be legalised by mere acknowledgement of paternity, without the necessity of any form of marriage between the parents."¹²⁰

Succession is essentially patrilineal, the legitimacy of children has no bearing on the right to succeed as long as paternity is acknowledged, a widow's right to remain in the family property depends on whether she has children and if she does, having been married under traditional rites, she may remain with them. A woman not married according to traditional rites may remain in the house if she has acknowledged children but if she has no children and is not a widow, she has no right to live in the family during the lifetime or after the death of the man. Male

¹¹⁷ Coker at 262. See also pp260-261 for details of the marriage ceremony. There exist variations in the ceremony as performed by different communities. N.A. Fadipe's description of the ceremony, described above differs slightly from Coker's and may be accounted for by the different practices of varying Yoruba communities.

¹¹⁸ *Omo ale* or an illegitimate child is the child of an adultress or unmarried woman; the latter being really someone whose partner is not easily identifiable. A couple may live together as husband and wife and will be considered and referred to as husband/*oko* or wife/*aya* and their children will not be considered illegitimate.

¹¹⁹ see Coker, pp263-274. A child may be legitimated and once paternity is acknowledged will succeed to family property.

¹²⁰ *Re Sapara*, quoted in Coker at 266.

children remain in the family home and can live there with their wives and children. A daughter may remain in the house and even after marriage may return with her children to live there.

Statutory Law¹²¹

If a person dies testate, the disposition of the property is as prescribed under law. The will may be made under the statutory wills law or customary law. If a person dies intestate, the devolution of the property will be according to the laws the deceased used during her lifetime with the type of marriage contracted during the deceased's lifetime used as an indication. Under common law, either spouse can inherit from the other, whether or not the deceased died intestate. Thus, while under customary law neither the husband and the wife can inherit from the other, a wife cannot deprive her husband of inheriting her estate by testamentary disposition. "There are still some recognised status which at customary law affect the capacity to make a will. For instance a wife cannot by the exercise of testamentary disposition deprive her husband of his right to succession in her estate."¹²²

On dissolution, settlement of property within a marriage under the Marriage Act¹²³ is governed by section 72 of the Matrimonial Causes Act; that is, the court may order such settlement to the children of the marriage or either or both parties that it considers just and equitable in the circumstances. Application for relief must be made in the petition. An applicant for relief need not have made any contributions to the property.¹²⁴

¹²¹see further Atsenuwa, Chapter 7, *ibid* and Uzodike, E.N.U, "Property Rights", Chapter 13 in Obilade, A.O., *WOMEN IN LAW*, *op cit*.

¹²²Karibi-Whyte J.S.C. in *Idehen v Idehen*, 1991 6 N.W.L.R., Pt 198, p382, a Supreme Court case.

¹²³Laws of the Federation of Nigeria, 1990 rev. ed., Cap. 218.

¹²⁴*Kafi v Kafi*, 1986, 3 N.W.L.R. Part 27, 175.

On intestacy under statutory law, Section 36¹²⁵ of the Marriage Act applies to people who marry under the Act and its application is restricted to the geographical area of Lagos. It has however been held in a Supreme Court case, *Salubi v Nwariaku*,¹²⁶ that although section 36(3) restricts the application to the Colony of Lagos, the interpretation given to the section by the courts is that its provisions are applicable throughout Nigeria. The estate which would under English law go to the Crown is distributed in accordance with Customary law. The personal and real estate of the deceased is distributed in accordance with the provisions of the law of England relating to the distribution of personal estates of intestates i.e. the Statutes of Distribution, 1670, Administration of Estates Act, 1685 and Intestates Act, 1890.¹²⁷ The widow of an intestate with issue is entitled to one-third of the deceased's estate with the remainder distributed amongst the issue in equal shares. If there are no children, the

125 Section 36 Marriage Act, Cap 115, Laws of the Federation, 1958:

(1) Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this Ordinance, and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance

The personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding: Provided that -

a) where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of native law and customs, and shall not become a portion of the said casual hereditary revenues; and

b) real property, the succession to which cannot by native law or custom be affected by testamentary disposition, shall descend in accordance with the provisions of such native law and custom, anything herein to the contrary notwithstanding.

126 1997 5 N.W.L.R. 442 at 464-465.

¹²⁷see Uzodike op cit., note 44 at p324.

widow is entitled to half with the remainder devolving on the deceased's kin. It has been held that children born outside marriage to a deceased on his intestacy may share in his estate because under section 39(2) of the Constitution no one shall be subjected to deprivation by reason of the circumstances of his birth. Consequently, the court in *Salubi v Nwariaku*¹²⁸ deemed the term "illegitimacy" as unconstitutional and illegal, a progressive ruling which is consonant with Yoruba customary law which does not recognise the concept of illegitimacy.

Section 36 is not contained in the Marriage Act, Cap 218 Laws of the Federation 1990 and is presumably repealed. Its omission from the 1990 compilation of the Laws of the Federation of Nigeria was noted in *Salubi v Nwariaku*¹²⁹ but there was no decision on whether it had in actual fact been repealed based on that omission since on the facts of the case, the section 36 applied to the marriage in question having been contracted under Cap 115.

The principle in *Cole v Cole*¹³⁰ applies on the death of an intestate who marries according to Christian rites outside the colony, i.e. not under the Marriage Ordinance, as it was then, in which case English law of succession will prevail over native customary laws.

Generally, women married under statutory law are entitled by law to inherit parts of both their deceased husband's real and personal property. Daughters are entitled to share equally with their brothers the real and personal estate of their father. There is no discrimination in law as to who may apply for letters of administration; the wife¹³¹ is entitled to do so jointly with

128 1997 5 N.W.L.R, 442 at 470.

129 At 460 ff.

130 1898, 1 N.L.R., 1929, 15

131 Under Yoruba customary law, a widow under an intestacy is not entitled to apply for a grant of letters of administration nor

any of the children who have attained majority. The core problem in these cases, however, is that custom is predominantly enforced.¹³² This may be due to ignorance of rights under the law or pressure by kin to follow tradition. If death rites are performed according to custom, pressure to deal with property after burial according to tradition may not be easily avoided. Enforcement of rights using the legal system is not common; financial constraints may be a factor and perhaps also an unwillingness to go through the legal process. Where there is no legal support for discrimination, cultural practices militate against women's rights.

The Convention on the Elimination of all Forms of Discrimination Against Women,¹³³ which Nigeria has ratified without reservations requires States Parties, under article 2(f) and under article 5, to take appropriate measures to abolish customs and practice which constitute discrimination against women. While this work concentrates on Yoruba women, who tend to be discriminated against primarily as wives, there exist worse instances of discrimination across the country in differing customary traditions. Case law demonstrates that judges do not always question the validity of customary laws or indeed the gender aspects of customary laws in the light of Constitutional protection, regional treaty obligations and international treaty obligations. For example, in a 1994 case, *Olowu v Olowu*,¹³⁴ Bini customary law on inheritance was confirmed. The eldest or first son of the deceased inherits exclusively the last house where the deceased lived and died and if he had only one house, the first

may she be appointed as co-administrator of her deceased husband's estate. She may, however, successfully sue on behalf of her children as their next friend. *Akinnubi v Akinnubi* 1997 2 N.W.L.R, 144.

¹³² see Obilade, WOMEN IN LAW op cit which is good is illuminating the disparities between law and custom and how this affects women.

¹³³ UN Document A/34/46.

¹³⁴ 4 N.W.L.R, 90, a Court of Appeal case.

son inherits the house to the exclusion of all the other children. The case concerned the estate of a Yoruba man who naturalised as a Bini man. One of the deceased's sons contested the devolution of the property under this tradition amongst other issues. Ige J.C.A said on that matter, "If the appellant has any grudge against Bini Native Law and Custom he should have objected to his father's naturalisation as a Benin man in the lifetime of the father and not wait to contest ownership of a house which he was looking forward to inherit."¹³⁵

As mentioned earlier, in the case of *Akinnubi v Akinnubi*, the deceased's wife was bequeathed to the deceased's younger brother according to tradition. Since the tradition is correct the court made no comment on the practice or the value judgements behind them. Once the customary law or tradition has been verified, the courts tend not to question the law itself or at least consider any gender aspects which ought to be incorporated for a modern society. Discriminatory practices also breach article 18(3) of the African Charter on Human and Peoples' Rights which says that "The State shall ensure the elimination of every discrimination against the woman and the child as stipulated in international declarations and conventions". Yoruba customary on custody of the child belonging to the father clearly breaches Nigeria's obligations under CEDAW, since Yoruba women do not have equal rights of custody or guardianship. Current practice also breaches article 4 of the Draft Protocol to the African Charter on Human and Peoples' Rights on the rights of Women on equality between the sexes, article 6 (2)(b) on equal rights in marriage and article 6(7) on equal rights with regards to children. While Yoruba women already have the right to own and acquire property(article 6(8)), there is clearly room for improvement in relying on regional and international rights obligations for the promotion and protection of women's human rights in Nigeria.

135 Ibid at 97.

The legal system in Nigeria has resulted in the existence of plural law of rights and succession to property on intestacy. Some of the elements of customary law are clearly discriminatory. This is to a certain extent compounded by Constitutional provisions for the application of customary law in the area of personal laws. The provision of section 20 of the 1979 Constitution provides that the State shall protect and enhance Nigerian culture. Is this irrespective of whether certain cultural practices are discriminatory and contrary to specific sections of the Constitution and in direct contradiction to Constitutional provisions for the equal and non-discriminatory application of the law?

The Land Use Act¹³⁶ provides another illustration.¹³⁷ In southern Nigeria generally, the mode of ownership of land is communal ownership with possessory rights allowing use but with the land being held by the head of the family on behalf of the whole family. Under section 1 of the Land Use Act, 1978, all land within the territory of each state of the country became vested in the governor of that state who holds in trust and administers the land for the use and benefit of the entire people. All urban land came under the control and management of the governor of the state with land in rural areas controlled and managed by the local governor in the area of jurisdiction in which the land is situated. Those who held land subject to customary law became entitled to a limited right described as a customary right of occupancy. The right and power of families over such land is limited in the sense that only the local government in the area in which the land is situated can grant the customary right of occupancy. In urban areas, they are entitled to a statutory right of occupancy which is granted by the governor of the state.

Section 24(a) of the Land Use Act, 1978 provides that in the case of a customary right of occupancy, the devolution of the deceased

136Cap 202 Laws of the Federation of Nigeria, 1990 rev ed.

¹³⁷ see Uzodike op cit., note 44 at 301.

occupier's right shall be regulated by the customary law existing in the locality in which the land is situated. Most customary laws of succession exclude women from benefiting, the Act further entrenches the custom which excludes women from inheriting. The supremacy of customary law in the area of family law means that the status quo with regards to discriminatory practices remains with little likelihood of change unless the judiciary takes action. This is difficult since most statutory enactments specifically state that the regulation of, for instance, property and inheritance are outside the scope of the enactment which tend on the whole to be fairer.

"Customary Laws were formulated from time immemorial. As our society advances, they are more removed from its pristine social ecology. They meet situations which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the courts the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the courts are there enact customary laws. When however customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment."¹³⁸

CONCLUSION

Gender discrimination in Nigeria, based on the study of the Yorubas, is institutionalised in a complex form. A distinction is made between a woman as a daughter and sister and a woman as

¹³⁸Nwokedi, J.S.C in *Agbai v Okogbue* 1991, 7 N.W.L.R., Part 204, 391 at 417, also quoted in Obilade, A.O., *WOMEN IN LAW* at 314.

a wife. Once a woman is married and becomes a wife, she is regarded as her husband's responsibility and she is expected to defer to his judgement and authority as head of the family. While she may work, own property, real and personal and maintain her own finances, she remains co-dependent with regard to her role with her husband within society. As a result of this lower status she suffers instances of discrimination; she requires her husband's consent before she can be issued with a passport or have her children added on to her husband. This sort of administrative barrier is not sanctioned by law but is a direct result of the lower status of women in society.

In terms of education¹³⁹ and opportunities for education; the wealth and education of parents play a large role in determining the sort of education their children, male or female, receive. The 1979 Constitution contains provisions for equal and adequate educational opportunities at all levels. The constraints against equality of opportunity include gender stereotyping in who needs the opportunity (women marry so do not need much, if any, education), sex stereotyping in occupational choice, school location and religious and cultural factors which may result in early marriage. Low female enrolment¹⁴⁰ in schools is a reflection of the sexual division of labour in most homes. Girls are kept at home to help parents (their mother) with household chores or with petty trading. If the girl child tries to combine both it will obviously affect her schoolwork. Education is seen as an investment and parents prefer to give boys the opportunity of education as they are seen to carry on the family line and their education in that case enhances the status of the family.

Within the home, while no customary law prescribes domestic violence as lawful, there is tacit approval when it is considered

¹³⁹ see Omorodion, F.I., "Women's Rights in Law and Practice: Education", chapter 9 in Obilade, WOMEN IN LAW.

¹⁴⁰ see Chapter 2, Part III, on Regional Institutions for figures on school enrolment under the section on the Lagos Plan of Action.

as chastisement or correction of the wife. Section 55 of the Penal Code allows chastisement of one's wife as long as it does not amount to grievous hurt and if correction is recognised by the applicable customary law. Grievous hurt includes deprivation of any member or joint, loss of an eye, hearing or the power of speech, *inter alia*.¹⁴¹

As with rights issues, in general, formal protection does not always equate with real rights protection. In terms of women's rights, the institutionalisation of gender discrimination based on prejudicial attitudes that are woven into the fabric of society, its rituals and norms; its culture, make it difficult to redress the balance through law alone. Attitudes need to change and with it the elements of cultural heritage which play a large part in perpetuating the institutionalisation of gender discrimination.

Cultural values are undoubtedly a fundamental and essential part of any society. They inform the organisation of the society, both political and social. They are however, dependent on a complex structure of familial and community relations to operate successfully and effectively. These values, whether they have the force of law or are moral imperatives evolve from a certain web of rights and obligations which must remain sufficiently intact for the values to have continued legitimacy and efficacy. The complex web upon which the values depend deliver the rationale behind certain rules and norms.

However, custom itself evolves and societies do not remain static. Given the specificities of a country like Nigeria, an artificially constructed state that has not yet developed or had the time to develop a sense of cohesion or national unity, local communities within the state, and the customary values and laws of that community (demarcated along ethnic lines perhaps) are

¹⁴¹ s241 Penal Code, Cap 89, The Laws of Northern Nigeria, 1963.

going to attach a preponderant importance to the people of that community as opposed to a detached federal government to which they have no immediate or obvious allegiance. Where customary laws are inadequate and inappropriate for modern life because they are discriminatory and because that discrimination is gender based, rights protection and enforcement under international treaty obligations is going to be extremely difficult. First of all, human rights are rights against the state and the state is not generally regarded as a protector of rights,¹⁴² secondly, the government does not represent the will of the people in any sense¹⁴³ nor is it accountable and thirdly, because it is removed from the rules that govern the personal issues of most people having devolved that responsibility to customary law, the relevance of government/state and any kind of action in these areas is a moot point. Therefore, the notion of enforcing individual rights in this manner, if we overlook cultural relativist arguments for the moment, is a non-starter. The fundamental hindrance to reforming certain elements of culture is that of allegiance in a fragmented state. It affords continuity, stability and reassurance against a background of political instability which further detaches citizens from the state.

Notwithstanding this intransigence to change, one of the essential elements of custom is that it is susceptible to change. Nigerian is a rapidly developing and evolving country. The structures upon which certain norms depend are changing. There are movements from rural to urban areas. The extended family network upon which family property, for instance, depends on for its success in the provision of a home for future generations no longer exists in the way it did when the notion was most useful. If possession is the sine qua non of inheritance in family property and most of the family are dispersed, inevitably, if the

¹⁴² see for example, Civil Liberties Organization Annual Report 1993 op cit.

¹⁴³ see Chapter 3 on self-determination.

property is not partitioned, it will be sold. In time, one customary law will be modified and ultimately changed. This also means that for women, who perhaps always had a natal home to return to on divorce that they will have no safety net. The customary law that women do not inherit from their husband is dependent on the idea of family property. If this no longer exists, or if their limited right becomes attached to rent, not only is the purpose of family property defeated, we now have women for whom no provision is made because of changes in society. Where this sort of situation exists, notwithstanding any formal customary law rights, women will find themselves dispossessed and discriminated gainst by the operation of the law.

These difficulties make it imperative that feminist theory on the issue of the protection of women's human rights take note of the effect of culture. All societies have gender based discrimination. But the specificities of a dynamic society with no state welfare, authoritarian government, increasing industrialisation and the upheaval of traditional societies means that groups of women will find that they have little or no rights protection.

PART III FEMINIST CRITIQUE OF CULTURAL RELATIVISM

Cultural practices which affect women, whether adversely or not, tend to be those of a personal nature i.e. personal status laws. These tend to be regulated by customary law. It is the difference between cultures in its regulation of these acts within the private sphere which gives rise to concerns for women's rights since their rights are more likely to be affected in these areas. The relegation of these issues to the private sphere has its roots in Western ideology¹⁴⁴ which effectively separated issues

¹⁴⁴ see Kim, N., "Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism", Columbia Human Rights Law Review, vol 25, 1993, 49 at 67-68.

affecting women from the spheres of power. This same argument is being advanced under the guise of cultural relativism with regards to acts in the private sphere affecting women.

Feminist critique of cultural practices which are manifestations of institutionalised gender discrimination suffer the same charge of cultural imperialism as proponents of the universal nature of human rights standards.¹⁴⁵ There is without doubt the danger that practices of other cultures are viewed from an ethnocentric¹⁴⁶ position which informs reactions to them. That reaction itself may also be uninformed of the interconnectedness of the social framework within which these practices operate. On the latter point, Nzegwu¹⁴⁷ is of the opinion that the role of women within a society must be properly understood in its context, the values attached to that role and the worth of an individual must be contextualised rather than applying value judgements from another culture in determining the status of women. She argues that the mono sex system misunderstands the dual sex system, where sex difference are valued, because the dual sex system seems to value motherhood and the complementary role of women which Western feminists classify as the loci of women's oppression. She points out that the dual sex system values women within these roles and they are accorded due respect such that women's roles are not identified with oppression. The refusal of women to identify their roles in their culture as oppressive is misunderstood and interpreted by Western feminism to mean that they do not recognise their own oppression.

In practical terms, however, what is seen as discriminatory

¹⁴⁵ see Chapter 2, Part I on cultural relativism vs universalism.

¹⁴⁶ see further Gunning, I., "Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries", Columbia Human Rights Law Review, 23, 1991-1992, pp 189-248.

¹⁴⁷ Nzegwu, N., "Gender Equality in a Dual-Sex System: the case of Onitsha", Canadian Journal of Law and Jurisprudence, vol 7, 1994, 73.

behaviour will depend on the positionality of the observer. Non-discriminatory behaviour means equal treatment but if women in Nzegwu's dual sex system are of the view that they are valued in their roles and, further they have representative roles within their society, then the issue of equal treatment is moot. Their needs are perceived to be fulfilled by the society in which they live. The problem with illustrations and examples of societal organisation in which women have participatory roles is that not only have these structures been affected and even decimated by European influence and colonialism, these structures are no longer the loci of political power they once were. Yet, the disconnection between the formal state as the guarantor of rights and the community of heterogeneous ethnicity is such that these structures retain an importance even without political power.

Further not all cultural practices are discriminatory. As illustrated with the Egba Yoruba, while it is primarily patrilineal, women have equal rights of inheritance and take in equal shares. Conversely, however, there is clear discrimination in terms of custody rights. Discriminatory acts are not all pervasive. A woman, married or not, can hold property, real or personal, she can work but she will not inherit from her husband. This lack of capacity to inherit from her spouse may be traced to the concept of family property. Obviously, in other parts of Nigeria there are differences and differing discriminatory acts; for instance, the Igbos practice primogeniture. The crux of the problem seems to be that customary law developments have not kept apace with modern, industrial developments and the concomitant demands of an increasingly individualised society. Where traditional structures have been eroded, new developments such as societal support have not developed quickly enough to replace them.

In critiquing cultural practices, we need to remember that cultural development is an intrinsic part of the right to self-determination and any challenge to culture challenges the right of a people to determine how they live. Notwithstanding this

critical point, the former societies which represented women and their concerns no longer exist in the same form as before. Political power no longer rests with traditional rulers and traditional forms of ruling. Feminism, as a tool of empowerment, is important in making women aware of their legal and political rights within the new system of political power. Feminism can be a tool to enable women to participate fully, bad governance permitting, in their political systems. Participation, based on legally enforceable women's and human rights, in the cultural milieu of each woman can enable challenges to any oppressive and discriminatory cultural practices on the terms of that society. Whatever the dictates of culture, however women's roles are valued in a complementary aspect, political power in the modern state is important. Feminism, through its various¹⁴⁸ challenges to the legal order can enable the inclusion of women in the political structure. Reliance on other legal principles such as self-determination and the right to development, particularly, the inclusive and participatory elements of both, will ultimately assure that women, whatever their culture, can enjoy full rights as enumerated in the international bill of rights and under CEDAW. The necessity for feminist legal theory to be representative in terms of race and culture, as factors which affect the ability of a large proportion of the world's women to be economically, socially and culturally equal, cannot be underestimated.

¹⁴⁸ see Chapter 4, Part I (1) on concept(s) of women's rights for the various challenges.

CHAPTER 6

CONCLUSIONS

The failure of dominant trends of feminist legal theory to represent all women stems, not in its inapplicability to all women, but in its present omissions as to salient defining traits which must be comprised within the theory. Race is important in efforts to combat all forms of discrimination. In a human rights context, culture and its effects are extremely important. Cultural relativists arguments inherently challenge human rights law. Yet, the primary site for institutionalised discrimination is within the private sphere where cultural practices are dominant. Feminist theory rests on solipsism and makes the personal political. It is therefore imperative to have the diversity of all women's experiences and how they experience it represented in feminist legal theory. Feminist legal theory must challenge and must have the capacity to challenge all forms of discrimination however complex and whatever its form.

This work stated at the outset that feminist legal approaches to international human rights law fail African women in the reconceptualisation of the legal order. Identification of this failure is important because feminist theory can work to ensure equal rights for all women. By the same token any identified omissions are equally important because not all women will be represented within the substance of that theory. While striving for equality between men and women, we must not overlook equality between all women and equality for all women.

I began this work to try to explore if there existed a concept of African culture that could promote and protect women's human rights in Africa as distinct from a Eurocentric perspective. From the outset I was convinced of the value of feminist approaches in identifying the differences of women's experiences, working towards a recognition of these experiences and assuring women's rights in all strata of society. Had there existed an alternative

African form of protection, the thesis would have developed along the lines of finding a common ground in working towards protecting women's rights despite any identified differences in approach.

What I discovered during the course of my research was that there certainly existed culture within differing African communities but that there did not exist an African legal or political culture that differentiated Africa from other parts of the world save in its development. Developmental aspects are of course important because they affect implementation and because they serve as a continuous reminder of the unequal balance of power between many African countries and the developed world. That should not obfuscate the fact that legally, in terms of rights protection, African institutions are predicated on the same principles as other regional and international institutions. I have been unable to ascertain in the African Charter on Human and Peoples' Rights, the African Charter on Children's Rights or in the Draft Protocol on Women's Rights any quintessential African value or model of rights protection nor did I find there to exist in African regional mechanisms, political or economic, an intrinsically African model of organisation. The promulgations and the institutions follow an established pattern of organisation and are based on the same legal principles as other regional and international models.

It is a fact that different groups of people have different cultures. I do not believe that values attached to different groups differ fundamentally with regard to human rights standards. Culture is important; it is the lifeblood of a community. I believe that all peoples should have the right to organise socially in whatever manner they wish but with a form of rights protection. Cultural manifestations of institutionalised gender discrimination is predominantly located in the private sphere, it is within the private sphere that women's rights are adversely affected and therefore it is important not to allow arguments of culture and cultural

relativism to obfuscate the gender based aspect of this form of discrimination. It is my opinion that arguments of cultural relativism are arguments to preserve institutionalised gender discrimination or gendered relativity. Feminism is about women's experiences and how social, cultural and economic factors are experienced differently by women; but this leads to essentialism. Culture is about socialisation and it is therefore possible, in making public women's experiences, to influence a change in that socialisation. Feminist legal theory and the methodology of essentialism can influence change in any cultural setting but only if the theory itself is not distilled into a particular female experience. At present, essentialism represents White middle class Eurocentric women. It needs to be imbued with other factors, such as the cultural manifestations of institutionalised discrimination within the private sphere in other regions, to enable challenges to be made in those other settings using the same methodology.

For example, native law and custom among the Yorubas is predicated on an extended familial basis which consists of rights and obligations or duties among members of the family. Traditional society has however been affected and transmuted by a variety of factors; colonialism, post-colonialism, increasing industrialisation, movement from rural to urban areas and a societal organisational framework of the state which exists independently of the smaller regional communities which are identified along ethnic lines. Allegiance of individuals, generally, is primarily to their communities, followed by their wider ethnic affiliation and finally by identification of nationality with the state. This disparity or dislocation of allegiance means that, in effect, the role of the state in the protection of cultural mores is detached. It also means that there is limited perception and identification of the state as the protector of rights. Consequently culture and customary rules and regulations are important regulators of that community and are not readily abandoned.

The role of the family in Yorubaland, as within other communities, is paramount. Within the family, women have a circumscribed and complementary role. Personal status laws are defined by roles within the family. While it is primarily patriarchal, the rationale for this may be ascribed to the status women have within the society. Daughters in general, have equal rights to sons in the use and possession of family property, the paramount property in any family unit. Wives do not because the legal effects of their marriage do not restrict in any way their rights in their natal home. In practice, because on marriage they are considered a part of the husband's family (custody and rights to the children of the marriage belonging to the father) their role in the use and possession, and participation in family affairs of the family of birth, is considerably constricted. De jure, according to native law and custom, they have full rights, de facto, their rights are limited. Coupled with the lack of rights in their marital home based on the rationale that they have rights elsewhere, women find themselves in an anomalous position of having little de facto personal status rights.

Therefore, on divorce or widowhood, women may find themselves without rights of maintenance or inheritance since statutory ancillary relief provisions do not apply to customary marriages. Custodial rights belong traditionally to the father or to his family on his death. Since family property belongs to all the members of the family equally and can usually not be alienated or may only be alienated with the consent of all the members of the family, it is difficult to realise proceeds of any share a woman may need to support herself on divorce or widowhood. It is of course open to her to return to her family of birth to take possession, but this may mean that she has to leave her children with her husband, or his family, if he is dead.

The complex nature of personal status laws and its effect on women cannot be readily remedied without an appreciation of the society in which those women live. A woman's right depends and is inextricably interwoven with the rights of other members of

her family and cannot be easily extricated. While there have been changes in society, the changes have not been sufficient to enable the promotion and protection of individual rights without the alienation of other rights within the family unit.

The realities of culture and indigenous law and custom will transform individual rights protection into a battle among family members. The existence of a modern state and the notion that individual rights, being rights against a state, do not take into account allegiance, cohesion and unity within a state. Primary allegiance and identification remains with one's ethnic grouping and its modes of organisation, political and social. Therefore, in the area of personal laws, without an understanding of and sensitivity to culture, rights protection within the international framework of individual rights against the state offer an incomplete solution for women living within a cultural framework that merges the rights of the family. Therefore, feminist approaches to international human rights law needs to be informed by the realities of culture.

Cultural differences inform the type of gender subordination suffered by women. Given that feminist theory primarily developed in the West, the main thrust of the theory has been concerned with issues important in that context although they may have application in other settings. By definition, it omits issues and concerns intrinsic to another culture because it is not based on the complexities of societal organisation and gender subordination in that milieu. The value of feminism is that it advocates participation and inclusion. Its application is not limited to a particular culture although some of its substance is. But, as a potentially representative force for all women, its substance needs to be informed by the values of other cultures so that it may be successfully applied outside its context of origin.

In any multicultural setting, race and racial discrimination are important factors which shape the experiences of groups of

people. Women who are part of a racially defined group will experience life differently to women who are part of the dominant culture. Women of the same race who are ethnically different will have different experiences in different locations. Racial discrimination and gender discrimination are not mutually exclusive. The accumulative effect of these forms of discrimination shapes the life experience of Black women. Their experiences will shape their solipsism and this in turn will affect approaches to combatting their particular form of discrimination. Issues of race and an understanding of how race affects or compounds gender subordination need to inform feminist legal theory.

In Chapter 3, I discussed self-determination and the right to development to illustrate how both these rights either in theory or in application have not resulted in parity between men and women and how they have not resulted in autonomy for women. Institutionalised discrimination has hindered their application to women even though both self-determination and the right to development are inclusionary, participatory legal principles. If culture is about socialisation, it is in the implementation mechanisms and in efforts to implement women's human rights that we must imbue with a sensitivity to the specificities of that culture. It does not mean that human rights have no application to that culture; it simply means that we must endeavour to give it cultural legitimacy. To do this we need to be aware of the practical effects of culture, developmental factors that may hinder implementation and seek to ensure recognition for women's human rights within any societal structure. Feminist approaches to international human rights law, being an inclusionary theory, can enable this. Reliance on established legal principles such as the right to development and the right to self-determination and their participatory, accountable elements can allow us to claim women's rights in all strata of society, whether it is in the public or private sphere.

Accepting that feminist legal theory has value in application to

other settings apart from its place of inception, it is important that the theory is informed by the effects of culture and cultural practices which will affect its implementation. Women's rights are an integral and indivisible part of human rights. Cultural relativist arguments challenge the application and more importantly, the implementation of human rights. Consequently, cultural relativist arguments also challenge feminist legal theory. Feminist legal theory itself challenges the legal order on which human rights are based on the grounds of its androcentric and exclusionary nature and through its various concepts attempts to introduce a more inclusionary element.

The legal order on which the Nigerian legal system is based is derived from a western colonial heritage and consequently feminist challenges to the patriarchal structure of that legal system and order subsists. At the continental level, regional organisations such as the OAU are based in substance and form on existing models of regional organisation and rely on the same legal principles. Again, feminist challenges to that legal order subsists.

Additionally, these regional organisations make reference to African values and their protection. I have attempted to demonstrate that there is no notion of 'African Values' evidenced in these organisations. Not only do the regional documents on human rights protection not exhibit an identifiable notion of African values, it is impossible for a continent to have values. Secondly, they are based on internationally recognised principles and refer to their allegiance to these values and thirdly, their institutional models are based on established international and regional models of rights protection. The recent adoption of the Protocol of an Africa Court of Human Rights demonstrates this point. Further, even if there existed such a notion of African Values, these values are specifically gendered and on that basis are to be challenged on internationally accepted principles for the promotion and protection of women's human rights. Where values which may be termed African exist, they exist in social

relations and organisations and especially in the context of personal status laws. The importance of feminist theory as a political force is evident in this context. Indigenous modes of political organisation had established mechanisms for some form of representation of women, however imperfect. The colonial heritage of most African states introduced new laws and regulations and decimated a lot of the existing structures. Artificial states comprised of heterogenous groups with different cultures and languages became subject to a new political power from which they were and remain disaffected. Political instability, lack of social cohesion, little allegiance to the state, little or no identification with the state save in nationality issues, have all resulted in a disaffected populace. Although indigenous mechanisms of government and social organisation have little political power nowadays, they still subsist and people are attached to them. In spite of the cultural lag and reduced political participation in these systems, they retain an incalculable value for many groups.

Yet, the only way to achieve change and political power is to participate in the 'new' political system. As part of the general process of the promotion and protection of human rights in Nigeria, as part of the democratisation process and the struggle for accountable, representative, transparent government, the protection of women's rights as human rights must be integral. Feminism, as a theory of empowerment, can enable women to fight for political power and obtain representation in the present political system. It can do this because of its inclusionary nature. It can do this if it is informed by issues of race and culture and if essentialism means all women's essentialism.

APPENDIX

DRAFT PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN

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 OAU Assembly of Heads of State and Government has in June 1995, endorsed the decision of the African Commission on Human and People's Rights to elaborate a draft protocol on the Rights of Women;

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;

CONSIDERING also that Article 18 of the African Charter on Human and Peoples' Rights calls on all African states to eliminate all discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

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 and the International Covenant on Economic, Social and Cultural Rights, and are now

recognised 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;

CONSIDERING also that the plans of action adopted in Dakar in November 1994 and in Beijing in September 1995 call on all Member States of the United Nations 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;

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 Charter;

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by a majority of African States and their solemn commitment to eliminate all forms of discrimination against women, discrimination against-women in Africa continues;

NOTING that many people in Africa continue to perceive human and peoples' rights as being the exclusive preserve of men despite the fact that women play a fundamental role in peace and development in Africa;

HAVE AGREED UPON THE FOLLOWING:

ARTICLE 1

For the purposes of this present Additional Protocol, and in conformity with Articles 2 and 18 of the African Charter on Human and Peoples' Rights discrimination against women means any distinction, exclusion or restriction based on sex whose effects compromise or destroy the recognition, enjoyment or the exercise by women - regardless of their matrimonial status - on an equal basis with men, of human rights and fundamental freedoms in all aspects.

ARTICLE 2

Women shall enjoy on the basis of equality with men the same rights and respect for their dignity and contribute to the preservation of those African cultural values that are positive and are based on the principles of equality, dignity, justice and democracy.

ARTICLE 3

In order to eliminate effectively all forms of discrimination against women, State Parties to this Protocol shall take all necessary measures to integrate a gender perspective in their policy decisions, legislation, development plans and all spheres of life.

ARTICLE 4

In order to attain equality between the sexes, State Parties to this Protocol shall:

- a) take specific positive action in those areas where discrimination against women in law and in fact continues to exist;
- b) Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices

which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

ARTICLE 5

In conformity with Articles 4 and 5 of the African Charter on Human and People's Rights, States Parties to this Protocol shall:

- a) never sentence pregnant women to death;
- b) prohibit all forms of trafficking;
- c) prohibit the commercial exploitation of prostitutes;
- d) prohibit medical or scientific experiments on women;
- e) prohibit all traditional and cultural practices which are physically harmful to women and girls and which are against recognised international norms (including force-feeding, genital mutilation, infibulation, etc.
- f) protect women against rape and other sexual assaults as war crimes and punish them as such.

ARTICLE 6

1. No marriage shall take place without the free and full consent of both parties.
2. The minimum age of marriage for men and women shall be the same and shall not be less than the age of majority;
 - a) Polygamy shall be prohibited except otherwise consented by both parties; and in any country where polygamy exists, the law shall strive to work towards its elimination;
 - b) Women shall have the same rights as men in marriage;

3. In order to be legally recognised, every marriage shall be recorded in writing and immediately registered, in the presence of the husband and wife, with the competent authorities;

4. The husband and wife shall by mutual agreement choose their place of residence;

5. A married woman shall have the right to keep her maiden name, to use it as she pleases - jointly or separately with her husband's surname - and to give her maiden name to her husband and children;

6. A married woman shall have the right to retain or change her nationality or to confer it on her husband and children;

7. A man and a woman shall have the same rights and responsibilities towards their children;

8. During her marriage, the wife shall have the right to acquire her own property and to administer and manage it freely; and in cases of joint ownership of property the husband and wife shall have the same rights.

ARTICLE 7

1. Divorce or annulment of a marriage shall be effectuated only by judicial order. Women shall have the same rights as men to seek divorce or annulment of a marriage and, after divorce or annulment, with respect to the children and property of the marriage.

2. It shall be prohibited to subject widows to inhuman, humiliating and degrading treatment.

3. In the case of death of one spouse, nobody shall have the right - whatever the matrimonial regime - to deprive the surviving spouse of the right to live in the former matrimonial home. The surviving spouse shall have the right to continue to live in the matrimonial residence as long as need be and if the general interest of the family has been taken into consideration.
4. After the death of the husband, the widow shall be by law the guardian of the children and she shall have the right to remarry if she wishes;
5. A widow shall have the right to inherit her husband's property.

ARTICLE 8

With reference to Article 7 & 25 of the African Charter on Human and Peoples' Rights, States Parties to this Protocol shall:

- a) take all appropriate measures to facilitate the access of women to legal services;
- b) put in place adequate structures to inform women and make them aware of their rights

ARTICLE 9

In conformity with Article 13 of the African Charter on Human and Peoples' Rights, States Parties to this Protocol commit themselves to:

- a) take specific positive action to promote the equal participation of women in the political life of their countries, ensuring that:
- b) women can participate without any discrimination in all elections;

- c) women are represented equally with men in all electoral and candidate lists;
- d) include women equally with men at all levels of the development and execution of state policy.

ARTICLE 10

1. In conformity with Article 23 of the African Charter on Human and Peoples' Rights, women shall have the same rights as men to promote and maintain peace and to live in peace.
2. State Parties to this Protocol commit themselves to take all appropriate measures to involve women, on an equal basis
 - a) in programmes of education for peace and a culture of peace;
 - b) in the structures for conflict' prevention, management and resolution at local, national, regional and international level, in particular within the mechanisms of the OAU;
 - c) in the local, national, regional and international structures for the establishment and management of camps for refugees and displaced persons and for the distribution of food.
3. State Parties additionally commit themselves to reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources;

ARTICLE 11

1. On the basis of Article 4 of the African Charter on Human and Peoples' Rights, in this Protocol violence against women shall mean all acts directed against women as women which cause or could cause them physical, sexual, or psychological harm or suffering, including the threat of such acts; or the imposition of arbitrary restrictions on or' deprivation of fundamental freedoms in private or public life.

2. State Parties to this Protocol commit themselves to take all appropriate measures to:

a) prohibit all forms of violence against women - physical, mental, verbal or sexual, domestic and family - whether they take place in the private sphere or in society and public life including sexual harassment, sexual abuse or exploitation, rape, etc.;

b) identify the cause of violence against women and take measures to eliminate such violence;

c) punish perpetrators of such violence committed against women;

d) Provide for the rehabilitation and reparation for victims of such violence.

ARTICLE 12

1. In conformity with Article 17 of the African Charter on Human and Peoples' Rights, women shall have equal opportunities with men.

2. State Parties shall take all appropriate measures to:

a) eliminate all discrimination towards women in education;

b) eliminate all references in text books and syllabuses to the stereotypes which perpetrate such discrimination.

3. State Parties shall take specific positive action to:

a) promote an increased literacy rate among their citizens and in particular among women;

b) ensure that primary education is free and compulsory for all and that secondary education is free and compulsory for girls.

c) promote the education of girls by providing free education through grants and bursury.

ARTICLE 13

With reference to Article 15 of the African Charter on Human and Peoples' Rights, States Parties to this Protocol shall guarantee women equal opportunities to work. In this respect, they commit themselves to:

a) promote equality in the terms of remuneration and conditions of work for women;

b) ensure transparency in employment and dismissal relating to women;

c) allow women freedom to choose their own job, with decent conditions of work, and to protect them from exploitation by their employers;

d) regulate the occupations and economic activities dominated by women, in particular the informal sector of the economy;

- e) put in place a system of protection and national insurance for women working in the informal and formal sectors of the economy;
- f) introduce a minimum age of work and prohibit children from working below that age, and to prohibit the sexual exploitation of children;
- g) recognise the value of and to protect the work of women in the home;
- h) guarantee adequate pre- and post-natal maternity leave;
- i) recognise motherhood and the upbringing of children as a social function for which both parents must take responsibility, as well as the state and employers.

ARTICLE 14

1. With reference to Article 16 of the African Charter on Human and Peoples' Rights, women shall have the same right to health as men. As part of this right, they shall have the right to control their fertility, including the right to decide whether to have children, how to space their children, to choose any method of contraception and to protect themselves against sexually transmitted diseases.

2. State Parties to this Protocol shall take appropriate measures to:

- a) ensure that adequate and if necessary free health services are available to women especially those in rural areas;
- b) establish pre- and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding.

ARTICLE 15

1. Every woman, like every man shall have the right to adequate supplies of wholesome food.

2. State Parties to this Protocol shall take appropriate measures to:

a) guarantee to women access to clean drinking water, to sources of domestic fuel, to land, and to the means of producing food;

b) establish adequate systems of supply and storage to ensure food security.

ARTICLE 16

Every woman, like every man, shall have the right to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties to this Protocol commit themselves to grant to women, whatever their marital status, access to state provided/social housing sufficient for their needs.

ARTICLE 17

1. Women shall have the right to live their life in a positive cultural environment and to participate at all levels in the determination of cultural policies.

2. State Parties to this Protocol shall take all appropriate measures to protect women and society from the harmful effects of all forms of fundamentalism and from any other cultural or religious practices contrary to this right.

ARTICLE 18

1. In conformity with Article 24 of the African Charter on Human and Peoples' Rights, women shall have the right to live in a healthy environment.

2. State Parties shall take all appropriate measures to:

- a) involve women in the management of the environment at all levels;
- b) promote research into renewable energy sources;
- c) regulate the management, processing and storage of domestic waste;
- d) ensure that the proper standards are followed for the storage, transport and destruction of toxic waste.

ARTICLE 19

1. With reference to Articles 21, 22 & 24 of the African Charter on Human and Peoples' Rights, women shall have the right to fully enjoy their right to development.

2. State Parties to this Protocol shall take all appropriate measures to:

- a) ensure that women can participate fully at all levels in the development and execution of development policies;
- b) ensure that women have access to credit and to financial, economic and natural resources;
- c) take into account indicators of human development specifically relating to women in the working out of development policies.
- d) ensure that in the implementation of trade and economic policies such as structural adjustment programmes, the negative effects of such measures do not affect women.

ARTICLE 20

1. This Protocol shall be open for signature, ratification and accession by the Member States of the OAU.
2. Instruments of ratification or accession to this Protocol shall be deposited with the Secretary General of the OAU.
3. This Protocol shall come into force one month after the deposit of fifteen instruments of ratification or accession.
4. For each of the States Parties that ratify or accede to this Protocol after its coming into force, the Protocol shall come into force at the date of deposit of the instrument of ratification or accession.
5. The Secretary General of the OAU shall inform the Member States of the OAU of the coming into force of this Protocol.

ARTICLE 21

This Protocol may be amended if a State Party makes a written request to that effect to the Secretary General of the OAU. The Assembly of Heads of State and Government adopts the draft amendment after all the States Parties have been duly informed of it and the Commission has given its opinion. The amendment shall be approved by a simple majority of the State Parties. The Commission may also, through the Secretary General of the OAU, propose amendments to this Protocol. The amendment shall come into force for each State Party which has accepted it one month after the Secretary General of the OAU has received notice of the acceptance.

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