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WOMEN'S RIGHTS IN AFRICA: AN EXAMINATION OF AFRICAN HUMAN RIGHTS SYSTEMS IN THE CONTEXT OF CEDAW AND THE UNIVERSALISM VERSUS CULTURAL RELATIVISM DEBATE.

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Abstract: Many African women suffer discrimination on the grounds of their gender and other factors, such as religion, customs, age and marital status. They continue to be victims of harmful practices whose perpetrators are never held to account because the practices have their roots in cultural values and traditions. Attempts to initiate a change in human rights especially in relation to women, is countered with the argument which rejects the imposition of Western culture on other regions of the world. This argument is based on the premises that human rights should be tailored to people's cultural beliefs and therefore can never be universal. By comparing provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and with examples of African human rights instruments, this article investigates the influence of cultural relativism, if any, on the formulation of women's rights policies in African countries.

Keywords: women's rights, Africa, CEDAW, culture, relativism, universalism

Introduction

Behind the human rights discourse of various nations is often the accusation of the imposition of the Western values on other parts of the world.¹ Some writers have concluded that the concept of human rights is a Western construct, and therefore does not apply to all nations.² Shivji, for example, contends that human rights resulted in the

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¹ Advisory Council on International Affairs (ACIA) (1998) *Universality of Human Rights and Cultural Diversity*, p10. Available from <http://www.aiv-advies.nl/ContentSuite/upload/aiv/doc/AIV_04_Eng_titel.pdf> (accessed on 16 May 2014)

² See Pollis, Adamantia (1979) 'Human Rights: A Western Construct with Limited Applicability' in Pollis, Adamantia and Schwab, Peter (eds) *Human Rights: Cultural and Ideological Perspectives* cited in Kufuor, KO (2010) *The African Human Rights System: Origin and Evolution* 1-18.

perpetuation of class differences.³ Furthermore, the Universal Declaration of Human Rights (UDHR) is regarded by some as universal only in name and not in content. This assertion is based on the argument that there was little African representation during its drafting,⁴ while both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, which were drawn up in 1966 are a product of an imbalance of power between the negotiators.⁵ An historical assessment of human rights conventions shows that these conventions are archetypes of Western values.⁶ When the latter part of the twentieth century and the early twenty-first century witnessed the participation of African countries and other developing nations in the making of various international conventions, it was anticipated that those who oppose Western dominance would no longer be the objects of history, but the actual makers of history and policy.

To assess the response of developing countries to alleged Western dominance, this article explores the relationship between the Convention on the Elimination of all Forms of Discriminations against Women (CEDAW) and selected human rights systems in Africa as they affect women's rights. African human rights systems exhibit a complex intersection of laws and organisations in Africa. Kufuor divides human rights systems into three broad groups. The first is a set of human rights which are found in specific charters, protocols, and human rights tribunals' decisions and declarations. The second set consists of sub-regional, economically focused treaties that do not directly relate to the protection of human rights and the decisions of tribunals established under these treaties. Finally, the third set is municipal court decisions applying the provisions of the treaties.⁷

The essence of international human rights law is to ensure uniformity in the protection of human rights.⁸ Thus, regional human rights systems are decried as heresy in realisation of universal human rights because they tend to embody the specific social

³ Shivji, IG(1989) *The Concept of Human Rights in Africa* 3

⁴ Only Liberia, Egypt and Ethiopia participated in the drafting of the UDHR.

⁵ Ogunbanjo, Martin Bimbo 'Human Rights in Africa in the new Global Order: A Dilemma?' African Studies Association of Australasia and the Pacific 2003 Conference Proceedings - Africa on a Global Stage Available from <<http://afsaap.org.au/assets/Ogunbanjo.pdf>> (accessed on 16 December 2014).

⁶ Ibid.

⁷ Kufuor, KO (2010) *The African Human Rights System: Origin and Evolution*.

⁸ Universal Declarations of Human Rights GA Res. 217A 3rd Session U.N. Doc A/810 (1948).

and cultural characteristics of a particular region.⁹ By their nature, regional human rights systems have the tendency to expand the gulf between the rights espoused by one state and those espoused by others.¹⁰ Does this regionalisation of human rights systems constitute a threat to the international protection of human rights? In other words, to what extent are African human rights systems in consonance with international human rights law, in relation to protection of women's rights?

Through analysis of the relevant normative aspects of African-authored human rights instruments, this article investigates whether human rights systems in Africa are designed to perpetuate the relativism argument, since African nationalists are part of the global campaigns against Western dominance and neo-imperialism. The article reviews the human rights universalism-relativism debate and the quest for a convergence between the two sides, as a response to the actual reality in international in the context of human rights policies and instruments. The article suggests that it would be useful to explore a meeting point between relativism and universalism in order to eliminate the divergent viewpoints and suspicion surrounding the notion of human rights as a Western construct.

The position on the human rights of women has been one of the areas in which the relativism-universalism debate is prominent. Using Africa as an example, many women are victims of inequalities which are justified on the ground of cultural values and traditions, which are embodied in uncodified customary law. There is no doubt that cultural traditions in some instances have complemented constitutional rights guarantees; however, they have also constituted a clog in the full enjoyment of human rights in other areas. This article therefore examines African regional and sub-regional instruments relating to the protection of women's human rights by comparing these instruments to the provisions contained in CEDAW. It concludes that, irrespective of vociferous arguments for cultural relativism, African human rights systems have always been designed to be in tandem with other international conventions protecting women's rights. This work builds on the existing literature examining the status of women's rights in Africa by extending its coverage to sub-regional instruments.

⁹ Robbins, M (2005) "Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement" 35 *California Western Law Journal* 275 – 302.

¹⁰ Ibid.

Cultural relativism versus the universality of human rights: A quest for consensus

Contentions about the content and applicability of human rights instruments represent another aspect of the universalism versus cultural relativism debate. These debates have evolved in the context of contrasts between North and South or liberal and conservative systems.¹¹ Relativists were led by the American Anthropologist Association, which argued in 1947 against the UDHR's applicability before its adoption. The Association contended that the UDHR should have contained a statement acknowledging the rights of men to live in terms of their own traditions¹² because failure to do so this amounts to an excessive imposition of Western values on other cultures.¹³ This conclusion was rejected at the World Conference on Human Rights in 1993, as the delegates believed that the universal nature of human rights was beyond question.¹⁴ Human rights, delegates concluded, are the birth right of all human beings. Delegates noted that different cultures of the world share many similarities and they all uphold fundamental principles and values.¹⁵ They stated that 'all human rights are universal, indivisible, interdependent and interrelated'.¹⁶ Regardless of their political, economic and cultural systems, governments have a responsibility to satisfy international obligations in accordance with international standards, including human rights obligations.¹⁷ It is submitted that a denial of the universality of human rights is also a denial of human rights. Arguments based on cultural relativism should not be used to avoid or undermine human rights obligations. More importantly, cultural relativism should not be invoked to justify any act which infringes or denies others their human rights and fundamental freedoms.

¹¹ See for a detailed philosophical and theoretical discussion An-Na'im, AA 'Problems of Universal Cultural Legitimacy for Human Rights' in An-Na'im, AA & Deng, F. (eds) (1990) *Human Rights in Africa: Cross Cultural Perspectives*; Donnelly, Jack (1984) 'Cultural Relativism and Universal Human Rights' 6(4)*Human Rights Quarterly*; Donnelly, Jack (2000) (2nd ed.) *Universal Human Rights in Theory and Practice*.

¹² Advisory Council on International Affairs (ACIA) (1998) *Universality of Human Rights and Cultural Diversity* at 10.

¹³ *Ibid.*

¹⁴ World Conference on Human Rights 'Vienna Declaration and Action Programme' adopted in Vienna on 25 June 1993 Part I para. 1.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Beyani, Chaloka (1994) 'Towards a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook, R (ed.) *Human Rights of Women: National and International Perspectives* 285.

What is cultural relativism? Cultural relativism asserts that human values vary according to different cultural perspectives.¹⁸ The presumption here is that rights and other social practices, values and moral rules are culturally determined. In other words, relativism rests on the notion of moral autonomy and communal self-determination. Culture is the principal source of the validity of a moral rule or right.¹⁹ A society's norms and values are dictated by its culture.²⁰ A homogenous society encompasses, by way of its sub-cultural groups, much heterogeneous behaviour.²¹ For example, the British culture consists of English, Northern Irish, Scottish and Welsh cultures. As these sub-cultural groups interact, the cultural differences become more pronounced.²²

Scholars in support of universalism contend that culture is irrelevant in the determination of human rights.²³ Louis Henkin argued that 'to call them human suggests that they are universal: they are the due of very human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development.'²⁴ In other words, everyone is entitled to human rights simply because one is human and the concept of human rights loses its value when not all people can lay equal claim to it. Donnelly concludes that cultural relativism is the argument of oppressors who want to perpetuate an unjust dynasty.²⁵ This author is of the view that the idea that there should be a contextual cultural approach is amorphous and prone to abuse. It will not only undermine the effectiveness of international law and the international system of human rights, but will also legitimise the violation of human rights; and act as a clog for constructive and genuine criticism of human right abuses.

¹⁸ Donnelly, Jack (1984) 'Cultural Relativism and Universal Human Rights' 6(4)*Human Rights Quarterly* 400.

¹⁹ *Ibid* at 401.

²⁰ *Ibid*.

²¹ Advisory Council on International Affairs (ACIA) (1998) *Universality of Human Rights and Cultural Diversity* at 9

²² *Ibid*.

²³ Robbins, M (2005) "Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement" 35 *California Western Law Journal* 275

²⁴ Henkin, Louis (1981) "Rights: Here and There" 81 *Columbia Law Review* 1582.

²⁵ Donnelly, Jack (1984) 'Cultural Relativism and Universal Human Rights' 6(4)*Human Rights Quarterly* 400.

The counterclaim of non-Western relativist scholars is that the prevalent human rights standard does not reflect their particular moral and cultural values.²⁶ Using the UDHR as an example, African relativists claim that the three independent African countries, namely Liberia, Egypt and Ethiopia, which participated in the drafting, could not be said to have represented the interests of the entire African continent.²⁷ Zvogbo contends that if the documents were to be re-drafted today, the content would be substantially different.²⁸ First, the Western conception of human rights views the fundamental unit of society as that of the individual, in contrast to the communalism cherished in Africa. This Western notion of individualism hinders economic development and ongoing nation building in many African countries. However, Zvogbo's assertion does not provide guidance on the extent to which derogation from individual rights should be permitted to allow community rights. Second, the Western idea that the primary basis of securing human existence in society is through rights and not duties is not sustainable in Africa and other similar cultures. For example in the African context, one owes one's community a variety of duties and these duties take precedence over one's individual rights.²⁹ The importance of these ideals is to strengthen community ties and social cohesion by ensuring patriotism on the part of the individual, who sees society as above him or herself and to strengthen the principle of reciprocity, which compels the community to safeguard the interests of the individual in return. Third, the primary method of securing these rights is through a process of legalism, where rights are claimed and adjudicated upon as against reconciliation, repentance and education.³⁰

An examination of the norms governing legal, political and social structures in the pre-colonial African societies should not be misunderstood. The examination portrays an African concept of rights which supports group solidarity, communal well-being and a sufficient level of individualism.³¹ The Akan and Akamba societies are an example of

²⁶ Banda, Fareda (2003) 'Global Standards: Local Values' 17 *International Journal of Law, Policy and the Family* 1-27.

²⁷ Ibid.

²⁸ Zvogbo, E. (1990) 'A Third World View' in Kommers, DP & Loescher, GD (eds) *Human Rights and American Foreign Policy* 90-106.

²⁹ M'Baye, Keba (1987), "Organisation de L'Unite Africaine," in Vasal, Karel *Les Dimensions Internationales de Droits de L'Homme* 651.

³⁰ Shina, S (1981) 'Human Rights: A Non Western View Point,' *Archiv für Recht und Sozialphilosophie*, vol. 67, at 89-90 cited in Ibhawo, B (1999) *Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria*.

³¹ Ibhawo, B (1999) *Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria* 20

this conception of human rights. The power over life and death was reserved for a few elders, who could only exercise it after an elaborate judicial procedure with appeals from one court to another; this power could be only invoked in murder and manslaughter cases.³²

The recent trend in the human rights discourse notes that the universalism versus cultural relativism debate has been exhausted. Asserting one position over the other is misleading; instead a common ground should be explored. According to Sousa Santos:

‘[t]he debate is an inherently false debate...All cultures are relative, but cultural relativism as a philosophical posture is wrong. All cultures aspire to ultimate concerns and values, but cultural universalism as a philosophical posture is wrong.’³³

An objective examination shows that underlying the diversity of cultures are certain universally accepted values.³⁴ It is advantageous to pursue a global concept of human rights, which is inclusive of all values of other cultures if human rights are to play an important role in the new world order. Scholars should neither gloss over the challenges of cultural relativism to the concept of the universality of human rights, nor accord prominence to it, but instead adopt a constructive approach that recognises the problems and addresses them in the context of different cultural traditions and across cultural boundaries.³⁵ Failure to do so will diminish the prospects of developing truly universal standards of human rights and effective mechanisms for achieving them.³⁶ While relativism is prone to legitimise human rights violations, universalism can also produce undue formalism or naïve idealism.

The Bangkok Declaration of the Asian countries,³⁷ while acknowledging that human rights are universal in nature, states that universality can only be valuable where

³² Wa Mutua, Makau (1995) ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ 35(2) *Virginia Journal of International Law* 339.

³³ Sousa Santos, B (2006) ‘Towards a Multicultural Conception of Human Rights’ in Isa, GF & Feyter, Koen de *International Protection of Human Rights: Achievements and Challenges* 58

³⁴ Ibhawo, B (1999) *Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria* 22

³⁵ An-Na’im AA (1992) ‘Introduction’ in An-Na’im AA (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* 1- 15.

³⁶ *Ibid.*

³⁷ Bangkok Declarations as cited by Cerna, C (1994) ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in different Socio-Cultural Contexts’ 16 *Human Rights Quarterly* 740, 741.

regional peculiarities and various historical, cultural and religious backgrounds are considered.³⁸ The Declaration appears to suggest that relativism is achievable within universality. A point which is not clear is how to accept cultural tolerance, without condoning the violation of women's rights. Will a normative consensus not negate the universality of human rights? Possibly the quest for congruence is a lofty aspiration.

Universalists, for example Beyani,³⁹ suggest a radical approach in which cultural norms are sieved through a human rights filter. Where cultural norms fail this simple compatibility test, they must be jettisoned. Such a radical approach revisits the concept of the supremacy of universalism and this cannot be ignored. The problem with this suggestion is that where it does not enjoy the support of the people, it might be difficult to effect such changes. Stewart⁴⁰ prefers an evolutionary approach that allows cultures to evolve and change with time. In other words, the processes of acculturation and globalisation will phase out discriminatory cultural trends. People's views and beliefs will change as they interact with other cultures and perspectives. However, although true, an evolutionary approach is an oversimplification of the discourse because it does not take into consideration the imbalance of power within a society. Global events show that cultural institutions are deeply rooted and determine the time and pace of evolution, unless forcefully overthrown. In instances where the advocates of change do not have the necessary power and are unable to muster support both externally and internally, the evolutionary process becomes stifled.

In conclusion, there is a danger in adopting an all-or-nothing approach regarding the relevance of culture to human rights, be it universalist or relativist. Rather 'an intermediating relevance for both international law (standards, procedures, and implementation) and cultural hermeneutics' might be the solution.⁴¹ Falk highlights the symbiotic relationship between the two. He explains that:

'[W]ithout mediating international human rights through the web of cultural circumstances, it will be impossible for human rights norms and practices to take deep

³⁸ Ibid.

³⁹ Beyani, Chaloka (1994) 'Towards a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook, R (ed.) *Human Rights of Women: National and International Perspectives* 285.

⁴⁰ Stewart, A (1993) 'The Dilemmas of Law in Women's Development' in Adelman, S & Paliwala, A (eds) *Law and Crisis in the Third World* 266.

⁴¹ Faulk, Richard (1992) 'Cultural Foundations for the International Protection of Human Rights' pp 44-64 in An-Na'im AA (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* 46

hole in non western societies except to the partial, often distorting.... At the same time, without cultural practice and tradition being tested against the norms of international human rights there will be a regressive disposition towards the retention of cruel, brutal, and exploitative aspects of religious and cultural tradition.’⁴²

An-Na'im suggests that Falk's mediation will be realisable through an internal cultural discourse and a cross-cultural dialogue.⁴³ The cross-cultural approach will demystify the underlying causes of the continuing divergence between the theory and practice of human rights. Human rights cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural traditions. The success of this approach can only be attained when it is mutual between cultures and sensitive to the needs of internal authenticity and legitimacy. However Howard⁴⁴ is doubtful of the success of a cross-cultural dialogue and argues that human rights are a modern concept now universally applicable in principle. Human rights is a fashion borne out of the social evolution of the entire world toward state societies and to embark on a voyage of all known human cultures for consensus on rights is to confuse the concepts of rights, dignity and justice.

To round off this section of this article, it is submitted that the debate of universalism versus cultural relativism of human rights will always be present. The issue might become even stronger in the context of continuing globalisation and the growing clamour for self-determination along cultural lines. World issues such as civil wars, terrorism and religious intolerance are manifestations of the new dimension to the debate. Each nation or cultural group must purge itself of rigid formalism and allow the flexibility needed for reciprocal concessions. While there were arguably 'good old days' there is also a better tomorrow. Nevertheless, cultural relativism should never be a justification for oppression or arbitrary rule in any form, but rather an expression of a genuine right to self-determination.

⁴² Ibid. at 45.

⁴³ An-Na'im AA, (1992) 'A Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in An-Na'im AA (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* 19 -43.

⁴⁴ Howard, RE (1986) 'Dignity, Community, and Human Rights', in An-Na'im AA (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* 81-102.

Convention on the Elimination of all Forms of Discriminations against Women (CEDAW)

Prior to the emergence of CEDAW, there were international attempts to address the inequality and discrimination meted to women. CEDAW is a landmark treaty in the struggle for women's rights⁴⁵ as it represents a departure from the fragmentary approach of earlier instruments⁴⁶ protecting women's rights. CEDAW entered into force on 3 September 1981 upon ratification by the required 20 member states.⁴⁷ As of June 2013, CEDAW has been affirmed by 187 states parties making it the second most widely ratified human rights treaty.⁴⁸

Written in a gender-neutral language, CEDAW has 30 articles contained in six uneven parts. Part I consists of arts 1– 6, which contain the definitions on discrimination and other fundamental edicts, states' obligations,⁴⁹ a provision on temporary special measures and a provision on the eradication of trafficking and exploitation of women. Part II focuses on equal participation of women in political and public life at both international and national levels, as well as on equal treatment in nationality law. Protection for the interests of rural women is contained in Part III in arts 10-14, which advocate measures that will ensure equality between the sexes in economic, social and cultural matters. Part IV provides for legal equality and in art16 addresses issues pertaining to marriage and family relations. Part V, which outlines the Convention mechanisms also establishes a twenty-three-member committee and a reporting system. Finally, Part VI contains provisions for revisions, entry into force and very importantly,

⁴⁵ Maboreke, M (1991) 'Women and Law in Post-Independence Zimbabwe,' in Bazilli, S (ed) *Putting the Women on the Agenda* 227.

⁴⁶ *The Convention on the Political Rights of Women 1952; the Convention on Nationality of Married Women 1957; and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage 1964* have been criticised for being too narrow in scope.

⁴⁷ For a detailed history, see <<http://www.un.org/womenwatch/daw/cedaw/history.htm>> (Accessed on 10 September 2013).

⁴⁸ African countries that have ratified CEDAW are Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Togo, Zambia and Zimbabwe.

⁴⁹ CEDAW art 2.

for reservations.⁵⁰ Koskinen describes CEDAW as the International Bill of Women's Rights.⁵¹

CEDAW is built on the twin pillars of non-discrimination and equality. Article 1 of CEDAW provides a very broad definition of discrimination. This definition covers discriminations in the form of distinctions, exclusions and restrictions; it prohibits all guises of discrimination in all areas of life, either as an act of the state or by a private person or private organisation. The definition outlaws both the de jure and de facto discrimination that may cause imbalances between the treatment of men and women in the society. Under the Convention, the CEDAW Committee explains that differential treatments on the basis of gender may constitute direct discrimination if it results in impairing or nullifying women's rights.⁵² The Committee adds further that similar treatments which can impair or nullify women's rights may lead to indirect discrimination.⁵³ Indirect discrimination could arise from a neutral law, policy or programme in relation to men and women, which fails to address pre-existing inequalities.⁵⁴ Discrimination against women will only be eradicated where both men and women are treated equally.⁵⁵ However, no definition is given to the term 'equality'. This non-inclusion in the definition has led to a myriad of conclusions which are at cross-purposes with the aim of CEDAW.⁵⁶ It is not clear whether the focus should actually be on 'equity' instead of 'equality'. Some scholars regard the terms as being synonymous, while others contest that equity is actually a mechanism through which equality can be achieved.⁵⁷ Gómez Gómez, writing for the Pan American Health Organization, argues that inequality does not necessarily entail inequity. She concludes

⁵⁰ I regard the allowance for reservation as part of efforts in mediating between international standards and local values as suggested by Falk and An-Na'im though this may not have been directly envisaged when it was drafted. This reservation is not a blank cheque because it has to be compatible with the 'object and purpose' of CEDAW. Many states parties who entered reservations to particular provisions invoked various conflicts between their traditions and national laws.

⁵¹ Koskinen, Paivi (2005) 'To Own or to Be Owned: Women and Land Rights in Rural Tanzania' in Scheinin, Martin & Suksi, Markku (eds): *Human Rights in Development Yearbook: Empowerment, Participation, Accountability and Non-Discrimination: Operationalising a Human Rights-Based Approach to Development*.

⁵² UN Doc CEDAW/C/GC/28, [16], *General Recommendation 28*,

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ UN Doc A/59/38, annex I [4], *General Recommendation 25*,

⁵⁶ Jones, Karen L 'Women's National League: Does CEDAW go far enough?' (2013) 13 *International Sports Law Journal* 35 - 44

⁵⁷ International Women's Rights Action Watch – Asia Pacific 2009 CEDAW Available at <<http://www.iwraw-ap.org/convention/doc/cedaw.pdf>> (accessed on 23 October 2013).

that ‘while equality is an empirical concept, equity represents an ethical imperative associated with the principles of social justice and human rights.’⁵⁸ Both Facio and Morgan, on the other hand, disagree with Gómez Gómez’s conclusions.⁵⁹ They are of the view that while both equity and equality focus on social justice, equity is never a concept associated with human rights. In addition, they maintain that equity is an unrealistic social goal which governments put forward when they have failed, while equality is a human rights obligation, to which they must comply.⁶⁰ Simply put, the principle of equality is pivotal to human rights and human rights without equality would be meaningless.

A close reading of the CEDAW text reveals three types of equality: formal equality, substantive equality and transformative equality.⁶¹ Formal equality focuses on the content of the laws and practices and their even-handed application. This is de jure equality, which demands that women and men should be treated the same. For example, states parties are required under art 7(a) to adopt measures that protect women from being disfranchised, either as voters or aspirants to political offices, while art 9 requires states parties to guarantee women the right to, by choice, change, acquire and retain their nationality without any fear of being rendered stateless by that decision.⁶² De facto or substantive equality requires states parties to ensure that women are given equal opportunities and to create an enabling environment which allows them to achieve equal result. Substantive equality addresses the effects of laws, policies and practices and aims to alleviate any inherent disadvantages a particular group may experience. Biological, social and cultural differences between men and women must be taken into account. For example, arts 3 and 24 respectively enjoin states parties to explore all possible measures to ensure the full development and advancement of women and full realisations of rights provided for in CEDAW.⁶³ Under these articles, governments

⁵⁸ Gómez Gómez, Elsa (2004) ‘Equity, Gender and Health: Myths and Realities’, *Women’s Health Journal* 54

⁵⁹ Facio, Alda & Morgan, Martha (2009) ‘Equity or Equality for Women? Understanding CEDAW’s Equality Principles’ *60 Alabama Law Review* 1133.

⁶⁰Ibid.

⁶¹ Cusack, Simone & Lusey, Lisa (2013) *CEDAW and the Rights to Non-discrimination and Equality* 14 *Melbourne Journal of International Law* 1 – 39.

⁶² Byrnes, Andrew (2012) ‘Article 1’ in Freeman, Marsha A; Chinkin, Christine & Rudolf, Beate (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* 51, 52.

⁶³ UN Doc A/59/38, annex I [10], *General Recommendation* 25.

must design and implement strategies which address the problems of under-representation of women and redistribution of resources between men and women. Lastly, the dismantling of systemic inequalities and eradication of gender-based stereotypes is core to transformative equality.⁶⁴ This form of equality imposes dual obligations on the states parties. First, there must be a review of institutions and societal structures which are being used to perpetuate inequality. Second, there must be modifications and transformation of norms, prejudices and stereotypes. Accordingly, under article 2(f) states parties are required to take appropriate measures to modify or abolish laws, regulations, customs and practices that discriminate against women. This would involve states parties adopting measures ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’.⁶⁵

On discriminatory cultural practices, article 2 obligates states parties: ‘to take *all appropriate measures*,⁶⁶ including legislation, to modify or abolish existing laws, regulations customs and practices that constitute discrimination against women’.⁶⁷ The Convention acknowledges that in reality outlawing discriminatory cultural or religious practices requires more than law. So the phrase ‘all appropriate measures’ means all reasonable means and efforts. These efforts may entail ‘invading’ the private sphere of life because this is where these violations thrive. This will require proactive action from state parties.

For the elimination of all stereotypic attitudes that prejudice women, the states parties have the onus ‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.⁶⁸ Articles 2 and 5 are a catalyst of women’s rights conceptions as they aim for a holistic transformation of society. A state party violates its obligations under these articles where it either fails to address gender

⁶⁴ UN Doc. CEDAW/C/57/D/34/2011 (2014), Communication No. 34/2011.

⁶⁵ Ibid.

⁶⁶ Emphasis supplied.

⁶⁷ CEDAW art.2(f).

⁶⁸ Ibid art 5.

inequalities or perpetuates them through legislation, judicial pronouncements or customs.⁶⁹

It is, however, not surprising that the radical approach of CEDAW is also the obstacle to its implementation⁷⁰ as many states parties have invoked the art 28(2) provision that allows reservations to express their relativistic views, provided they are not incompatible with the purpose of the Convention to express their relativistic views. For example, Egypt entered reservations to arts 2, 9 and 16, claiming that Islamic law had given women the necessary rights even before ratification of CEDAW.⁷¹ Lesotho, citing cultural reasons, said it would not take any legislative measures under CEDAW which were incompatible with its Constitution.⁷² A similar issue to that of reservation is the idea of making a treaty subject to national law. National laws change, because of positive or negative trends in governance; this jurisprudential restructuring makes it difficult to ascertain a state's obligations.⁷³

The 1999 Optional Protocol to CEDAW⁷⁴ permits individuals or organizations acting on their behalf to bring complaints to its Committee.⁷⁵ The Committee is vested with the power under the Protocol to launch an inquiry if it has reason(s) to believe that grave systematic violations of women's rights exist within a state.⁷⁶ The inquiry processes can only be invoked where the membership of a state party still subsists.

⁶⁹ Hossain, Sara (1994) 'Equality in the Home: Women's Rights and Personal Laws in South Asia' in Cook, Rebecca J. (ed.), *Human Rights of Women: National and International Perspectives* 465-94.

⁷⁰ The Sub-Commission on the Prevention of Discrimination and Protection of Minorities expressed its concern that '[c]ertain reservations to the Convention, in particular, those in relation to the adoption of policies and institutional measures to implement the terms of the convention (art.2), political and public life (art.7), discrimination in the field of employment (art.11), equality of men and women before the law (art.15) and marriage and family relations (art.16), might diminish the international legal norms and legitimize its violations...' See *Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities on its forty-third session, Geneva, 5-30 Aug UN Doc E/CN4 Sub2/1991/65 of 24 Oct 1991* 145-146.

⁷¹ Tomasevski, K *Women and Human Rights* p 124 citing The Report of the Committee on Elimination of Discrimination against Women, Vol. II Third Session, UN Doc A/39/45 (1984) para 215-16.

⁷² <<http://www.bayefsky.com/doc.php/area/reservations/state/97/node/3/treaty/cedaw/opt/0>> accessed on 13 July 2013.

⁷³ Clark, B (1991) 'Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' 85 *American Journal of International Law* 281.

⁷⁴ *Optional Protocol to the Convention on the Eliminations of All Forms of Discrimination against Women* UNGA Res. 54/4, 6th October 1999 ('Optional Protocol').

⁷⁵ Optional Protocol to art 2

⁷⁶ Ibid. Arts 8, 9 and 10.

African human rights system

Compared to their counterparts in the in most other parts of the world, African women suffer discrimination and violation of human rights which are justified by cultural and religious practices.⁷⁷ Many women are victims of female circumcision, oppressive puberty rites, widowhood rites, forced marriages and the erosion of basic rights. African women's access to human rights was captured in this way 'If human rights begin with breakfast, a great majority of Africa's residents go very hungry indeed. And within this group women and children suffer most'.⁷⁸

The cultural relativism versus universalism debate, as pointed out by Banda, is centred on the cultural justifications found in personal laws for discriminating against women.⁷⁹ This part of the article explores whether cultural relativism engineers a departure by African created human rights documents from international human rights standards rights. In other words, does the argument relating to the imposition of Western values influence the African continent in culturally structuring its human rights documents?⁸⁰

Beyani provides a guidance note on the complementary role of regional instruments. Regional instruments, he posits, are an essential part of the international systems of human rights and the latter should not be seen as holistic or homogeneous.⁸¹ Any regional instrument must be read as furthering the interests of a superior body, such as the United Nations. The Charter of Organization of African Unity (OAU) now known as the African Union (AU), clamours for freedom, equality, justice and dignity.⁸² Thus, no African which is a signatory to the African Charter country or any similar instrument can justify its failure to fulfilling its human rights.⁸³ The conclusion is that regional

⁷⁷ Welch, Claude E. Jr. (1993) 'Human Rights and African Women: A Comparison of Protection Under Two Major Treaties' 15 *Human Rights Quarterly* 549 - 574

⁷⁸ Ibid at 551.

⁷⁹ Banda, F. (2003) 'Global Standard: Local Values' 17 *International Journals of Law and Policy* at 3.

⁸⁰ Compare with the Universal Islamic Declaration of Human Rights of 1981 (UIDHR) ,in which all rights are guaranteed as provided under Sharia.

⁸¹ Beyani, Chaloka (1994) 'Towards a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook, R (ed) *Human Rights of Women: National and International Perspectives* 285 at 288.

⁸² As a regional organisation, the AU is connected to the UN as shown in the former's preamble. It pledges its allegiance to the UN Charter and the UDHR as a solid foundation for peaceful and positive cooperation among states. This subordinates the AU and any other body or instrument emanating from the region or elsewhere to the UN Charter and its instruments. See Beyani 287- 289.

⁸³ AU Constitutive Act 2000, preamble, articles 3(g), 3(h), 4(l) and 4(m)

instruments and international regimes for human rights are always expected to work in tandem. A contradictory or inconsistent regional law would be regarded as void to the extent of its inconsistency.

The African Charter on Human and People's Rights (1981)

Disadvantaged by prevalent repugnant traditions and customs, many African women are treated as of lesser value compared to their male counterparts.⁸⁴ Many African women suffer from discriminatory practices in the areas of employment, marriage and religion. Article 2 of the African Charter on Human and People's Rights (African Charter) therefore prohibits all forms of discrimination, including those based on sex, whilst art 3 provides for equal protection before the law. The principle of non-discrimination in the African Charter is unequivocal in its agreement with art 1 of CEDAW. The African Charter provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms guaranteed in the present Charter without distinction of any kind such as . . . sex'. The Charter goes further to re-echo the practice of *de facto* equality found under CEDAW. Article 18(3) provides that 'the states shall ensure the elimination of *every*⁸⁵ discrimination against women and also ensure the protection of the rights of the woman . . .'. The word 'every' in this provision permeates all aspects of discrimination and admits no exception. To guarantee a robust protection, this shall be done with regard to international conventions and declarations.⁸⁶ Article 60 of the African Charter allows the African Commission on Human and People's Rights (African Commission) to draw inspiration from international law on human and peoples' rights; this includes provisions of various instruments adopted within the specialised agencies of the United Nations, of which the parties to the present Charter are members. Therefore, the African Commission in *Legal Resources Foundation v Zambia*⁸⁷ took into consideration the comment of the United Nations Human Rights Committee (HRC) on art 2 of the International Covenant on Civil and Political Rights.

⁸⁴ Ssenyonjo, Manisuli (2007) 'Culture and the human rights of women in Africa : between light and shadow' 51(1) *Journal of African Law* 39 – 67.

⁸⁵ Emphasis supplied.

⁸⁶ This binds the African states to international human rights standards relating to women rights regardless of whether they are a party or not to those particular instruments. Kois, L (1997) 'Article 18 of the African Charter on Human and Peoples' Rights: A Progressive Approach to Women's Human Rights' 3(1) *East African Journal of Peace and Human Rights* 102-103.

⁸⁷ Comm No 211/98, 29th ordinary session (23 April-7 May 2001). Available from <<http://www1.umn.edu/humanrts/africa/comcases/211-98.html>> (Accessed on 10 December 2014).

The African Commission adopted the definition of discrimination proposed by HRC which stated that the term ‘discrimination ‘implies:

‘ . . . [a]ny distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.’⁸⁸

From the above, the African Commission rightly concluded equality entails the expectation that all citizens to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all citizens.

Apart from states parties having to put appropriate measures in place, the contributions of individuals for the protection of human rights are very vital. An individual in the society under article 29(7) has an obligation:

‘ . . . [t]o preserve and strengthen *positive*⁸⁹ African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society’.

No definition is offered for *positive* for this purpose; however it is hoped that ‘positive’ would be given its ordinary meaning in the light of the purpose and objective of the Charter. Article 29(7) can neither be a tool to bypass the non discrimination provisions in the Charter, and nor to disregard any of CEDAW’s provisions. Rather, in the context of the African Charter, art 29(7) demonstrates the commitment of the drafters to discard cultural or religious practices that are deemed to be retrogressive.

The scope of the Charter was tested in the *Attorney General of Botswana v Unity Dow* case,⁹⁰ where the validity of some provisions of the Botswana Citizenship Act of 1984 was challenged. The Act provided that children born in wedlock acquired only the nationality of their father and not that of their mother. The Act also allowed a Tswana man to pass on his nationality to his alien wife, but denied a Tswana woman the same right to pass on her nationality to her alien husband. Dow, who was married to an American citizen, challenged these provisions, because her two children and her

⁸⁸General Comment No. 18 (37) UN Doc. CCPR/C/21/Rev.1/Add.1 (1989), reprinted in UN Doc. HRI/GEN/1/ Rev.1 at 26 (1994).

⁸⁹ Emphasis supplied.

⁹⁰ [1992] *LRC Const.* 623.

husband could not claim Botswana citizenship. Accordingly, she argued that this was discriminatory on the grounds of sex and in contravention of international human rights standards. The court, invoking the African Charter, rejected the defence of traditions and custom, and held that the challenged provisions of the Citizenship Act were discriminatory and violated the international standards of human rights.⁹¹

Critiques of the African Charter have centred on the lacklustre performance of the African Commission,⁹² claw-back clauses,⁹³ the choice of language⁹⁴ and the provision of article 18.⁹⁵ The latter has generated debates arising from the linking of women's rights with the concepts of family, tradition and morality and with children and the disabled. The contention is that the lumping together of women's rights along with others forms of rights will not sufficiently safeguard women's rights.⁹⁶ The arguments emphasise women's rights in relation to the traditional African family in which women are seen as the 'beast of family burden'.⁹⁷ This perception is said to be sustained through the Charter's stance which implies that the African concept of human rights should be inspired by the virtues of African tradition and the values of African civilization.⁹⁸

⁹¹ See also *Ephraim v Pastory and Kaizingele* 87 I.L.R 106, a Tanzanian decision outlawing discriminatory cultural practices, under the Haya customary law that forbids a woman from disposing of her interest in land.

⁹² Viljoen, F (2004) 'The African Commission on Human and Peoples' Rights: Introduction to the African Commission and the Regional Human Rights Systems' in C Heyns (ed.) *Human Rights Law in Africa* vol.1 at 497

⁹³ Kufuor, KO (2010) *The African Human Rights System: Origin and Evolution*. These are clauses which subject the provisions of the Charter to domestic laws thus limiting the effect of such provisions. Some examples are Articles 6, 8 and 9. See also Nmeielle, Vincent O (2004) 'Development of the African Human Rights System in the Last Decade.' 11(3) *Human Rights Brief* 6 - 11

⁹⁴ Heyns, Christof (2001) 'The African regional human rights system: In need of reform?' 1(2) *African Human Rights Law Journal* 155 -174

⁹⁵ For general discussions on the flaws of the African Charter, see Heyns, Christof (2001) 'The African regional human rights system: In need of reform?' 1(2) *African Human Rights Law Journal* 155 -174

⁹⁶ Elmadmad, K (1992); 'The Rights of Women under the African Charter on Human and Peoples' Rights in Benedek, W & Heinz, W (eds), *Regional Systems of Human Rights in Africa, America and Europe: Proceedings of the Conference*; Oloka-Onyago, J (1995) 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic, Social and Cultural Rights in Africa' 26 *California Western International Law Journal* 1; Odinkalu, C A (2002) 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights in Evans, M & Murray, R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*.

⁹⁷ Butegwa, Florence (1994) "'Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa,'" in Cook, Rebecca (ed) *Human Rights of Women: National and International Perspectives* 495

⁹⁸ Beyani, Chaloka (1994) 'Towards a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook, R (ed) *Human Rights of Women: National and International Perspectives* 291-292.

Mutua argues that these fears are unfounded and give the Charter a negative image.⁹⁹ In fact art 18 has comprehensive provisions covering various classes of rights. In agreement with Mutua, it is submitted that such an interpretation betrays a lack of awareness of the African family system and the position which women occupy in African society. Furthermore, women are highly placed within the family system; they are not just equal but embody a cardinal personality in the sustenance of human life.¹⁰⁰ Besides, African culture has never been stagnant; it has grown and changed in response to contemporary developments. This would be expected to continue, although a problem could be the speed at which it responds and adapts, a continuous acculturation process may guarantee a smoother transformation.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

To remedy the visible weaknesses of the African Charter, Protocol (the Protocol)¹⁰¹ was adopted on 11 July 2003 at the African Union (AU) meeting in Maputo, Mozambique and came into force on 25 November 2005.¹⁰² Twenty-eight countries had ratified the Protocol by 18 February 2013, the latest being Guinea Bissau. Egypt, Tunisia and Botswana are key countries which have neither signed nor ratified the Protocol.¹⁰³ The existence of a specific treaty on women's right has the benefit of underlining the issues which negatively impact upon women and forces states parties to adopt a more gendered interpretation of rights so that human rights can really begin to be seen as women's rights. The Protocol represents the greater visibility and the newly acquired strength of women's organisations in Africa.¹⁰⁴

⁹⁹Mutua, Makau 'The African Human Rights System : A Critical Evaluation' Available from <<http://hdr.undp.org/sites/default/files/mutua.pdf>> (accessed on 23 February 2014).

¹⁰⁰ Ibid.

¹⁰¹ African Commission on Human and Peoples' Rights, 'The African Charter on Human and Peoples Rights' and the 'Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa'. Available at <http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf> (accessed on 18 February 2013).

¹⁰² See Evans, M & Murray ,R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* 303; Karugonjo-Segawa, Roselyn (2005) "The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women"

¹⁰³ For a list of countries which have signed and ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa see <<http://www.achpr.org/instruments/women-protocol/ratification/>> (accessed on 10 September 2013)

¹⁰⁴ Viljoen Frans (2009) 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 16(1) *Washington and Lee Journal of Civil Rights and Social Justice* 11

The preamble launches the Protocol into normative recognition by building on art 66 of the African Charter. It reaffirms the principle of promoting gender equality as stipulated in the Constitutive Act of the African Union¹⁰⁵ and laments the continued existence of female gender discrimination and cultural practices which are harmful to women. The Protocol contains some unique provisions, such as the right to peace;¹⁰⁶ protection of women in armed conflicts;¹⁰⁷ widows' rights;¹⁰⁸ the right to inheritance; special protection of elderly women;¹⁰⁹ special protection of women with disabilities;¹¹⁰ and special protection of women in distress.¹¹¹ There are also substantive provisions on reproductive rights and the rights to abortion.¹¹² Banda describes the Protocol as 'uncompromisingly pro-woman and anti-defence of discriminatory cultural practices'.¹¹³

The definitional article, art 1, contains vital terms that are meant to address the shortcomings of the African Charter. Its comprehensiveness goes beyond the scope of CEDAW. Article 1 defines discrimination against women:

'as any distinction, exclusion or restriction or *any differential* treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women or regardless of their marital status, of human rights and fundamental freedom in all sphere of life'.

This definition of discrimination represents an improvement over CEDAW's definition. The phrase 'any differential treatment' targets imbalances, such as those found under Islamic law regarding the status and rights of women in marriage and the family.¹¹⁴ The enjoyment of equal rights 'regardless of marital status' establishes further that the Protocol is not in conflict with CEDAW, knowing full well that in many African

¹⁰⁵ Art 4(1) AU Constitutive Act available from http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

¹⁰⁶ The Protocol art 10.

¹⁰⁷ Art 11.

¹⁰⁸ Art 20.

¹⁰⁹ Art 21.

¹¹⁰ Art 22.

¹¹¹ Art 23.

¹¹² Art 24

¹¹³ Banda, F. (2003) 'Global Standard: Local Values' 17 *International Journals of Law and Policy* at 18

¹¹⁴ In keeping with verse 4:34 of the Qur'an, it is un-Islamic for women to hold general public office. In addition, while a man is entitled to divorce any of his wives at will, a wife is not entitled to a divorce, except by judicial order on very specific and limited grounds. And under the Islamic law of inheritance, women are only entitled to half of the share of men. See Alston, Philip & Goodman, Ryan (2012) *International Human Rights in Context: Text and Materials* 550.

societies unmarried and divorced women are treated with disdain. This definition uses the phrase ‘in all spheres of life’ instead of the specific listings of CEDAW to allow for an interpretation that encompasses all areas of discrimination. Article 1 also defines harmful practices as ‘... all behaviours, attitudes and/or practices which negatively affect the fundamental rights of women and girls such as their right to life, health dignity, education and physical integrity’. The aim is to use law to correct the attitude of the people; this is a task to be done incrementally. Harmful practices encompass, inter alia, female genital mutilation and widowhood rites. Drafted to reflect recent happenings on the African continent, the definition of violence against women encapsulates inchoate acts of violence. It covers:

‘[A]ll acts perpetrated against women, which cause or could cause them physical, sexual psychological and economic harm, including the threat to take such acts: or to undertake the imposition of arbitrary restriction on or deprivations of fundamental freedoms in private or public life in peace time and during situation of armed conflicts or war’.¹¹⁵

Obligations of the states parties to eliminate discrimination against women will be fulfilled through the enactment of appropriate legislative, institutional and other measures.¹¹⁶ They are to include in their national constitutions and other legislative instruments the principle of equality between women and men and ensure its application.¹¹⁷ States parties must take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.¹¹⁸ Article 2(2) of the Protocol resonates with CEDAW’s article 5: the states parties commit to modifying the social and cultural patterns of conduct of women and men through public education, information, education and communication, with the aim of eliminating harmful cultural and traditional practices

The Protocol provides that every woman shall have the right to dignity as a human being and recognises her human and legal rights.¹¹⁹ It adds that states parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.¹²⁰ This provision aims to forestall humiliating practices such as widowhood rites, forced labour and forced marriage. This is amplified in the succeeding article,

¹¹⁵ Protocol, art1(j)

¹¹⁶ Art 2

¹¹⁷ Art 2(i) a.

¹¹⁸ *ibid* art 2(1)d

¹¹⁹ Art 3(1).

¹²⁰ Art 3(3).

which commits states parties to guarantee the right to life, and the integrity and security of the person of women by prohibiting all forms of exploitation, cruel, inhuman or degrading punishment or treatment.¹²¹ States parties are bound to take appropriate and effective measures to actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes that legitimise and exacerbate the persistence of violence against women.¹²²

The Protocol goes to the root of stereotypes in family law. The onus of ensuring that women and men enjoy equal rights and are regarded as equal partners in marriage is placed on the states parties.¹²³ Forced marriages are forbidden¹²⁴ and a minimum age for marriage is specified.¹²⁵ Article 6(d) forms an alliance with art 16(2) of CEDAW and makes legal validity of marriage subject to registration.¹²⁶ It approves and adopts the *Unity Dow* case¹²⁷ and allows a woman not only to retain her nationality, or to acquire the nationality of her husband, but also to pass the same to her children, except in cases of threat to national security interests.¹²⁸ The revolutionary tone of CEDAW became distinct in the drafting of the Protocol which provided that: polygamy shall be prohibited except when consented to by both parties; and in any country where polygamy still exists, the law shall strive to work towards its elimination.¹²⁹

Most legal systems in Africa support polygamy because, which is entrenched in many customary and religious systems. The usefulness of cross-cultural dialogue becomes apparent here. In its final form, the Protocol reads: ‘...monogamy is encouraged as the preferred form of marriage...’.¹³⁰ This cautious approach of the Protocol has been regarded not just as a compromise, but also as an act of legal cowardice.¹³¹ However the Protocol gives women locked in such relationships the consolation that ‘...the rights

¹²¹ Art 4(1).

¹²² Art 4(2)(d).

¹²³ Art 6(1).

¹²⁴ Art 6(a).

¹²⁵ Art 6(b).

¹²⁶ Art 6(d).

¹²⁷ *Attorney General of Botswana v Unity Dow* [1992]LRC Const. 623.

¹²⁸ Protocol art. 6 (g)- (h); compare to CEDAW art 9.

¹²⁹ CEDAW Draft Protocol art 6 (2)(a).

¹³⁰ Protocol art 6(c).

¹³¹ Karugonjo-Segawa, Roselyn (2005) “The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women” at 23.

of women in marriage and family, including in polygamous marital relationship are promoted and protected'.¹³²

Regarding separation, divorce and annulment of marriage, the Protocol provides that men and women enjoy the same rights and divorce must be by a judicial order; a reiteration of CEDAW's stance.¹³³ The Protocol adds that both men and women have the same rights and responsibilities towards their children when seeking separation, divorce or annulment of marriage.¹³⁴ Furthermore, both women and men are given equal rights in sharing any joint property deriving from the marriage.¹³⁵ Finally, on family issues, the Protocol goes further than CEDAW in that it incorporates dealing with the rights of widows to be free from inhumane, humiliating and degrading treatment; the rights to retain the guardianship of their children; to remarry if they wish and the rights to inherit their husband's property¹³⁶ and to continue living in their matrimonial home.¹³⁷

Like the African Charter, the Protocol shies away from the problem of reservations. This may either mean there is no reservation or that reservation is possible. The Protocol should have been clearer in forbidding reservations, in order to avoid the problems created by CEDAW. Similarly, provisions that allow states to derogate from the rights provided during times of war, public danger or other emergency are lacking in the Additional Protocol. This suggests that there is no instance when a state can derogate from the rights guaranteed in the instrument.

Sub-regional human rights instruments

The instruments considered in this part of the article fall under Kufour's categorisation, namely those sub-regional economic instruments that do not relate directly to human rights. Poverty is a common threat and one of the sources of human rights violations in

¹³² Viljoen, F (2004) 'The African Commission on Human and Peoples' Rights: Introduction to the African Commission and the Regional Human Rights Systems' in C Heyns (ed.) *Human Rights Law in Africa* vol.1

¹³³ Protocol art 7(a) and CEDAW art 16(1)(c).

¹³⁴ Protocol art 7(b) -(c).

¹³⁵ Art 7 (d).

¹³⁶ Art 20(a)-(c).

¹³⁷ Art 21.

Africa. As Viljoen explains, ‘the heart of sub-regional integration would beat in vain if it did not provide a lifeline to those living in poverty’.¹³⁸ Thus, economic integration only makes sense when it guarantees the socio-economic rights of citizens.

Both the Union Economique et Monetaire Ouest Africaine (UEMOA) and the Economic Community of West African States (ECOWAS) also address the socio-economic rights of women and the need to liberate women from discrimination. UEMOA recognises the particular role of women in the social and economic development of the region. Apart from identifying the inferior status of women in African society, UEMOA recommends that states parties should commit themselves to a timetabled plan of action broadly covering social health, education and the economic constraints facing women. It encourages states to take temporary measures to improve the access of girls to educational establishments including those at higher and education technical levels. Member states are categorically enjoined to ratify CEDAW and its Protocol where they have not.¹³⁹ The revised ECOWAS Treaty recognises the promotion and protection of human rights as stipulated in the African Charter. In ECOWAS’s Protocol on Democracy and Good Governance, member states are obliged to eliminate all forms of discrimination and harmful and degrading practices against women. States Parties are to put in place the necessary structures to ensure that women’s, youths’ and children’s education is enabled.¹⁴⁰

Since its priority is to establish a free trade area, the Common Market for Eastern and Southern Africa¹⁴¹ (COMESA) does not address human rights in detail. Article 6(e) of the Treaty recognises the promotion and protection of human and people’s rights in accordance with the provisions of the African Charter. Though couched in commercial language, the role of women in development and business is recognised. Women play a vital role in economic transformation and sustainable growth. It is imperative to involve them in the implementation of programmes for rural areas and improvements

¹³⁸ Viljoen, Frans 2ed (2012) *International Human Rights Law in Africa* 481.

¹³⁹ <http://www.izf.net/isf/Documentation/JournalOfficiel/Afriqueouest/de99/Rec_03_99.html> (accessed on 21 May 2014).

¹⁴⁰ Protocol to the ECOWAS Treaty on Democracy and Good Governance. Protocol A/SPI/12/01 arts 33-35, 40 and 43.

¹⁴¹ The Common Market for Eastern and Southern Africa established in 1993 is the largest economic community in Africa. It replaced the Preferential Trade Area for Eastern and Southern Africa in 1994.

in the informal sector.¹⁴² Examining the position of women and their right to own land, Päivi Koskinen argues that economic rights guarantee political rights and these rights eventually lead to other human rights, such as the right to health and the right to food.¹⁴³ Therefore, member states should eliminate discriminatory regulatory frameworks and customs which prevent women from owning land and other assets.

Customary land law systems across Africa do not favour women; many women own property only at the pleasure of their husbands. Art 154 of the COMESA Treaty attacks the root of this culture. The integration of women into economic decision-making requires the acquisition of the necessary skills, education and capacity development. Necessary changes must be implemented in educational and training strategies to include the needs of women.¹⁴⁴ COMESA Treaty¹⁴⁵ is premised upon ‘adherence to universally acceptable principles of good governance . . . observance of human rights and social justice’. Articles 121(a)-(b) in agreement with the previously agrees with the earlier discussed arts 2(f) and 5 of CEDAW that member states should abolish legislation and discourage customs that are discriminatory against women. In addition, member states should take other measures in order to eliminate prejudices against women and promote the equality of the female gender in relation to that of men in every aspect of life.¹⁴⁶

The Declaration on Gender and Development (1997)¹⁴⁷ and the Addendum to the SADC Declaration on Gender and Development, namely the prevention and Eradication of Violence Against Women and Children (1998)¹⁴⁸ by the Southern African Development Community (SADC)¹⁴⁹ both proscribe discrimination on the basis of sex. The 1997 Declaration, in agreement with CEDAW, calls for ‘repealing and reforming all laws, amending constitutions and changing social practices which

¹⁴² See the Treaty Establishing the Common Market for Eastern and Southern Africa art 154

¹⁴³ Ibid.

¹⁴⁴ Ibid art 155

¹⁴⁵ Treaty establishing The East African Community 1999 reproduced in Heyns, C (ed) *Human Rights Law in Africa* vol 1 at 634-639

¹⁴⁶ Ibid.

¹⁴⁷ < http://www.sadc.int/files/7613/5292/8380/Declaration_on_Gender_Development_1997.pdf>

¹⁴⁸ <<http://www.achpr.org/instruments/eradication-violence-woman-sadc-addendum/>>

¹⁴⁹ A Southern African regional body of 14 members nations.

will subject women to discrimination, and enacting gender sensitive laws'.¹⁵⁰ It advocates women empowerment through access to and control over resources. The Addendum complements the 1997 Declaration by focusing on violence against woman in both the private and public spheres. The types of violence covered include 'economic deprivation, marital rape, femicide, female genital mutilation, trafficking in women and children, forced prostitution, sexual harassment and intimidation'.¹⁵¹ In North Africa, the document which established the Arab Maghreb Union does not address human rights.¹⁵²

Conclusion

This article has looked at the interplay between African culture and the formulation of women's rights in Africa. In the context of the debate between universalism versus relativism with regards to human rights, the article has attempted to explore whether African regional human rights can rightly be circumscribed within wider international human rights legislation in relations to women's rights. Undoubtedly, the universalism-relativism debate will continue to be part of human right discourse. This debate will never be static and will continue to evolve in response to various political developments and undertones, which are dictated by the necessity for people to interact with and tolerate one another. When universality of human rights are conceived without regards to the cultural beliefs and participation of a particular region or state, such universality will not be acknowledged by states that feel that their opinions have been disregarded. On the other hand, an excessive focus on relativism could lead to denial or violation of rights individuals or minority groups. States must therefore continue to seek a converging point through cross-cultural dialogue.

¹⁵⁰ <http://www.sadc.int/files/7613/5292/8380/Declaration_on_Gender_Development_1997.pdf> para. H(iv)

¹⁵¹ The Prevention and Eradication of Violence Against Women and Children (1998) Available from <<http://www.achpr.org/instruments/eradication-violence-woman-sadc-addendum/>> (accessed on 15 March 2015).

¹⁵² See the Treaty Establishing the Arab Maghreb Union available at <<http://www.maghrebarabe.org/en/conventions.cfm?type=1>> (accessed on 15 March 2013). The aim of AMU is to ensure regional stability and enhanced political coordination among member states. Members are Algeria, Libya, Mauritania, Morocco and Tunisia.

This article has also highlighted the capabilities of the normative frameworks of a number of African regional human rights instruments in the protection of women's rights. The article accentuates the challenges of these instruments to be accepted on the wider international stage and also reflecting the collective regional identity and protect cultural integrity within a framework of promoting human rights.

To an appreciable extent, CEDAW has set a standard which surpasses its predecessors in protecting women's rights on an international level. CEDAW adopts a holistic approach by focussing on discrimination against women, emphasising that women have suffered, and continue to suffer from various forms of discrimination because they are women. CEDAW imposes a legal obligation on states parties to protect, respect and promote the rights to non-discrimination and to ensure the development and advancement of women in order to improve their position to one of *de jure*, as well as *de facto*, equality with men. Impressively, all but two African states, namely Sudan and Somalia, have ratified CEDAW. In the context of CEDAW, African regional human rights instruments do not retreat from the concept of the universality of human rights; instead there is a concomitant rejection of relativism and this enriches the human right corpus on the continent of Africa. These instruments decry all forms of discrimination against women and advocate concrete agendas for women emancipation. The influence of CEDAW on the adoption of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa cannot be overstated. The Protocol is blunt in its eradication of cultural stereotypes; customs and traditions, which can only be respected where they do not infringe on the rights of African women in any guise. Without doubt, there is a clear cut convergence between the approach of CEDAW and African human rights systems with regards to women's rights.

It is trite that the normative recognition of (women's) rights does not always mean that the intended beneficiaries actually get to enjoy their rights. This doubt is compounded by the politics of multicultural and multi-ethnic societies can act as a 'yoke' on African human rights system. Cultural practices are deeply entrenched and most states are still reluctant or are 'dragging their feet' in adopting the appropriate measures required at both regional and international levels. It is through genuine commitment, which can be assessed through law making, judicial decisions and policy executions, that required changes can be effected. There is a need to interpret these instruments as living

instruments. Legislative bodies must purposely work towards aligning their laws with regional and international laws while judicial authorities, in good faith, take note of human rights decisions in other countries in promoting women's rights in their courts. In addition, since most women's rights violations happen in the private sphere, the usefulness of continuous education comes to the fore. Education becomes a vital tool in changing the orientation of both the 'preys' and the 'predators'. Some perpetrators do not conceive their acts to be a violation of human rights, while their 'victims' regard the status quo as acceptable. Public education and public participation in human rights create the space for intra-community dialogue.

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