

**Re-envisioning Gender justice in
African customary law through
traditional institutions**

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1. INTRODUCTION

Securing gender justice - gender equality - between the sexes in a cultural milieu elicits much debate among policymakers, human rights activists and traditional institutions. This paper discusses the attempts that have been made to protect the rights of women through national legislation and international human rights instruments, and argues that such attempts are inappropriate and ineffective within African traditional societies. Legislation as a tool to reform societal relations in diverse traditional African communities hampers the development of indigenous or customary law.

The authors examine the four key issues that constantly arise in this debate: gender justice and equality as a right and value, marriage, access to justice, and legislation as a tool for ensuring gender justice. It is argued that traditional systems are equal to and even surpass the national legislation and universal human rights instruments usually invoked by some scholars and human rights and gender activists.

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2. THE ISSUE OF GENDER JUSTICE AND EQUALITY

In any rights-based discourse, gender justice or gender equality (used interchangeably in this paper) is a right and value. In many post-colonial African national constitutions, the right to equality is clearly provided for. For example, section 9 of the South African constitution provides that:

- Everyone is equal before the law and has the right to equal protection of the law.
- Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative measures designed to protect or advance a person or categories of person, disadvantaged by unfair discrimination, may be taken.
- The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth...

This comprehensive provision has been hailed as the most progressive of any constitution in the world today. The other two subsections of the provision provide for vertical application of the right (against the state) and horizontal application (against private persons).

Over and above this prohibition of discrimination, subsection 2 requires that legislative measures be taken to ensure full enjoyment of the right. The implication is that there may be situations when these provisions are insufficient. This is evident in many cases dealt with by the constitutional court

such as: *President of the Republic of South Africa v Hugo*³ where the court held that it is discrimination to deny fathers in prison the opportunity of being a primary caregiver for children under the age of 12. However, such discrimination is not unfair. Justice Mokgoro, in her dissenting judgement, held that it was unfair discrimination based on gender roles and stereotyping. Clearly, this case points to equality as a right, but then considers that for substantive equality to be achieved, perhaps some kinds of discrimination are not unfair. Simply put, this case not only illustrates the huge difficulties involved in proving discrimination, but also reveals inconsistencies in what gender justice and fairness should be. Many of these inconsistencies exist in many instruments⁴ that have, in their provisions, the right to equality as well as the right to cultural life.

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In our opinion, the reason why common law relegates customary law to the level of obscurity is that it envisages customary law as incapable of delivering equity and justice. It is not true that equity and justice are not an intricate part of the lives of the African people. In fact, in the Igbo communities of Nigeria, women, for all intents and purposes, marry women and are referred to as 'husbands' to their spouses.⁵ The society recognises this kind of family and social relations without deeming the relationship to be unnatural. On the contrary, all common law jurisdictions still grapple with ensuring equality between the sexes, especially those with a different sexual orientation. In this instance, it may then be argued that customary law is even more progressive than common law.

Thus, gender justice, while being universally desired, is not alien to customary law as it is practised in many communities across Africa. The customs and practices allow women to be decision makers and community leaders, and adjudicators in disputes about personal and community issues.⁶ The recognition of women as crucial partners in community development is responsible for their being made chieftainesses in their various communities. This was further highlighted by the court in the South African case of *Shilubana and Others v Nwamitwa* (2008) ZACC 9, which held that tribal chiefs have the power to develop customary law to allow the appointment of a woman as a tribal chief. In essence, this case recognises that culture is not static, and thus the roles of traditional institutions in developing their own system to benefit them cannot be overlooked. Therefore, gender justice within the customary law milieu is inevitable as practices are bound to incrementally change.⁷ Global thoughts on gender justice and human rights within customary law system demand local implementation, which only resides with traditional institutions.

3. THE ISSUE OF MARRIAGE

The idea that marriage within an indigenous law system deprives a woman of her rights as equal partner in the marriage have been made by authors, rights activists and civil society. It has been argued that women lack substantial equality and are mere chattels for men in society. In order to ensure that women become equal partners in marriage, several actions are taken by government by way of legislative measures to correct this perceived imbalance. In South Africa, for instance, the Recognition of the Customary Law Marriages Act 120 of 1998, which came into force on 15 November 2000, sought to remove legal and economic inequality which was seen as an impediment to equality between partners in marriage. In terms of the Act, the definition of marriage, its recognition and validity, personal and proprietary consequences, and the provision for dissolution, is the same as the provisions of common law, which in our view are merely an importation of common law into an indigenous law system. In fact, the Act introduced elements such as the matrimonial property regime, rescission, variation or suspension of orders, and an accrual system, in which either of the spouses has the opportunity to share in the profits made to the estates during the marriage.⁸ These elements were previously unknown and so are 'foreign' under customary law or indigenous law (the terms are used interchangeably in this paper). The question that should be asked is how would the accrual system operate in a union that is communally-based as opposed to the individualistic approach of a common law system? When marriages are conducted in an indigenous law system, the woman becomes part of a family group and clan. She is entitled to farm lands for growing cash crops, and agricultural trees. In the case of divorce, neither spouse has a claim to the other's property which was acquired during the marriage, according to Igbo custom.⁹ So, in actual fact, the accrual system of sharing property is irrelevant and unnecessary as far as indigenous law systems are concerned. This is true of certain interpretations given by the courts of the proprietary consequences at the dissolution of a customary law marriage. For example, in Nigeria, in terms of applying customary law, the repugnancy doctrine, according to section 14 (3) of the Evidence Act, provides that 'any custom relied upon in any judicial proceedings shall not be enforced as law if it is contrary to public policy, and is not in accordance with natural justice, equity and good conscience'.¹⁰ The courts incorrectly interpret this section in ways that are detrimental to women, despite the fact that this is aimed at ensuring gender justice. Contributions made by the woman during the subsistence of the marriage are now quantified in a manner not envisaged under customary law, which results in the woman being unable to prove her worth. Under a customary law system, the non-judicial method of dissolving marriage is considered by the families, and in those circumstances, appropriate compensation is made to the woman.¹¹

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Where a woman alleges that she has been abused in her home by her husband or his relations, she returns to her family home. She is only allowed to come back to her husband's home after he (the husband) in the company of his relations come to appeal to her and her family with items such as traditional drinks (notably locally made gins), items of clothing, goats or chickens, depending on the gravity of the alleged abuse. This is in line with the reconciliatory nature of justice in the indigenous law system. In the Igbo land of Nigeria, the general saying regarding the position of women in marriage is that *nwanyi obi oma na erite ihe n'aka di ya* (literally means that a good woman receives many gifts from her husband).¹² It follows that traditional institutions do have the basic tenets of gender justice. It is therefore unwarranted that legislation should be used as a reformatory tool when traditional institutions are better positioned to deal with change or modifications. In our view an indigenous law system is well-suited to develop practices acceptable to the people, and has ensured - and will continue to ensure - gender justice.

The main issue is simply the complications brought about by legal pluralism, which has created limited access to justice for both men and women in Africa

4. THE ISSUE OF ACCESSING JUSTICE

One of the contentious issues among scholars and human rights activists is that of women being able to access justice in the same way as their male counterparts. The main issue is simply the complications brought about by legal pluralism, which has created limited access to justice for both men and women in Africa. Most African countries retained 'received' common law from the colonisers alongside the customs and cultures of the people, as embodied in their various indigenous or customary laws. In some cases, a variant of customary law is located among those countries with Islamic influence. The challenges experienced by many include internal conflict of laws, matters of jurisdiction, and the forms of law that deal with personal law issues that usually lead to consequences not envisaged by parties to customary law practices. In Nigeria, for example, the establishment of customary law courts has not been able to bring about justice, especially for women in cases of succession and inheritance. The customary law courts are serviced by members of the legal profession not trained in customary law administration.¹³ So, cases that would have been mediated upon by the traditional court system administered by the people are adjudicated on by poorly trained personnel. In the case of *mojekwu v mojekwu*, the applicant sought the rule of primogeniture to be declared unconstitutional to allow for inheritance from the estate of the deceased father. The case was only concluded after 30 years in the Court of Appeal, clearly indicating the inherent lack of urgency in the administration of justice in the common law system. Had this case been allowed to be solely determined by the traditional justice system, it would not have lasted as long as it did.

In South Africa, the situation is somewhat more complex in that the constitution guarantees equality as a right and a value.¹⁴ This is in response to the history of

racial segregation and the need to create an egalitarian, non-sexist, non-racial society. Thus in terms of issues arising from customary law, it is adjudicated upon based on interpretations of statutes that differ remarkably from the living law of the people. There is a distinction between 'official' customary law and 'living' customary law. The 'official' customary laws are those contained in legislation and precedents, while 'living' customary laws are those that are actually observed by the communities. The South African constitutional court has been forthright in recognising the notion of living law but, regrettably, the outcome of the cases in reality is far from achieving the desired objective.¹⁵ For example, the *Bhe* case highlighted the issue of the notion of 'living law' and also decried the distortion of core elements of customary law as well as the inability of the system to develop from within due to past influences and distortions.

In our view, it is inappropriate to impose pieces of legislation that are ill-suited for indigenous law and its development

Justice within the indigenous or customary law system is reconciliatory and timely. This is based on the assumption that the interests of the community as a whole are paramount. In other words, every adult member of the community has a stake in maintaining social cohesion. It is largely based on this concept of communal healing that the Rwandan people constituted the *gacaca* courts to deal with alleged perpetrators of the horrifying 1994 Rwandan genocide.¹⁶ The recognition by the people of this form of justice was not only to punish the offenders, but ensured that both victims and perpetrators actively participated in dispensing justice. Under this forum, men and women became equal partners in determining the process for the collective healing of the people of Rwanda. Without doubt, the case clearly highlights the role of gender and the relevance of the traditional courts system as a means of dispensing justice in modern-day Africa.

5. LEGISLATION AS A TOOL FOR ENSURING GENDER JUSTICE

In most societies, enacting pieces of legislation is considered the best tool for maintaining social cohesion and achieving gender justice. Many governments have employed this model in such important areas as marriage and land. The state, through its agents, protects its citizens in any given society. In terms of international law, the state as a party to the instruments is also obliged to respect, protect and fulfill human rights. This obligation goes a step further, requiring that states 'take steps including adopting legislative measures to the maximum available resources' to ensure the protection and enforcement of human rights in their respective countries.¹⁷ Is legislation appropriate for regulating social relations, particularly in a customary law system where distinctive forms of traditional practices exist? In our view, it is inappropriate to impose pieces of legislation that are ill-suited for indigenous law and its development. For example, in terms of customary law, the nature of marriage is

such that the union is not necessarily that of the two people involved, but a more integrated kind of union between the two families. The consummation of a customary law marriage brings into being reciprocal rights and obligations for which the families are collectively responsible.¹⁸ The families thus have a means of dealing with forms of violation and abuse in a manner that is reconciliatory rather than adversarial, as found in common law courts. Even in cases where changes have been hailed as significantly progressive, the inability to consider the development of indigenous/customary law from within the traditional system is a disaster as regards the preservation of African indigenous law. The Constitutional Court decision in the *Bhe* case is a case in point, where Justice Sandile Ngcobo in the minority judgement highlighted the adverse effect of legislative reform in indigenous law systems.¹⁹

While the argument is that customary law should respect universally held principles of human rights, we argue that the interventions, rather than being cosmetic (a mere importation of common law into customary law practices), should be organic

When the South African Department of Agriculture and Land Affairs sought to provide for land redistribution and security of tenure for previously dispossessed communities, it sent a draft bill - referred to as the Communal Land Rights Act -²⁰ to Parliament. It aims to achieve gender justice, especially in the area of improving security of tenure for women. Under this system, women would be able to acquire land as members of a group. Although the Act intends to support gender equality, certain misgivings have been voiced with respect to the kind of rights it intends to protect. For example, the minister of agriculture and land affairs establishes the process for confirming 'new order rights' based on existing land rights. The only available means for assessing this 'new order rights' is based on 'old order rights', acquired through the possession of 'Permission to Occupy' certificates. These certificates were granted to men as 'heads of household' in keeping with the patriarchal nature of society, as well as colonial land administration that sought to deny Africans land tenure. Clearly, this is a distortion of customary law. More so, it denies women the limited right they had to farm lands for cash crops and extinguishes any rights they might have had under customary law. At the same time, the Act provides men with stronger and absolute right, which they did not have under customary law. Claassens²¹ also reiterated the fact that some pieces of legislation have nothing to do with custom or tradition but rather entrenched key colonial and apartheid distortions, thereby undermining the strength and status of land rights vesting in people, particularly women. In other words, no actual development occurred here; rather common law was incorporated into customary law without due regard to the actual implication thereof. In Africa currently, there are more women-headed households, which challenges the status quo of favouring men.

Thus, while the argument is that customary law should respect universally held principles of human rights, we argue that the interventions, rather than being cosmetic (a mere importation of common law into customary law practices), should be organic. In other words, those practices that do not support gender justice could be mostly changed through the influence of the traditional

institutions; customary law courts and traditional leaders who uphold the values and customs. There have been some developments in the recognition of the need to encourage traditional institutions to activate change from within. These institutions receive legitimacy from their various constituents; therefore there is a need for people to observe new developments from the institutions they recognise and accept if change is to be visible. Rautenbach²² is also of the opinion that traditional institutions could serve as therapeutic agents in dealing with the constant customary law versus human rights debate. Even in instances where it is clear that traditional practices result in fatal health risks, the situation demands modification from within. However, how would this modification occur? What is the standard for modification, and what processes could be employed to achieve the desired outcome for the benefit of the people? We believe that creative ways need to be employed in delineating where gender discrimination under customary law ends, and new forms of gender discrimination in legislative-based reform begin. It is a complex process not usually envisaged by the drafters of legislation, but is a process that is pertinent if customary law is to develop.

We believe that creative ways need to be employed in delineating where gender discrimination under customary law ends, and new forms of gender discrimination in legislative-based reform begin

6. CONCLUSION

In ensuring gender justice/equality, we have shown that substantive equality in marriage, access to and timely dispensation of justice, are found within the indigenous law system. It is argued that legislation as a reformative tool within indigenous systems is inappropriate. Despite the large amount of national legislation that exists in different countries in Africa, women still contend with social and economic inequalities, which are exacerbated by legal (dis) ability. What is required is a return to the basics of the fundamental African system of ensuring justice and equity. There is no doubt that many aspects of people's lives are better protected within indigenous law systems. In instances where discriminatory practices exist, we advocate that changes should and could be sought through education, exchange meetings, awareness and training. This method would invariably modify patterns of behaviour, as well as incrementally develop indigenous law systems.

ENDNOTES

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- 2 Professor of Law, Centre for Human Rights Faculty of Law, University of Pretoria.
- 3 1997 (4) SA 1 (CC).
- 4 Universal Declaration of Human Rights of 1948 provides for equality before the law in art 7 as well as the right to participate in cultural life of the community in art 27 (1), International Covenant on Economic, Social and Cultural Rights of 1966 have the same provision in art 2 (2) and art 15 (1) (a) respectively.
- 5 Ifi Amadiume. 1987. *Male Daughters, Female Husbands: Gender and Sex in an African Society*, Zed Books: London & New Jersey, 17.
- 6 Joseph Therese Agbasiere. 2000. *Women in Igbo Life and Thought*, Rutledge: London, 7.
- 7 Bonny Ibhawoh. 2001. Cultural Relativism and Human Rights: Reconsidering Africanist Discourse 19 *Netherlands Quarterly of Human Rights* (2001) 43-62 at 50.
- 8 Section 7 of the Recognition of Customary Law Marriages Act 120 of 1998 deals with the proprietary consequences, while section 8 deals with a variety of issues such as grounds for dissolution, rescission, variation or suspension of orders. The Act further provides for an accrual system which gives either of the spouses the opportunity to share in the profits made to their estates during the subsistence of the marriage. It also provides for the intervention of the Family Advocate. See also C Himonga, *The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession* (2005) *Acta Juridica* 82.
- 9 M.O.A. Ashiru Gender Discrimination in the Division of Property on Divorce in *Nigeria Journal of African Law*, 51 2 (2007) 316-331 at 320.
- 10 Cap E14 Laws of Federation of Nigeria 2004.
- 11 In the Nigerian case of *Onwuchekwa v Onwuchekwa and Obuekwe* (1991) 5 NWLR (pt 194) 739, the woman failed to prove her contribution to the marriage in a claim that was considered by the Court of Appeal. She ended up with nothing, which would not have been the case if the families had dealt with it.
- 12 Joseph Therese Agbasiere. 2000. *Women in Igbo life and Thought*. Rutledge Publishers: London

- 13 I. O. Agbede. 1991. The Different Systems of Law: Nature and Basis of Conflict of Laws in Nigeria in Yemi Osibanjo & Awa U. Kalu (eds) *Towards a Restatement of Nigerian Customary Law* Ministry of Justice: Lagos, 42- 45 at 44.
- 14 Section 9 of the South African Constitution.
- 15 *Bhe v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Others v President of the Republic of South Africa and Others* 2005 (1) BCLR 1 (CC), Wieland Lehnert 'The Role of the Courts in Conflict between African Customary Law and Human Rights' (2005) 21 *South African Journal of Human Rights* 241-277 at 246. See also W Van der Meide *Gender Equality v Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the 'Official' Version of Customary Law*, 1999 SALJ 112.
- 16 Frans Viljoen. 2007. *Human Rights Law in Africa* Oxford University Press.
- 17 Article 2 (1) of the UN International Covenant on Economic, Social and Cultural Rights adopted on 1966 and came into force in 1976.
- 18 See the South African case of *Mabuza v Mbatha* 2003 (4) SA 218 (C) where these sentiments were expressed.
- 19 *Bhe & Others v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President Republic of South Africa* 2005 (1) BCLR 1 (CC).
- 20 Act 11 of 2004. For further elucidation see Aninka Claassens *Women, Customary Law and Discrimination: The Impact of the Communal Land Right Act* in Christina Murray & Michelle O'Sullivan (eds) *Advancing Women's Rights* (2005) Juta & Co Ltd, Cape Town at 42.
- 21 Aninka Claassens. 2005. *Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act* in Christina Murray & Michelle O'Sullivan (eds) *Advancing Women's Rights: The First Decade of Democracy*, 43.
- 22 Christa Rautenbach, *Therapeutic Jurisprudence in the Customary Courts of South Africa (Traditional Authority Courts as Therapeutic Agents* 21(2005) 2 *South African Journal on Human Rights*.