EDITED BY STEFANIE RÖHRS AND DEE SMYTHE
with Annie Hsieh and Monica de Souza

In search of equality

WOMEN, LAW AND SOCIETY IN AFRICA

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The papers in this volume were written for a workshop convened by the African Network of Constitutional Lawyers' (ANCL's) Women, Equality and Constitutionalism focus group. This inaugural workshop set out to map and record women's choices and experiences with using courts around the African continent to promote gender equality. In particular, we asked participants to document the current legal position in their countries and the strategies that informed the choice of forum in which to claim or enforce these rights. If rights litigation was not considered to be an appropriate route for this purpose, we were interested to learn more about constraints and challenges that women faced when trying to access the justice system. The three-day workshop, held at the University of Cape Town during August 2009, brought together 30 participants from 16 African countries. These included leading academics, gender activists, government officials, judges, lawyers and politicians, including South Africa's former Minister of Justice, Brigitte Mabandla and the UN Special Rapporteur on Violence Against Women, Professor Rashida Manjoo. Participants benefited from the wide range of experiences, legal systems, and cultures and traditions represented in the ANCL.

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Steffi Röhrs and Dee Smythe

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Acronyms and abbreviations

ACHPR	*African Charter on Human and People's Rights*
AFI	Association des Femmes Ivoiriennes (Côte d'Ivoire)
AFJCI	Association of Women Lawyers of Côte d'Ivoire
ANCL	African Network of Constitutional Lawyers
BAA	Black Administration Act 38 of 1927 (South Africa)
CDHCI	Commission on Human Rights of Côte d'Ivoire
CEDAW	*Convention on the Elimination of All Forms of Discrimination against Women*
CEE	Commission for Employment Equity (South Africa)
CEFRD	*Convention on the Elimination of all Forms of Racial Discrimination*
CLAIM	Christian Literature Association in Malawi
CNCA	National Council for Audiovisual Communications (Côte d'Ivoire)
CNP	National Press Council (Côte d'Ivoire)
DHA	Department of Home Affairs (South Africa)
DoJ&CD	Department of Justice and Constitutional Development (South Africa)
EISA	Electoral Institute of Southern Africa
HIV	Human Immunodeficiency Virus
IDEA	International Institute for Democracy and Electoral Assistance
ILPD	Institute for Legal Practice and Development (Rwanda)
INTERIGHTS	International Centre for Human Rights (United Kingdom)
LAC	Legal Assistance Centre (Namibia)
LGBTI	Lesbian, gay, bisexual, transgender and intersex (people)
MLC	Malawi Law Commission
MPA	Matrimonial Property Act 88 of 1984 (South Africa)
MPG	Migration Policy Group (South Africa)
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organisation
OSISA	Open Society Initiative of Southern Africa
RCMA	Recognition of Customary Marriages Act 120 of 1998
SADC	Southern African Development Community
SAPES	Southern African Political Economy Series Trust
SCA	Supreme Court of Appeal (South Africa)
UCT	University of Cape Town
UNICEF	United Nations Children's Fund
USAID	US Agency for International Development

WLC	Women's Legal Centre (South Africa)
WLEA	Women and Law in East Africa Research Project
WLSA	Women and Law in Southern Africa Research Trust
WRAPA	Women's Rights Advancement Protection Alternative (Nigeria)

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INTRODUCTION

In search of equality: Women, law and society in Africa

Dee Smythe and Stefanie Röhrs

The wave of independence that swept through African countries in the 1960s sparked in those countries periods of constitutional change, filled with both turbulence and promise. The creation of these new constitutions reflected the tumultuous political landscape of many African countries at the time.[1] Despite their history of volatility, emerging constitutions inspired hopeful promises of change — particularly for women — with provisions guaranteeing gender equality and access to justice. As modern constitutions and international and regional human rights protocols have emerged over the ensuing decades, constitutional rights have been increasingly viewed as a useful tool for the protection and promotion of women's rights.[2] In the 1990s, women's organisations across the continent pushed for further constitutional guarantees and for the enactment of laws that would give effect to equality rights.[3] More recently, however, these gains, always tenuous, have been under threat. As Sylvia Tamale warns: 'Today, feminist activists around the continent are ironically fighting tooth and nail to halt the changes that are threatening to roll back hard-won gender equity gains and social progress.'[4] The persistent question then is, what actual progress has the last half-century of constitutional development brought in terms of gender equality, and what does gender equality mean when translated to the everyday lives of women on the continent?

With these questions in mind, the Women, Equality and Constitutionalism focus group of the African Network of Constitutional Lawyers (ANCL)[5] convened an inaugural three-day workshop in August 2009. Thirty lawyers from 16 African countries, specialising in women's rights, came together in a meeting that included leading academics, gender activists, judges, lawyers, government officials and politicians, to map and discuss African experiences with the use of law to promote gender equality and women's rights. As a starting point, participants were asked to document the current legal positions and strategies by which women's rights are

claimed or enforced in their respective countries, and to reflect on the constraints and challenges of women's rights litigation. The resultant contributions to this volume provide useful insights into specific women's rights issues arising in seven African countries. Each looks at the causes, context and consequences of women's rights struggles; together they demonstrate how constitutional law penetrates a multifaceted range of women's rights issues. Through them we gain insight into specific issues such as 'property grabbing' in Malawi,[6] women's citizenship rights in Nigeria,[7] the struggle to achieve gender equality within customary marriages in South Africa,[8] and the rise of hate crimes and sexual violence against black lesbians in that country.[9] While some chapters take a bird's-eye view, like Hubbard's examination of Namibian case law in Chapter 1, other authors, like Manzi in Chapter 7, make use of a single case study to illustrate women's daily struggle to enforce their rights. At the same time as providing a perspective on the gains and losses achieved in pursuit of women's rights in particular African countries, the contributions also identify distinct overarching themes and recurring patterns across those countries, which we consider further in this chapter. These include the continued oppression of women through the law itself; the challenges of legal pluralism; the persistent problem of access to justice; the gap between legal protections on paper and implementation of these rights in practice; the limitations of strategic litigation; and the need for other forms of collective activism to advance women's rights.

1 Discriminatory laws

Law is never neutral. Early feminist legal activism focused on the removal of discriminatory laws and later on the passage of new laws that would substantively improve the position of women, particularly through the inclusion of protective measures. In this way, legal activism has moved from 'public issues' relating to voting and citizenship, to property and inheritance rights and into the domestic sphere, where the last two decades have brought remarkable gains in 'private issues', including sexual and reproductive rights and domestic violence.[10] At the same time, there has been substantial focus on making justice systems more accessible to women and to improving outcomes for women engaging with the criminal justice system in particular. Nonetheless, as the contributions to this volume illustrate, despite its powerful potential for advancing and protecting women's rights, law has been and continues to be used as a tool of oppression against women. Even where progressive laws have been passed, their efficacy has been undermined in practice, often through a combination of discriminatory attitudes and institutional incapacity.

A number of landmark cases have been brought before domestic courts on the continent to challenge discriminatory laws. In *Bhe v Magistrate*, *Khayelitsha* the South African Constitutional Court overturned the customary rule of male primogeniture in inheritance,[11] as did the Botswana Court of Appeal in *Ramantele v Mmusi and Others*.[12] In *Unity Dow v Attorney General of the Republic of Botswana*,[13] the same court invalidated provisions of Botswana's Citizenship Act[14] that excluded the children of citizens married to foreign men from Botswana citizenship. Laws that allow citizenship to be passed to children only through their fathers, and those that deprive women marrying foreigners of their citizenship rights, exclude women from a range of political rights, as well as access to social services for themselves and their children. UN Women calculates that while 19 African countries have amended their citizenship laws in the two decades following the decision in *Dow*, and more than 80 per cent of them now provide for both mothers and fathers to pass citizenship rights to their children, fewer than half allow for male spouses to obtain citizenship through their wives.[15] In this volume, Kondowe in Chapter 4 and Ordor in Chapter 8 highlight the impact of this type of discrimination in Malawi and Nigeria, respectively. In both countries only male citizens can marry foreign spouses without risking their citizenship, and their wives can easily acquire local citizenship.[16]

Also in this volume, in Chapter 5 Bahi reflects on the continued prevalence of explicitly discriminatory laws in Côte d'Ivoire. Under the Civil Code men are considered to be the head of the household and, as such, are entitled to administer and dispose of marital property, choose the place of family residence and make parental decisions with regard to the couple's children. The lack of equality guarantees in the Constitution of Côte d'Ivoire makes it difficult to mount a legal challenge. At the same time, while the Ugandan Constitution does protect gender equality, Asiimwe shows in Chapter 2 how the Ugandan Succession Act[17] essentially deprives widows of their property rights, and Manzi shows in Chapter 7 how both the Rwandan Civil Code[18] and the 1999 Matrimonial Regimes Law[19] include provisions that clearly discriminate against women, particularly in divorce settings, despite constitutional guarantees of equality.

State-sanctioned discrimination is a cornerstone of patriarchy, reflecting and justifying women's normative inferiority over centuries. The examples of state-sanctioned discrimination described in this volume highlight the need to remove formal discrimination against women in law and to enshrine gender equality in constitutional rights. Laws that improve the position of women and those that purport to offer some protection are a critical foundation from which to hold state and private actors to account for rights violations—and to invoke the resources of the state in improving the position of women.

2 Legal pluralism

All the countries represented in this volume recognise multiple legal orders. The coexistence of multiple legal systems — common law, civil law, religious laws and customary laws, as well as remnants of colonial and post-independence statutes, precedents, and custom — complicates the administration of justice and makes these legal systems difficult to navigate. In particular, as the contributors to this volume explain, the persistence of codified customary law continues to compromise women's rights, as it is often based on discriminatory patriarchal notions of women's appropriate role in social and family relations, which coincide with deeply vested, male property interests. Asiimwe points out how customary inheritance in Uganda, as in several other African countries, is based on male primogeniture, making it virtually impossible for women to inherit land intestate. In Malawi, Kondowe underlines that, until recently, customary heirs were exempt from prosecution for the crime of property-grabbing although they were the ones most likely to commit it.

In Côte d'Ivoire, the legislature decided to abolish customary law, in the interests of a single legal system. But Bahi tells us that notwithstanding its abolition, people still have recourse to customary law to order their lives and manage disputes. Going further, Tamale warns that 'we must be careful about separating women from the sources of their empowerment, which, more often than not, include customary practices'.[20] In Chapter 8, however, Ordor openly questions whether customary practices can be regarded as a tool of empowerment for women or whether proponents of customary practices succumb to a 'sweeping romanticisation' of such practices. Some states have sought to address the perceived conflict between customary laws and practices and gender equality by providing for their constitution and statutory law to supersede customary law. The South African Constitution, for example, provides as follows in section 211:

> *(1) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.*
> *(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.*
> *(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*[21]

Twenty-one out of 46 African countries have followed this approach, their Constitutions stipulating that customary law is overridden by statutory law and/or the Constitution.[22] While establishing such a hierarchy is an important first step

to deal with the gender inequalities and intersecting forms of discrimination found in other forms of law, it is important to keep in mind that many constitutions do not protect gender equality or a range of other crucial human rights. In such a case the guarantee of constitutional supremacy serves little practical purpose for those wishing to assert their rights against problematic aspects of customary law.

In the customary law arena, we have seen the most important conceptual developments happening in African courts. South Africa's Constitutional Court has developed a strong line of jurisprudence focused on 'living indigenous law', as opposed to official customary law, recognised in that country as being deeply tainted by distortions of both colonialism and apartheid.[23] While it is not easy to prove the content of living law,[24] there is a growing body of evidence suggesting that women are often much better off in terms of social practice than the stereotype of patriarchal customary law would suggest. As Claassens and Mnisi argue, the challenge facing women's rights activists is to protect the space within which these shifts are happening.[25] The Botswana Court of Appeal in *Ramantele v Mmusi and Others*[26] also focused its reasoning on the flexibility of customary law and on its ability to respond to shifting social realities, concluding that:

> *Constitutional values of equality before the law, and the increased levelling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere, demonstrate that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems.*[27]

It is in its potential for reflexivity and its ability to respond to social change that we see the biggest potential for customary law. Codifying customary law removes this flexibility and, as Maluleke (Chapter 3) argues forcefully in respect of customary marriages in South Africa, 'cannot produce social change'.

Amien argues that the relationship between legislation and 'the lived realities of the people that it aims to protect' is equally critical in the context of religious laws, where codification also runs the risk of entrenching discriminatory rules.[28] Contrasting marriage under African customary law and Muslim personal law, Amien makes the point that:

> *In the case of African customary marriages, the need to embody living customary law to ensure that the legislation is responsive to the changing needs of African indigenous communities has been highlighted. In the context of Muslim marriages, it is important to incorporate subsidiary sources of Islamic law into the legislation to enable a process of* ijtihād*. In this way, Islamic law as it pertains to Muslim marriage and divorce can develop … Gendered reform of Islamic law then also*

> *becomes possible, because reliance on the whole body of sources of Islamic law can enable progressive interpretations that will be consistent with gender equality.*[29]

In this volume, Ordor also addresses the challenges that women face in responding to discriminatory religious laws, emphasising the way in which stigma acts to prevent individual women from asserting their rights. She points to the critical nexus between social mobilisation and litigation, emphasising the important mediating role played in Nigeria by the Women's Rights Advancement Protection Alternative (WRAPA), which has convened activists, academics and lawyers in periodic consultations on legal and advocacy strategies in a number of important cases before the Sharia Court of Appeal. In the context of discrimination that is deeply embedded in the social fabric of our lives, the availability of such new communities of association becomes critical in supporting the 'clients' who are brave enough to bring their cases to court and in giving voice to collective concerns.

3 Access to justice and the absence of protection

Violence against women is gender inequality and discrimination writ large. Of 48 countries in sub-Saharan Africa, UN Women reports that only 22 have legislation dealing with domestic violence and only six criminalise marital rape or exclude marriage as a defence against a charge of rape.[30] Yet ironically, there is no doubt that when it comes to *legal* protections many countries can now be considered a safer place for many women. All of the contributors to this volume highlight the introduction of progressive laws in recent years to protect women and provide them with recourse, including laws that address domestic and sexual violence,[31] protect children's rights,[32] enshrine better access to economic opportunities and labour protections,[33] recognise customary marriages and generally prohibit discrimination.[34] Nonetheless, the enactment of progressive laws in itself is ineffective in protecting women's rights where practical barriers continue to prevent the proper implementation of those laws. In many African countries, as Bahi points out, women are therefore faced with the reality of enjoying protection on paper, but not in practice. She questions the benefit of publishing laws in the *Government Gazette* when many women in Côte d'Ivoire cannot read or write and 'when the vast majority of the population does not know what the *Journal Officiel* is and where it is published'. These are real concerns not only in Côte d'Ivoire, where the overall adult literacy is 56 per cent,[35] but also in many other countries in sub-Saharan Africa. Kondowe and Maluleke alert us to the prevalence and impact of other practical challenges such as lack of public transport, limited financial means, unfamiliarity with the law, and the bureaucratic procedures that

prevent women from taking a case to court and leave the majority unable to gain recourse provided for in the laws of their lands.

The practical challenges women face in accessing the justice system are both reflected in and compounded by their marginalisation from other government services. While some countries in sub-Saharan Africa have made significant progress in promoting access to certain services, overall women and girl children continue to be excluded from public services as well as economic and political participation. For example, while equal or even higher numbers of girls than boys are now enrolled in primary education in Uganda, South Africa, Malawi, Rwanda and Namibia, countries such as Côte d'Ivoire and Nigeria continue to have lower enrolment rates among girls in primary school.[36] Furthermore, existing positive trends in primary school enrolment in Uganda, South Africa, Malawi, Rwanda and Namibia are reversed when we look at girls' enrolment rates in secondary schools and institutions of higher education. Except for Namibia, the countries written about in this volume show lower rates of girls' enrolment in secondary (Uganda, Malawi, Côte d'Ivoire, Nigeria) and tertiary education (Uganda, South Africa, Malawi, Côte d'Ivoire, Nigeria).[37] In Rwanda, enrolment rates for tertiary education are not yet equal, but women already represent 40 per cent of students at this level of education.[38]

Facilitating access to education for girls can act as a powerful gender equaliser that may reverse some of the current inequalities seen in adulthood. In all seven countries discussed in this volume, more adult women than men are illiterate.[39] It is therefore not surprising that even though some women's economic positions may have improved over the past years, in South Africa, Namibia, Uganda, Nigeria, Malawi and Côte d'Ivoire women still have higher rates of unemployment than men, they earn less for similar kinds of work and their share in wage employment in the non-agricultural sector is lower.[40] In sub-Saharan Africa, the lack of women's (equal) participation in economic opportunities may, at least to some extent, be caused by the type of work that is available to them. For instance, in Namibia, besides commercial agriculture, industry is dominated by mining and fishing,[41] both of which are industries that traditionally attract male workers. In Rwanda, however, since 2000 the employment rate is higher for women than men, which is reflected in 2010 female employment rates of 85.2 per cent compared to an employment rate of 83.2 per cent among men.[42] However, despite high participation in the labour market, the majority of Rwandan women still live in extreme poverty and 62 per cent of households headed by women live below the poverty line, compared to 54 per cent of male households.[43]

In addition to the improvements in access to education and economic participation, Rwanda has made considerable progress in promoting women's

political participation. In parliament, women represent 35 per cent of senators and 56 per cent of deputies, with more than half of parliamentary seats held by women.[44] In the judiciary, women represent 43 per cent of Supreme Court judges, 25 per cent of High Court judges and 43 per cent of judges in the Commercial High Court.[45] The reason for women's political participation may well be the constitutional provisions that stipulate that women should represent 30 per cent of incumbents 'in all leadership positions in the country'.[46] Despite these positive developments, Manzi's chapter suggests that many women have thus far not benefited from female members of parliament and female judges, but instead continue to struggle to enforce their basic human rights.

4 Strategic litigation for women's rights

There is growing recognition that states must take responsibility not only for passing appropriate laws, but also for ensuring that they are effectively and equitably implemented.[47] In response to this challenge, the contributors to this volume suggest strategies to address women's rights violations, often based on years of experience in the field. Several explore the question of whether courts can advance women's rights. Given a context of limited resources, can public interest litigation improve women's lives? Some argue that courts are ill-suited to advance women's rights because judges and lawyers are mostly male and belong to the social elite; they are therefore more interested in representing and asserting vested interests than addressing the needs of marginalised groups such as women.[48] Furthermore, critics highlight that the law itself is an inappropriate tool to advance women's rights because it is dependent on social structures that serve elite (male, wealthy) interests and, as such, reflects prevailing power-relations.[49] At the heart of this critique is the fear that talk of rights fails to change women's daily circumstances,[50] instead legitimising law and depoliticising the struggles of those at the margins.[51]

Gloppen argues that, at least to some extent, South Africa has had a different experience.[52] The South African Constitution shows that the law can be a powerful tool in advancing the rights of people at the margins, especially women.[53] In South Africa, legal mobilisation and strategic litigation have led to jurisprudence that protects the rights of vulnerable groups.[54] Several decisions of the South African Constitutional Court are particularly relevant for the protection of women's rights. In *S v Baloyi*[55] the Constitutional Court found that the state has a constitutional duty to provide effective remedies against domestic violence; in *Minister of Health v Treatment Action Campaign*[56] the Constitutional Court decided that HIV-positive pregnant women have a right to receive antiretroviral medication to prevent mother-to-child transmission of HIV; and in *Bhe*[57] the Constitutional Court advanced the

right to equality by developing the African customary law of intestate succession to include the right of South African women to inherit. The discussions in this volume reflect some of the feminist debates regarding strategic litigation. Ordor argues that strategic litigation may be particularly valuable for enforcing women's rights that affect large groups of women, even more so in 'the context of competing demands for limited resources, which characterise developing societies in Africa'. In her chapter, she shows how strategic litigation has been successfully used in Nigeria to overturn two convictions for adultery based on religious law and a judgment on women's inability to inherit under customary law. Litigation has also been used in Malawi, as described by Kondowe, to protect women from unfair dismissals and to ensure compensation for sexual harassment. Related to strategic litigation is the emergence of new venues in which to pursue women's rights. Isaack explains in Chapter 6 how the Equality Courts in South Africa present 'a unique opportunity for lawyers to litigate equality cases without having to rely directly on … expensive constitutional litigation'.

Despite these positive examples, certain criticisms regarding strategic litigation still apply. Strategic litigation has only a limited effect on women's rights; it may be helpful against public-sphere violations of women's rights, but it remains largely unable to protect against rights violations in the private sphere.[58] Furthermore, while the South African experience shows that public interest litigation organisations *can* outperform the state, the imbalance in resources, such as skilled staff and funding, between public interest litigation organisations and government lawyers may jeopardise the outcome of the litigation.[59] As a result, litigation can backfire by increasing negative precedents and reinforcing a lack of respect for women's rights in society. These limitations of strategic litigation need to be weighed against its benefits. Strategic litigation, if successful, has direct and indirect benefits. Among the direct benefits is the empowerment of individual clients or communities through the assertion of their rights. In addition to benefits for clients, strategic litigation has the potential to advance the rights of large groups of women. If successful, strategic litigation may create precedent, which could result in changes to laws and government policies, and could form the basis for future women's rights claims. Furthermore, successful litigation may shape the discourse of society and create acceptance of certain values.[60] But even if unsuccessful, strategic litigation may have positive indirect effects. Reflecting on the post-colonial experience in India, Kapur and Cossman suggest that strategic engagements with law should not be measured in terms of winning or losing a case; instead, the law offers a 'democratic space for women's participation in political, social, economic and cultural life'.[61] In this context, engaging with law is in itself 'part of an effort to challenge dominant meanings, and the construction of women therein'.[62] Similarly, MacKinnon argues

that 'relinquishing the terrain of law would be to surrender a powerful site in discursive struggles for ideological hegemony'.[63]

In Chapter 1, Hubbard provides a compelling in-depth analysis of the gains and losses achieved through strategic litigation in Namibia, discussing a number of cases on a wide range of legal matters, including the right to education, inheritance rights, sexual harassment, marital power and the state's duty of care, all litigated by the Legal Assistance Centre (LAC). While many of these cases have been successful, the cases presented by Hubbard also provide an overview of the drawbacks of strategic litigation. Two key examples are the lengthy nature of judicial proceedings, which can result in a case being overtaken by real life events or law reform and the challenge of enforcing judicial decisions. At the same time, judicial decisions can be blocked by recalcitrance on the part of the executive to change policy or the legislature to enact new laws.[64] In Uganda, for example, as Assimwe points out, strategic litigation has successfully challenged the Succession Act as unconstitutional, but the legislature has been reluctant to amend or replace the law. The lack of legislative response to court rulings creates a legal vacuum in which women's specific rights or status remains uncertain.

In light of the limitations of strategic litigation, women must turn to other strategies for change. These include political and social mobilisation and ensuring that victims are adequately and appropriately recompensed though the funding of counselling programmes, shelters and education. As highlighted by contributors to this volume, social activism and advocacy are powerful means by which to pressure lawmakers into drafting and implementing necessary laws. Ordor reminds us of the unprecedented mass action of Nigerian women in 1914, 1929 and 1947 against new taxation schemes that affected women disproportionately. In her opinion, these protests 'uncovered a capacity and readiness on the part of the women involved' that is missing in today's awareness campaigns, legal advocacy and strategic impact litigation. She recommends that women at all levels reunite in women's associations to draw on powerful associational activism, rather than fragmented and individualised approaches. Hubbard argues that cases for strategic litigation should be selected carefully and that litigation should be accompanied by sustained advocacy efforts and, Ordor would add, coalition building.

5 Conclusion

In light of the above discussion, Tamale is right when she argues that:

> *Thus far, the blunted tools of human rights have had a very limited effect on the lives and realities of African women. While the top-down constitutional and legal framework is necessary as a foundational touchstone of women's rights, our activism*

> *must begin from the assumption that bottom-up approaches anchored in local cultures and traditions are more likely to succeed than those working from without.*[65]

Does this mean that feminist lawyers should refrain from pushing for law reform and litigation because the resort to law only further legitimises an inherently gendered and unjust system?[66] On our reading, the authors writing in this volume would argue that although the success of law reform and strategic litigation has been limited and although the law alone may be insufficient to advance women's rights, selective and strategic litigation can be a useful tool for testing the potential of law.[67] Writing from their experience in the Women's Legal Centre, Martabano and O'Sullivan point out that:

> *… sometimes it is easier for controversial women's rights issues to be decided by the courts rather than through legislation, particularly where there are powerful constituencies such as traditional or religious leaders involved, and limited scope for reaching agreement in respect of proposed reform.*[68]

Apart from the potential direct benefits of litigation to clients and their communities of having their rights vindicated, there is the benefit of hearing your concerns given voice. In that process, judges are made more aware of women's rights issues and precedents develop. Constitutional protections can have a cascading beneficial effect on the laws and lower courts, and create scaffolding upon which future claims may be built.[69] Critically, laws shape social discourse,[70] so that their articulation and their vindication can have important symbolic value, acting as a focal point for political and social mobilisation.[71] Law alone cannot address centuries of inequality, but this volume shows, through a series of case studies, that it is a useful and important tool for challenging patriarchal discourses and practices, and for providing us with possibilities for advancing women's rights in Africa.

Endnotes

1 During colonial rule, early constitutions were ultimately replaced by what were promoted as more 'progressive' constitutions granting limited rights to the indigenous population. Independence, however, overturned these last colonial constitutions. These 'independence constitutions' also often had a short shelf life as political conflict and the frequent succession of new governments brought about one new constitution after another. Nigeria, for example, had the 'Clifford Constitution' of 1922, the 'Richard Constitution' of 1946, the 'Macpherson Constitution' of 1951, the 'Lyttleton Constitution' of 1954, all identified by the name of the Governor-General of the period, and, finally, the 'Independence Constitution' of 1960. But the country's independence did not put an end to constitutional development. Instead, the country saw the enactment of the 'Republican Constitution' of 1963, the

'Presidential Constitution' of 1979 and, most recently, the 1999 Constitution. See Ordor, Chapter 8 in this volume.

2 Irving, H. (2008). *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design.* New York: Cambridge University Press.

3 Trip, A.M., Casimiro, I., Kwesiga, J. & Mungwa, A. (2009). *African Women's Movements: Changing Political Landscapes.* Cambridge: Cambridge University Press.

4 Tamale, S. (2006). 'African feminism'. Presented at the African Feminist Forum, African Women's Development Fund, 5.

5 The ANCL, an affiliate of the International Association of Constitutional Law, was first established in 1997 and, after a period of inactivity, relaunched in April 2007 in Nairobi. It is an association of judges, lawyers, academics, activists, research institutes and bar associations interested in the development of constitutionalism in Africa. Further information is available at www.ancl-radc.org.za.

6 Kondowe, Chapter 4 in this volume.

7 Ordor, Chapter 8 in this volume.

8 Maluleke, Chapter 3 in this volume.

9 Isaack, Chapter 6 in this volume.

10 UN Women. (2012). *In Pursuit of Justice: Progress of the World's Women 2011–2012* Annex 3 (Women's reproductive and health rights) and Annex 4 (Violence against women). New York: UN Women.

11 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC).

12 *Ramantele v Mmusi and Others* CACGB-104-12.

13 *Unity Dow v Attorney General of the Republic of Botswana* 1992 BLR 119 (CA).

14 Act 25 of 1982.

15 UN Women (n 10), 29.

16 Section 9 of the Malawi Citizenship Act; section 26 of the Nigerian Constitution.

17 Succession Act (Amendment) Decree No. 22/1972.

18 Civil Code Book I, 42 of 1988.

19 Law to Supplement Book I of the Civil Code and to Institute Part Five regarding Matrimonial Regimes, Liberalities, and Successions 22 of 1999.

20 Tamale (n 4).

21 Constitution of the Republic of South Africa, 1996.

22 Trip et al. (n 3), 108.

23 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); *Bhe* (n 11); *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC); *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

24 Bennett, T. (2004). *Customary Law in South Africa.* Cape Town: Juta.

25 Claassens, A. & Mnisi, S. (2009). 'Rural women redefining land rights in the context of living customary law', *South African Journal on Human Rights*, 25: 491–516. See also Claassens, A. & Smythe, D. (eds). (2013). *Acta Juridica: Marriage, Land and Custom*. Cape Town: Juta.

26 *Ramantele v Mmusi and Others* (n 12).

27 *Ramantele v Mmusi and Others* (n 12) at para 80.
28 Amien, W. (2013). 'Reflections on the recognition of African customary marriages in South Africa: Seeking insights for the recognition of Muslim marriages' in A. Claassens & D. Smythe (eds). *Acta Juridica: Marriage, Land and Custom*. Cape Town: Juta.
29 Amien (n 28).
30 UN Women (n 10), 136.
31 Gender-Based Violence Law 59 of 2008 (Rwanda); Cross River State Prohibition of Domestic Violence and Maltreatment against Women Law 10 of 2004 (Nigeria), the Ebonyi State Protection against Domestic Violence and Related Matters Law 3 of 2005 (Nigeria), Protection against Domestic Violence Law 2007, Lagos State (Nigeria).
32 Child Rights Act 2003 (Nigeria).
33 Employment Act Cap. 55:02 of the Laws of Malawi; Labour Act of 1992 and 2007 (Namibia).
34 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (South Africa).
35 UNICEF (n 2).
36 Hausman, R., Tyson, L.D. & Zahidi, S. (2013). *The Global Gender Gap Report 2012.* Geneva: World Economic Forum, 152, 244, 268, 316, 342; Rwandan Ministry of Gender and Family Promotion. (2011). *Strategic Plan for the Integrated Child Rights Policy in Rwanda,* 27.
37 Hausman et al. (n 36), 50, 244, 268, 316; Rwandan Ministry (n 36), 27.
38 Rwandan Ministry (n 36), 27.
39 Hausman et al. (n 36), 50, 152, 244, 268, 316. According to these figures, the gender difference in rates of literacy is minimal in Namibia.
40 Hausman et al. (n 36), 152–153, 244–245, 268–269, 316–317, 342–343. Rwanda is not reviewed in this report. Furthermore, the report lacks data on rates of unemployment for women and men in Côte d'Ivoire.
41 African Development Bank. (2006). *Republic of Namibia: Country Gender*. Abidjan: African Development Bank, 12.
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43 Registre, J. (2011). 'Women in Rwanda: Beyond their high representation in government', *Notes From the Field,* 24 June, available at http://wfwnotesfromthefield.wordpress.com/2011/06/24/women-in-rwanda-beyond-their-high-representation-in-government accessed 2 September 2013).
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45 UNDP. *Human Development Report 2013* (n 44).
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48 Gloppen, S. (2008). 'Social rights litigation as transformation: South African perspectives', in P. Jones & K. Stokke (eds). *Democratising Development: The Politics of Socio-economic Rights in South Africa*. Amsterdam: Nijhoff.
49 Munro, V. (2007). *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory.* Oxford: Hart Publishing, 64; Smart, C. (1989). *Feminism and the Power of Law.* London & New York: Routledge, 5: 'in accepting law's terms in order to challenge the law, feminism always concedes too much'.
50 Palmer, S. (2002). 'Feminism and the promise of human rights: Possibilities and paradoxes', in S. James & S. Palmer (eds). *Visible Women: Essays on Feminist Legal Theory*. Oxford: Hart Publishing, 96.
51 Munro (n 49), 64, quoting Glendon, M. (1991). *Rights Talk: The Impoverishment of Political Discourse*. London: Free Press, 14. Minow, M. (1987). 'Interpreting rights: An essay for Robert Cover', *Yale Law Journal* 96: 1860.
52 Munro (n 49).
53 The South African Constitution includes various provisions directed at protecting women's rights, including the right to gender equality (section 9(3)), the right to be free from all forms of violence from either public or private sources (section 12(1)*(c)*), the right to access reproductive health care services (section 27(1)*(a)*) and the right to make decisions concerning reproduction (section 12(2)*(a)*).
54 *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001(1) SA 46 (CC); *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005 ZACC 19; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 ZACC 1.
55 *S v Baloyi* 2000 (1) BCLR 86 (CC).
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61 Kapur, R. & Cossman, B. (1996). *Subversive Sites*. New Delhi: Sage Publications, 285.
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66 Munro (n 49) 64.
67 Vanessa Munro makes a similar point regarding feminist engagement with law in

general, arguing that it 'encourages feminists to focus attention not on whether using law is good or bad in the abstract, but rather on whether law reform in this specific time and context will or will not be productive'. Munro (n 49), 73.

68 Martabano, A. & O'Sullivan, M. (2004). 'Three steps forward, two steps back: Legal activism for women's rights in South Africa', *Agenda* 60: 61.

69 Marcus & Budlender (n 59), 28.

70 Kapur & Cossman (n 61), 285.

71 Kapur & Cossman (n 61), 315. Catherine MacKinnon argues that 'one result of this turning away, however realistic its reasons, is that male power continues to own law unopposed'. MacKinnon, C. (2005). 'The power to change', *Women's Lives, Men's Laws.* Cambridge: Harvard University Press, 107.

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CHAPTER 1

Challenges in litigation on gender issues in Namibia

Dianne Hubbard

1 Introduction

While gender discrimination is rife in Namibia, public interest litigation has not to date been a key strategy in redressing this problem. Namibia has thus far had only a few test cases that have produced good jurisprudence on gender issues, particularly in the area of family matters. Although litigation has the potential of directly advancing gender equality by developing the law, litigation also has inherent limitations. Litigation in gender matters entails immense social pressures; it is difficult to bring legal action against a member of one's own family or community and still more difficult to maintain such an action over a lengthy time period until a case is finally concluded by the court. In practice, legal disputes therefore often result in a settlement before the case is heard. Even if the case is not resolved by settlement, litigation involves uncertainty: a judgment may or may not be what was anticipated and the case may consequently fail to have the desired impact. It is thus not surprising that even though there are still a number of Namibian laws that seem to involve unconstitutional gender discriminatory provisions — such as the grounds and procedure for customary divorce and certain rules of inheritance — few of these have been successfully challenged in court.

In an effort to explore the strengths and limitations of litigating gender issues in Namibia, this chapter analyses the impact of some key court cases on gender and related issues since independence,[1] with an emphasis on public interest cases on gender brought by the Legal Assistance Centre.[2] In light of the limitations of litigation, the Legal Assistance Centre has focused on research and advocacy geared towards law reform on gender issues rather than on litigation. The Namibian women's movement has been remarkably successful in changing the legal landscape for women through law reform. There has been a certain degree of government receptivity to law reform in this field, inspired by strong provisions

on gender equality in the Namibian Constitution — but strong advocacy by the women's movement has been instrumental in giving life and substance to the underlying constitutional framework. Many of the law reforms that have been enacted have involved hard-fought campaigns fuelled by demonstrations, marches, petitions, newspaper articles, radio programmes and television appearances.

This emphasis on advocacy should not be construed as suggesting that there is no role for litigation. Where successful, litigation can be a powerful tool, creating legal precedent that has an effect beyond the individual complainant. Nevertheless, the following review of some of the key court cases on gender and related issues in an independent Namibia indicates that, despite a few notable successes, to date litigation has not been as successful, generally, as advocacy in the gender terrain. This chapter looks at some of the cases that have and have not produced the desired results in an effort to explore how litigation might be used more successfully for gender issues in conjunction with various forms of advocacy. The chapter is organised into themes based on some of the challenges encountered in the gender-related cases.

2 Challenges

2.1 Lengthy court cases

Court cases are often lengthy processes that can be overtaken by real-life events. This problem can be encountered in gender-related cases that turn on pregnancy issues, such as abortion or discrimination on the basis of pregnancy, where it is possible for the issue in dispute to become moot before any decision is made by the court. An example of lengthy court proceedings leading to mootness was a court case challenging school policy on learner pregnancy.

Utjiua Karuaihe was a student at Windhoek High School in Grade 11, aged 17, when she became pregnant in March 2004. After passing her final examinations, she gave birth in December 2004 and sought to continue her studies when the new academic year commenced in January 2005. Acting on behalf of Utjiua as a minor, her mother requested Utjiua's immediate readmission to the school. She explained that the extended family would support Utjiua's return to school by caring for the baby during her absence. Utjiua planned to express breast milk to be given to the baby during her time at school, so that there would be no nutritional disadvantages from the arrangement, and she would be able to spend time with the baby after school hours.

Windhoek High School refused to readmit Utjiua for the 2005 academic year on the grounds that the Policy on Pregnancy amongst Learners approved by Cabinet allowed pregnant learners to return to school only after spending at least a

year caring for the baby. Attempts to appeal against this decision to the Permanent Secretary and the Under-Secretary of the Ministry of Basic Education, Sports and Culture proved fruitless.

In January 2005, Utjiua's mother brought a court case challenging the school's decision and the underlying policy, on the grounds that it denied Utjiua's constitutional right to education as guaranteed by article 20(1) of the Namibian Constitution.[3] Acting Judge Manyarara of the High Court ruled that the Policy approved by Cabinet — which stated expressly that it was only a 'temporary guideline' — was not binding on schools, which have a duty to exercise discretion on issues relating to pregnancy among learners.[4] Judge Manyarara stated further that 'it cannot reasonably possibly be the intention of the Cabinet Policy to prohibit the enrolment of teenage mothers where the mother has a support system', such as in Utjiua's case.[5] The court went on to draw a comparison with women in formal employment, who are entitled by law to a period of only three months maternity leave, pointing out that these women must invariably do what Utjiua had done — arrange for a relative or a nanny to take care of the baby while they are unavailable.[6] Judge Manyarara concluded that 'much as society may abhor teenage pregnancies (with sound reason, I may add), it is not the intention of the Cabinet Policy to punish learners who happen to find themselves in the position of Utjiua'.[7] The question was referred back to the principal of the school to exercise his discretion in light of the court decision.[8]

The school principal looked at the matter afresh and again denied admission to Utjiua in February 2005. Among the reasons given for the renewed refusal to readmit Utjiua in 2005 were that making exceptions to an official policy 'could encourage other learners from Windhoek High School and schools throughout the country to challenge all aspects of education policies which could result in a serious increase in disciplinary problems' and that it was 'in the best interests of both Utjiua Karuaihe and her baby that she remains at home to attend to the needs of her baby and to ensure that effective mother/child bonding takes place'.[9]

The family appealed against the school's decision to the Minister of Basic Education, Sport and Culture. While awaiting a decision on the appeal, the Legal Assistance Centre filed an urgent application with the High Court on 24 February 2005, again citing Utjiua's constitutional right to education and arguing that she should be readmitted to school pending the outcome of the appeal so as to avoid missing out on essential schoolwork. On 3 March 2005, Judge Silungwe of the High Court refused the application for interim relief on the grounds that it was unnecessary for the court to intervene at this stage since the outcome of the appeal against the school's decision to the ministry was expected by 11 March at the latest.[10] Shortly after this ruling was handed down, the Minister endorsed Windhoek

High School's refusal to admit Utjiua saying that the Policy on Pregnancy amongst Learners is 'an honest and fair attempt' to balance the constitutional right of the learner mother to education against the rights of the newly-born child.[11]

Utjiua's mother made a third attempt to have Utjiua readmitted to school. She brought an application for judicial review of the ministry's decision and an urgent application for Utjiua's readmission to school pending the outcome of the review application (which was expected to take place only in six to nine months' time). On behalf of Utjiua's mother, the Legal Assistance Centre argued that the ministry's refusal to order Windhoek High School to readmit Utjiua immediately was a denial of her constitutional right to education, and a contravention of article 11(6) of the *African Charter on the Rights and Welfare of the Child*,[12] which directs member states to adopt appropriate measures to ensure that children who become pregnant before completion of their education have an opportunity to continue their education on the basis of their individual ability. This urgent application was turned down by Judge Gibson of the High Court, who stated that the provisions of the Namibian Constitution and the *African Charter on the Rights and Welfare of the Child* were not being contravened, since Utjiua would be allowed to continue her education after one year.[13] Judge Gibson also ruled that there was no merit to the argument that the requirement to stay out of school for a year was punishment.[14] The judge noted that Utjiua had the option of continuing her education through the Namibian College of Open Learning, a government distance-learning institution, saying that 'in the unplanned circumstances she must face the realities'.[15] Judge Gibson found that taking two years to complete the desired course of study 'is not so great an inconvenience' and denied the request to order that Utjiua be readmitted to school while the application for judicial review of the ministry's decision was pending.[16]

Further legal action was abandoned at this stage, since the academic year was progressing and the question of when to readmit Utjiua would have become moot before any further court proceedings could be concluded. Therefore, there was no final resolution of the varying opinions of the Namibian courts on the government Policy on Pregnancy amongst Learners. Utjiua remained out of school for the remainder of 2005. She did temporary clerical work during this time, and rejoined Windhoek High School for Grade 12 in 2006. She completed her matric and went on to attend university in South Africa.

The legal challenge to the Policy on Pregnancy amongst Learners failed to help Utjiua, but it did spark renewed public interest in the issue. In January 2005, in response to media interest generated by the case, the Ministry of Basic Education, Sports and Culture issued a press release defending the existing policy.[17] In 2006, a Shadow Report on Namibia's compliance with the *Convention on the*

Elimination of All Forms of Discrimination against Women (CEDAW) reported on Utjiua's case.[18] The government delegation defended the Policy on Pregnancy amongst Learners when asked about it by the CEDAW committee in 2007, but the committee's response to Namibia's report expressed concern that the provision requiring a one-year leave period 'could act as a deterrent for girls to resume their studies after childbirth'.[19]

Impetus for change eventually came from the Ministry of Education, supported by UNICEF. In 2008 the Ministry of Education appointed the Legal Assistance Centre to research and draft a revised policy on learner pregnancy. Utjiua's story formed the centrepiece of the research and advocacy materials produced as part of this project, and many educators who were consulted supported the need for greater flexibility. The policy developed by the Legal Assistance Centre, in conjunction with ministry officials, proposed addressing each case on an individual basis with regard to the leave period, so that it would be possible to take into account factors such as the preferences of the learner and her family, the point in the academic year at which the baby is born, arrangements for care of the newborn child, and the health of both mother and child. A revised policy containing this more flexible approach was approved by the Ministry of Education's Ministerial Planning and Coordinating Committee in March 2009 and then approved by Cabinet in October 2009.[20]

The court case therefore did help to focus attention on the issue, even though it did not assist the client or change the policy. The arguments in Utjiua's favour seemed strong, and the case could have succeeded in incorporating international law on the right to education into Namibian jurisprudence. But a key drawback was the need for an urgent resolution of the matter. Perhaps the Legal Assistance Centre should have attempted to continue the case even though the issue would have been moot before judicial review of the ministry's decision could have taken place. This is what happened, most notoriously, in the US Supreme Court case of *Roe v Wade*,[21] where the final decision on Jane Roe's right to obtain an abortion was handed down several years after the baby had been born and given up for adoption. There, the court made an exception to the usual rule that there must still be an actual controversy at the time of review, on the grounds that the issue was, by its nature, 'capable of repetition, yet evading review'.[22] The court noted that, where pregnancy is a significant fact in litigation, the pregnancy will normally come to term before the usual appellate process is complete. If that fact were always allowed to make the case moot, then 'pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.'[23] The court concluded that cases involving pregnancy provide 'a classic justification for a conclusion of nonmootness'.[24] Other gender issues, such as cases

concerning pregnancy discrimination or abortion, will have similarly tight time frames, which can enable courts to duck hard decisions. It may be useful in this regard to explore liberalised approaches to standing that could open the door to a broader use of declaratory judgments, which could allow organisations like the Legal Assistance Centre to place questions before court on behalf of a group of similarly situated clients.

2.2 Settlement or abandonment of cases

Even where an issue does not involve an inherent time frame, women who want to assert their legal rights in family law contexts may feel unable to cope with the discomfort of being in an adversarial posture with family members for periods of months or even years. This may persuade women to settle family law cases out of court before they result in any jurisprudence that can help the broader public. Settlements can also be particularly likely in other gender matters involving uncomfortable issues, such as sexual harassment.

2.2.1 Sexual harassment

In 2008, the Legal Assistance Centre concluded one of the first court cases on sexual harassment in the workplace, and the first to be brought by the victim of the harassment. This case involved a young woman whose manager started to touch her inappropriately — he grabbed her from behind, rubbed himself against her, sat on her lap and even licked her ear. She endured the harassment for a while, but then felt so upset by it that she complained to the manager — which allegedly resulted in her dismissal. She then took both the manager and the company to court. The case arose under the 1992 Labour Act (Act 6 of 1992) that prohibited 'harassment' on the basis of sex, without defining what constitutes sexual harassment.[25] The evidence presented at the hearing canvassed the severe physical, mental and emotional trauma suffered by the complainant as a result of the harassment. The case was eventually settled on terms that cannot be disclosed due to a confidentiality clause in the settlement agreement. Although settlements in cases of this nature are generally completely confidential, the Legal Assistance Centre, with the support of the client, insisted on a provision allowing for the publication of a news article about the case, as long as it did not identify the employer in question or the amount of the settlement. A news article approved by the parties to the settlement was printed in a national newspaper several months later.[26]

The employee in question showed great bravery in speaking out. Her example, as publicised in the media, may inspire other employees who experience sexual harassment to speak out. However, despite this example and a more detailed

definition of sexual harassment in the new Labour Act that has since come into force, Namibia still has no jurisprudence on sexual harassment.[27] While the settlement was favourable to the Legal Assistance Centre's client, the failure to bring the case to completion means that the important legal issue of the employer's liability for the actions of the harasser was not addressed by a court and the goal of developing the law in this area was therefore not served. Perhaps the employer involved in the case will be more careful to take steps to prevent sexual harassment in future, and perhaps other employers will be influenced by the news article to introduce measures on this topic. However, meaningful employer action on sexual harassment is more likely to be stimulated by the Code of Best Practice on Sexual Harassment, which the Ministry of Labour is expected to promulgate under the 2007 Labour Act. This Code is expected to require employers to communicate policy statements on sexual harassment to all employees, including information on procedures to be followed for complaints about sexual harassment.[28]

2.2.2 Settlements in other areas of law

More Namibian examples of settlement or early discontinuation of cases can be cited, reflecting a fundamental weakness of litigation-focused strategies. A 2001 case that would have challenged race-based rules of inheritance and the common law rule that prevented children from inheriting intestate from their fathers, was settled before reaching court.[29] An effort in 2007 to challenge the constitutionality of the procedures for customary divorce failed at an early stage when the client abandoned the case after preliminary discussions — seemingly to enable her to put the ensuing problems behind her as quickly as possible and move on with her life. A settlement in a claim for damages stemming from an employer's alleged coercive testing of 22 employees for HIV[30] inspired public criticism on the lack of a precedent-setting outcome. A newspaper reader sent the following comment to the SMS page of a national newspaper: 'All the fuss by the LAC [Legal Assistance Centre] going to court about the HIV in a landmark case, only to be settled out of court. What a waste.'[31] While the Legal Assistance Centre published a response in the same newspaper a few days later, explaining that its primary duty is to represent the interests of the client,[32] the frustration of the reader is understandable. Working with limited resources, the Legal Assistance Centre needs to choose carefully which cases to take on for public interest litigation. However, once a case has been taken on, it becomes difficult to balance the interests of the individual client with the interests of the public in securing binding jurisprudence, since the lawyer is ethically obliged to follow the client's instructions.

The settlement of cases before the court reaches a decision seems to be particularly common in respect of family law issues, for understandable reasons.

It is certainly better in most cases for the client to resolve disputes with family members as quickly and as painlessly as possible, and the fact that clients have sought legal assistance may put them in stronger negotiating positions, which make more favourable settlements possible. A settlement involving an institution that must pay for its actions may have somewhat the same effect as an unfavourable judgment to that institution, even if it does not create helpful jurisprudence. For example, where a government must pay damages for torture by police, it may become cost-effective for that government to put more effective measures in place to prevent future torture. This kind of long-term positive outcome is less likely to apply in a family dispute. There may be some repercussions when others hear of the favourable outcome, but cases resolved by settlements are unable to assist the general public in the same way as a court ruling that develops the law.

2.3 Jurisprudence overtaken by law reform

Difficult questions are raised when law reform and jurisprudence coincide. Sometimes a court case can give a planned law reform greater priority, but on the other hand, a test case may constitute a waste of limited resources if law reform on the issue was already under way. The possibility of such an overlap also highlights the tension between the desire to assist an individual client and the need to steer resources where they can have the broadest impact.

2.3.1 The inheritance rights of children born outside marriage

A case that highlights this dilemma involved the matter of intestate succession by children born outside of marriage. Although this is not directly a gender issue, it has strong gender dimensions given the large number of Namibian children raised by single mothers.

Mr Eichhorn died intestate in 1991. He was not married, but he had two children, one of whom was Lotta Frans. Because 'illegitimate' children were not allowed to inherit in terms of the common law, Mr Eichhorn's sister inherited the assets (two farms and a significant amount of money) when his estate was finalised in 1993. Lotta Frans and his brother consulted the Legal Assistance Centre many years later, in January 2005. Although his brother's claim against the estate had already prescribed by then, Lotta's claim had not because Lotta had reached the age of majority only in 2005.[33] Summons was issued for his share of the estate, combined with a challenge to the constitutionality of the common law rule that children born outside of marriage cannot inherit intestate from their fathers. In *Frans v Paschke*, the High Court found that the common law rule in question was an unconstitutional form of discrimination on the basis of social status[34] and was

thus invalid from the date of Independence (21 March 1990) when the Namibian Constitution came into force.[35]

On this point, the court followed the ruling of the Supreme Court in the case of *Myburgh v Commercial Bank of Namibia*.[36] Article 66(1) of the Namibian Constitution provides:

> *Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.*

The *Myburgh* case held that this article means that any common law rule found to be in conflict with the Constitution is invalid from the date of Independence, since the article

> *… does not require a competent Court to declare the common law unconstitutional and any declaratory issued by a competent Court would be to determine the rights of parties where there may be uncertainty as to what extent that common law was still in existence and not to declare any part of the common law invalid.*[37]

By the time *Frans v Paschke* came to court, parliament had in fact already done away with the common law rule in the Children's Status Act 6 of 2006, which had been passed by parliament but had not yet come into force. A provision in this statute stated:

> *Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage.*[38]

However, while the Act generally has retrospective effect,[39] there is an exception in respect of the provision on inheritance by children born outside of marriage that applies only 'to estates in which the deceased person died after the coming into operation of this Act'.[40] This exception was made in an effort not to upset transactions that were regarded as settled. The Children's Status Act came into force a little over a year after the High Court judgment was handed down, on 3 November 2008.[41] The statute must now be read together with the case, which has effectively expanded the group of people to which the new rule applies. In practical terms, the *Frans* judgment will go beyond the statute to assist those persons who were born outside of marriage from a father who died intestate between 21 March 1990 and 3 November 2008, and whose claims have not prescribed. In other words, the law reform will probably suffice for most people, although the *Frans* case may be of particular benefit to minors for whom the running of the prescription period

is suspended until they attain majority. The real impact of the judgment may be in its willingness to recognise new forms of family. The court noted that 'loving partners and parents have the right to live together as a family with their children without being married',[42] which (although the court did not cite the Constitution's provisions on the family)[43] may, nevertheless, support future interpretations of the family forms protected by the Constitution.

For Lotta Frans, this judgment was only the first hurdle in what is likely to be a lengthy quest to claim his inheritance. The declaratory order issued by the court simply invalidated the common law rule barring intestate inheritance by 'illegitimate' children, thus clearing the way for him to bring a civil suit against the 'legitimate' child who had claimed the entire estate, in the hope of ultimately getting his share of his father's property. At the time of writing in mid-2013, this civil case had not yet been concluded.[44]

2.3.2 Marital power

Interestingly, the *Myburgh* judgment, on which the *Frans* court relied, similarly echoed a recent law reform. The issue in question was a husband's marital power over his wife, which was part of Namibia's inherited Roman-Dutch common law. The crisp question was whether or not the wife in this case had the capacity to sue and be sued. The Married Persons Equality Act 1 of 1996, which repealed the common law concept of 'marital power', came into force on 28 May 1996, before summons was issued in this case—but the statute explicitly provided that its abolition of marital power 'shall not affect the legal consequences of any act done or omission or fact existing before such abolition'.[45]

The court found marital power to be a violation of the Constitution's prohibition against sex discrimination[46] and asserted that 'it was not the Act which brought to an end the marital power which a husband had over the person and property of his wife, but the Constitution itself and at the stage when the provisions of the Constitution took effect'.[47] Therefore, the provision of the Married Persons Equality Act on marital power was, in effect, superfluous, although it 'ensures certainty as to the legal position'.[48] The statute was not applicable to the agreement concluded on 21 October 1993, which was the subject of the court case, but the provisions of the Constitution, which automatically invalidated the common law rule, had already taken effect on that date. Therefore the husband had no valid marital power at the time of the agreement.

The *Myburgh* case was not intended to serve a public interest function. Similar to the *Frans* case, its applicability beyond the client involved is limited, since it would be relevant only to invalidate the concept of marital power between

21 March 1990 and 28 May 1996 when the Married Persons Equality Act came into force and, as in the case of *Frans*, to claims arising during that period that have not already prescribed. In both of these cases, law reforms that were already in place (or almost in place) before the cases were concluded, accomplished essentially the same result as the judicial application of the Constitution. The cases may provide assistance only to a few persons with disputes that fall outside the time frame covered by the law reforms.

2.4 Difficulties in enforcing judgments

Even when public interest litigation succeeds in making ground-breaking jurisprudence in an area unlikely to have been addressed by imminent law reform, the impact of such litigation remains uncertain. The following examples show that neither a favourable judgment by a Namibian court nor the ruling of an international tribunal is a guarantee of an outcome that will benefit the general public. However, despite this important practical limitation, the cases discussed below have considerably advanced Namibian jurisprudence by introducing a test to identify discrimination on one of the grounds enumerated in the Namibian Constitution, and by applying that test to invalidate discrimination on the basis of race.

2.4.1 Ignoring the ruling of an international tribunal: The Müller *case on sex discrimination in surnames*

When Mr Müller married Ms Engelhard, he wanted to adopt her surname, so that the two of them could operate their jewellery business under her more distinctive and well-established business name. Under Namibian law, she could have simply started using his surname upon their marriage if she wished but he could assume her surname only by going through a formal name change procedure, which involved extra effort and expense.[49] On behalf of Mr Müller, the Legal Assistance Centre challenged the constitutionality of these different rules for husbands and wives.

Müller v President of the Republic of Namibia[50] was the first challenge brought under article 10(2) of the Namibian Constitution and so established the test to be applied in terms of that section. Article 10(2) provides:

> *No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

The earlier case of *Mwellie* had held that article 10(1) of the Constitution, which states that '[a]ll persons shall be equal before the law', permits 'reasonable classifications' that are 'rationally connected to a legitimate object'.[51] However, in the *Müller* case, the court followed the precedents set in South Africa and Canada

by applying a stricter 'unfair discrimination' test for differentiation on the grounds enumerated in article 10(2) of the Constitution. The court held that the constitutional guarantee of non-discrimination would be negated if rational connection to a legitimate legislative objective was sufficient to justify discrimination on one of the grounds enumerated in article 10(2), which 'are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics'.[52] The court therefore set out a stricter four-step test for the application of article 10(2) of the Constitution:

> *The steps to be taken in regard to this sub-article are to determine —*
> *(i) whether there exists a differentiation between people or categories of people;*
> *(ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;*
> *(iii) whether such differentiation amounts to discrimination against such people or categories of people; and*
> *(iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of art 23 of the Constitution* [which authorises affirmative action 'for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices', including women].[53]

The court also followed other jurisdictions by holding that an element of unjust or unfair treatment is inherent in the meaning of the word 'discriminate'.[54] The court found that, in order to determine whether unfair discrimination is present, it is necessary to look at the purpose of the discrimination in question, the impact of the discrimination on the victim and any previously disadvantaged groups in society and whether the discrimination has the effect of impairing the victim's human dignity.[55] Applying this test to the issue at hand, the court then ruled that this particular differentiation did *not* amount to unfair discrimination. Key factors were that the complainant, a white male, was not a member of a prior disadvantaged group; that the aim of the name change formalities was not to impair the dignity of males or to disadvantage them; that the legislature has a clear interest in the regulation of surnames; and that the impact of the differentiation on the interests of the applicant was minimal since he could adopt his wife's surname by a procedure involving only minor inconvenience.[56]

The court noted that the legal provision in question 'gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband', with the government being unaware of any other husband in Namibia who wanted to assume the surname of his wife.[57] Thus, the court gave particular weight to the social *status quo*,[58] despite its articulated desire to break

with past inequalities. Here, the court unfortunately failed to consider the effect of these legal rules regarding surnames on women, who arguably become subsumed under the identity of their husbands when they adopt their husbands' surnames.

The matter was subsequently referred to the United Nations Human Rights Committee, which oversees the *International Covenant on Civil and Political Rights*. This committee ruled in 2002 that the different procedures for dealing with surnames *do* amount to unfair sex discrimination in terms of the International Covenant, noting that long-standing tradition is not a sufficient justification for differential treatment between the sexes. As a result, in June 2002, the committee gave the Namibian government 90 days to report on what it had done to rectify the problem.[59] By then Mr Müller had already changed his name to Mr Engelhard under the laws of his home country, Germany, however at the time of writing — more than 13 years after the decision of the international forum — the offending Namibian law has yet to be changed.[60]

In hindsight, it is questionable whether it was strategically wise to bring such a significant test case on a set of facts involving allegations of discrimination against a white male — a member of the most privileged group in Namibia prior to Independence — and on an issue of little general concern. Moreover, even this case could rather have been presented to include the corresponding discrimination against Ms Engelhard, who was deprived of the right to make her surname that of the married couple.[61] Although the case did not help Mr Müller or any others in a similar position, it did advance Namibian jurisprudence by establishing a sound test for the application of a very important article of the Constitution. Obtaining a precedent for the application of the stricter test for discrimination on enumerated grounds entrenched into Namibian law was an important victory — especially for sex discrimination, which is so rife in Namibian society that it may be invisible to those who accept the *status quo*.

A countervailing consideration is that the failure to hold government accountable to adhere to the ruling of an international forum may contribute to a lack of respect for such forums. The lack of advocacy to ensure that the international decision was implemented is partly attributable to the fact that the underlying issue was of such limited public interest — meaning that it is doubtful that the Legal Assistance Centre would have been able to join hands effectively with other non-governmental organisations (NGOs) to apply pressure on government to comply with the directive of the UN Committee. The lack of a meaningful outcome could cause future litigants to doubt the efficacy of international law, and thereby discourage future use of international forums. But the lack of enforcement mechanisms is an inherent weakness in most international tribunals of this nature.[62]

2.4.2 Avoiding meaningful adherence to the court's judgment: The Berendt *case on discrimination in inheritance*

Another case outcome that has similarly not been enforced is that of the 2003 case of *Berendt v Stuurman*,[63] which dealt with discrimination in inheritance matters.

Up to now, the manner in which the property of a deceased person is distributed in Namibia has depended largely on race. The rules that apply depend on a complex interplay of race and (for a black person) the part of Namibia in which the person resides, whether that person was a spouse in a civil or customary marriage, and for those in civil marriages, what marital property regime applied.[64] Thus, although the rules overtly discriminate on the basis of race, the results have profound gender implications, relegating many women to the rules of customary law on inheritance, which favour men in most instances, even in matrilineal communities.

Namibia's 1996 *Country Report* under the *Convention on the Elimination of All Forms of Racial Discrimination* conceded the problems in the country's system of inheritance:

> *The system applicable to whites and coloureds is clear and easy to understand. There are detailed provisions regulating the succession and administration of these estates. The estates are administered under the supervision of a specialist office, that of the Master of the High Court. The law regulating the estates of blacks who die without leaving a will (the vast majority of cases) is a mass of confusion. There is no proper system of administration, nor is the administration properly supervised. It is difficult to ascertain who the heirs are and this uncertainty is exploited by unscrupulous persons who enrich themselves at the expense of the deceased's immediate family, particularly women and children.*[65]

The race-based rules in the Native Administration Proclamation 15 of 1928 were the subject of the *Berendt* case. Magrietha, Aron and Naftalie Berendt were the children of Martha Berendt, who died unmarried and intestate in 1999. Martha owned a house in Windhoek where she had lived with her three children until the time of her death. The Native Administration Proclamation provided that Martha's property must devolve in accordance with 'native law and custom'.[66]

The heirs met and agreed to the appointment of Martha's son Naftalie as the executor of the estate. Given that Martha was a member of the Bondelswarts community, it followed that the estate would be distributed according to the customary law of this community. On 31 May 2002, Naftalie Berendt, acting alone and with no consultation with his siblings, entered into a deed of sale that would transfer the deceased's house to Claudius Stuurman for a price of N$ 20 000 —

which left, after the settlement of debts, only N$ 5 000 for distribution among the heirs. The siblings were dissatisfied with this transaction, asserting that the sale price was well below market value and that Naftalie did not account properly for the money received. They brought an application in the High Court, calling into question the appointment of Naftalie as executor, challenging the constitutionality of the relevant provisions of the Native Administration Proclamation and asserting that the estate should be administered in terms of the Administration of Estates Act 66 of 1965, which applies to most estates not covered by the Native Administration Proclamation.[67]

The High Court found that the impugned sections of the Native Administration Proclamation were unconstitutional violations of the prohibition on racial discrimination in article 10(2) of the Namibian Constitution and gave parliament a deadline of 30 June 2005 to replace these sections with a new regime.[68] The court also held that the procedure, whereby magistrates issue letters of administration in respect of 'black estates', while other estates go to the more specialised jurisdiction of the Master of the High Court, stems from no valid legal authority and cannot stand.[69] It held that as an interim measure, until parliament enacted a new regime, heirs of black estates may choose the magistrate or the Master of the High Court as an administrating authority, as they prefer.

On 21 June 2005, the court granted the Namibian government's request for an extension of the deadline to 30 December 2005.[70] In November 2005, parliament passed the Estates and Succession Amendment Act 15 of 2005 without debate, just before parliament was due to close for the year. The lack of debate comes as no surprise considering that the Act makes no reforms whatsoever to the substantive law of inheritance. In fact, the wording of the law practically defies belief, as it repeals the sections found to be unconstitutional, but then effectively reinstates them:

> *(1) Section 18 of the Native Administration Proclamation, 1928 is amended by the repeal of subsections (1), (2), (9) and (10).*
> *(2) Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed.*[71]

In other words, the racially discriminatory laws were repealed but then simply reapplied as if they were still in force.[72] The only real change made by the new law concerns the *procedure* for administering estates. It stipulates that, irrespective of race, all deceased estates shall be administered in terms of the Administration of Estates Act by the Master of the High Court — while allowing the Master to delegate authority to magistrates. Magistrates in the past had been criticised for

failing to ensure that estates are distributed fairly among beneficiaries, because there were no regulations in place and because they were not compelled to report to the Master. The new law to a certain extent addresses this problem in that the powers and functions of the Master may be vested in magistrates and the latter may, on request, be required to provide the Master with information regarding the administration of an estate.[73] Accordingly, it could be argued that the most likely outcome is that inheritance matters will continue to be administered much in the same way as they were in the past, unless the Master's Office is robust in its oversight of the administration of estates by magistrates.[74]

Thus, despite the positive ruling by the court, the current inheritance laws remain grossly inadequate. The latest law reform not only perpetuates a dual race-based system, already found to be unconstitutional by the High Court, but also effectively retains and endorses the gender inequality that is still present in many customary inheritance practices. It appears as if substantive change to the laws on inheritance must still await further law reform — or perhaps another court case. By mid-2013, more than eight years after the initial deadline set by the court for the problem to be remedied, meaningful change is still not on the horizon; the Law Reform and Development Commission has published a draft Intestate Succession Bill based on gender- and race-neutral rules, but this proposal has not yet been considered by Cabinet.[75] It therefore seems likely that public pressure will be required to ensure that the law is substantively changed.

2.5 Mixed case outcomes

One risk of public interest litigation is its unpredictability. Since a court case will often strike down an unconstitutional law without putting anything in its place, it can leave a vacuum if the litigation is launched without accompanying advocacy. The case outcome, too, is unpredictable and may lead to jurisprudence that is actually detrimental to the cause at hand. One Namibian example of this problem is the case of *Frank v Chairperson of the Immigration Selection Board*, which concerned sexual orientation.[76]

2.5.1 Administrative law and the legal status of a lesbian relationship

The *Frank* case is an example of a mixed outcome, with positive developments in administrative law, alongside a loss on the issue of sexual orientation.

Liz Frank is a German citizen who came to Namibia in 1990. Ms Frank first received a work permit in 1991 and had been regularly renewing her permit since then. In 1995, she applied for permanent residence for the first time. When this application was unsuccessful, she reapplied in 1997. Her applications cited her

anti-apartheid work before coming to Namibia, her professional contributions to a number of NGOs and government agencies, and her volunteer work for the NGO, Sister Namibia. She also included glowing letters of reference from prominent government officials.

In the 1997 application, Ms Frank cited her long-standing lesbian relationship with Elizabeth Khaxas, a Namibian citizen by birth, asserting that they form a family unit with Ms Khaxas's son, whose father had died before he was born. She also requested to appear before the Immigration Selection Board to answer any queries they may have or to deal with any information that may adversely affect the application. Despite her impressive credentials, her application for permanent residence was once again denied, with the board giving her no opportunity to appear before it and refusing to give any reasons for its decision. This led her to speculate that her lesbian relationship may have motivated the rejection of her application.

The Legal Assistance Centre represented Ms Frank and Ms Khaxas in the High Court, seeking to set aside the Immigration Selection Board's decision not to grant Ms Frank permanent residence. The chairperson of the Selection Board submitted an affidavit to the court asserting that the lesbian relationship was not taken into consideration, since it is not recognised in Namibian law.[77] The board's acting chairperson similarly stated that the applicant's sexual preference was considered to be a private matter with no bearing on the application for permanent residence.[78]

With respect to the board's decision-making process, the court found that article 18 of the Namibian Constitution, which obligates administrative bodies and officials to act fairly and reasonably, means that the decision-making body must give reasons for its decision so that the reasonableness of its decision can be assessed,[79] and that it is obliged to 'apply its collective mind and could not take into account irrelevant or extraneous facts and could not be prompted or influenced by improper or incorrect information or motives'.[80] It found that the board had failed to do this, in various respects. With respect to the lesbian relationship, the court held that it can, in fact, be recognised in Namibian law as a universal partnership — an explicit or tacit agreement concerning the pooling of resources that can apply between cohabiting couples.[81] The court concluded that 'not only is this relationship recognised, but respondents should have taken it into account when considering the application for permanent residence'.[82]

On appeal by the respondents, the Supreme Court's holding developed Namibian jurisprudence on administrative law in ways that have far-reaching positive consequences. The overall decision split the court, but all three justices agreed that Ms Frank's constitutional right to administrative fairness invokes at a minimum the *audi alteram partem* rule. While this rule does not require an oral hearing in every instance, the administrative body must at least give an applicant

an opportunity to deal with the matter in writing.[83] All three justices were also in agreement that the Constitution further requires that 'an administrative organ exercising a discretion is obliged to give reasons for its decision — at least where there is no legitimate reason for a failure to disclose reasons, such as state security concerns.[84] The justice writing the minority opinion elaborated as follows:

> *There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article* [Article 18 of the Namibian Constitution] *requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided.*[85]

The majority opinion then proceeded to evaluate the role of the lesbian relationship, establishing elaborate jurisprudence on constitutional interpretation in the process. It was argued, on behalf of Ms Frank, that if her relationship with a Namibian citizen was a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship as the spouse of a Namibian citizen. It was asserted that the failure to afford her comparable rights in her lesbian relationship implicated several rights in the Namibian Constitution: the constitutional right to equality in article 10, the protection of the family in article 14, the right to privacy in article 13(1) and the right to leave and return to Namibia in article 21(1).

In considering the constitutional questions, the court canvassed the different approaches to proving violations of fundamental rights as opposed to fundamental freedoms, the different methods of interpreting constitutional language, and the appropriate background material that should inform the court's interpretation, as well as commenting extensively on the role of 'the traditions, usages, norms, values and ideals of the Namibian people'.[86] The court held that it must apply 'a value judgment based on the current values of the Namibian people' in any case in which the constitutional provision is not 'absolute' (citing the constitutional prohibition of the death penalty as an example of a provision that was absolute).[87] In making such a value judgment, the court stated that it must look to the 'moral standards, established beliefs, social conditions, experiences and perceptions of the Namibian people, as expressed in their national institutions and Constitution'.[88] While the court acknowledged that it was appropriate to look at the emerging consensus of values in the international community, it emphasised that local norms should be given priority to avoid creating a perception that the courts are imposing foreign values on the Namibian people.[89] It identified 'the Namibian Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organizations' as sources of expressions of Namibian values.[90]

This emphasis on national values is disturbing when it comes to constitutional jurisprudence, as constitutional protection is most often needed for unpopular opinions, or to assert rights that have not been addressed by parliamentary action. Furthermore, most of the institutions cited as sources of local norms are patriarchal institutions that will not necessarily represent the full spectrum of national views on gender issues. The court did express the need to exercise caution when considering the value of public opinion in constitutional interpretation, recognising that public opinion is not always based on 'reason and true facts'.[91] However, the strong emphasis on the view of the Namibian majority in this case is worrying, particularly since gay and lesbian relationships are in need of protection in Namibia, precisely *because* they do not always find broad public acceptance.[92]

Applying a value judgment to the issue before it, the court found that the Namibian Constitution makes no provision for the recognition of homosexual relationships as being equivalent to marriage, and that the constitutional term 'family' does not contemplate that a homosexual relationship could be regarded as a 'natural' or 'fundamental' group unit. In ruling that the right to equality in the Constitution does not protect homosexual relationships, the court found that 'Namibian trends, contemporary opinions, norms and values tend in the opposite direction'.[93] The main evidence cited for this conclusion was the absence of a legislative trend towards the recognition of same-sex relationships in Namibia, and statements by the President of Namibia and a male member of parliament who argued strongly against the recognition of such relationships.[94]

The court considered international law as well, noting:

> *The 'family institution' of the African Charter* [on Human and People's Rights], *the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Namibian Constitution, envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race.*[95]

It went on to state erroneously, 'in passing', that the *International Covenant on Civil and Political Rights* specifies 'sex' but not 'sexual orientation' as one of the grounds on which discrimination is prohibited.[96] In fact, in March 1994 (*before* Namibia's ratification of the Covenant) the Human Rights Committee charged with monitoring the Covenant stated that the references to 'sex' in the provisions on discrimination are 'to be taken as including sexual orientation'.[97] The *Frank* case thus seems a missed opportunity to open the door to future efforts to interpret the Constitution's prohibition on sex discrimination as prohibiting discrimination on the basis of sexual orientation, and to rely on international

covenants to which Namibia is bound, and which automatically form part of Namibian law.[98]

The court concluded that discrimination on the basis of sexual orientation in the context before it was not 'unfair discrimination' according to the *Müller* test, saying that '[e]quality before the law for each person does not mean equality before the law for each person's sexual relationships'.[99] However, the court emphasised that nothing in its judgment 'justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution'.[100]

It may be that an attempt to establish constitutional protection for gay and lesbian relationships might have more likelihood of success in a context that does not involve a discretionary decision, such as permanent residence. For example, the Combating of Domestic Violence Act 4 of 2003 covers romantic relationships, but only between people 'of different sexes'—a wording adopted specifically to exclude gay and lesbian relationships from the protections of this law.[101] A constitutional challenge to this discrimination might fare better than the one in the *Frank* case. Ironically, one argument offered in parliament to justify the exclusion in this statute was that such relationships 'are not recognised by the Namibian customs and traditions or by the laws of our Republic, as evidenced by the recent Supreme Court decision', referring to the *Frank* case.[102]

2.6 Successful litigation

This discussion of the challenges to litigation-based strategies should not obscure the fact that public interest litigation on gender issues sometimes accomplishes its intended purposes successfully, in which case it serves as a powerful tool that can benefit the individual affected, as well as having broader social and legal impact.

2.6.1 A duty of care to prevent rape

One recent success involved the development of the law on the duty of care. The case, *Vivier NO v Minister of Basic Education, Sport and Culture*, [103] involved an action for damages against the Ministry of Basic Education, Sports and Culture in respect of the rape of a mentally impaired child, resident at a school hostel, which allegedly occurred while she was in the care of a staff member over the weekend. This child, although aged 17, was estimated to be functioning at the level of a pre-schooler. The child's grandmother, who is her foster parent, requested that the child be allowed to stay at the school hostel on that weekend. The hostel superintendent nevertheless gave permission for the child to go home with a staff member for the weekend, without notifying the grandmother of this intention. This

staff member left the child at her house, where the child was allegedly raped by the staff member's boyfriend.

The argument on behalf of the child was that the school (which resides under the Ministry of Basic Education, Sports and Culture) negligently breached its legal duty of care to the child, resulting in a rape. The ministry was asked to pay compensation for the child's medical expenses, as well as damages arising from pain, suffering and emotional shock. The High Court judgment quoted a recent South African case on the test of wrongfulness in respect of an omission:

> *Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based inter alia upon its perception of the legal convictions of the community and considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.*[104]

First, the court noted that the decision to allow the child to leave the hostel in the company of an unauthorised person, without appropriate permission, violated the policy on hostels adopted by the Ministry of Basic Education, Sports and Culture.[105] Secondly, it found that there was a special relationship between the parties, which would support a legal duty to prevent harm, noting further that there is a high standard of care where children are involved, which is particularly onerous when one party is a mentally impaired child while the other is a mature and experienced hostel superintendent.[106] Thirdly, the court considered the requisite preventive measures, their cost and their probability of success. It found that, in this case, the only measure needed was a refusal to allow the child to leave the hostel — a cost-free measure with a high probability of succeeding.[107]

The court concluded that 'the legal convictions of the community' would regard the conduct of the hostel superintendent as an unreasonable infringement of the interests of the child in question — specifically of her right to bodily integrity and respect for her human dignity — and delictually wrongful.[108] The court also found negligence, holding (a) that, while the specific harm of rape might not have been

reasonably foreseeable, it was reasonably foreseeable that *some* kind of harm might befall a mentally impaired child who was allowed to leave the school hostel under such circumstances,[109] and (b) that this harm could have been prevented by simply refusing permission for her to leave.[110]

Having found a duty of care and negligence in the exercise of that duty, the next step was to consider causation, since delictual liability could flow only if the conduct of the wrongdoer caused the damage to the person who suffered the harm. In this case, the court held that if the child had remained in the hostel, she would not have been raped (thus finding 'factual causation'), and that the harm she suffered was not too remote to sustain legal liability (thus finding 'legal causation'). The court concluded that 'having regard to considerations of reasonableness, fairness, justice and policy considerations', the damages suffered by the plaintiffs should be imputed to the hostel superintendent. It awarded damages in the amount of N$ 80 000 for pain and suffering, loss of amenities, and emotional shock in respect of the child who was raped, as well as a smaller amount of damages for emotional shock suffered by the child's grandmother.[111]

The finding of the High Court on the duty of care was not disturbed on appeal.[112] This case could have significant ramifications for others, since the facts of the case were not altogether unusual. For example, a case brought to the Legal Assistance Centre in 2005 involved a four-year-old deaf-mute girl who was allegedly raped by a driver employed by the school she attended. Another example involves a government official who made an enquiry to our offices in 2006, in respect of two girls allegedly raped at a special school for children with disabilities, expressing concern that the school was not providing proper protection for the children.[113] News reports contain other similar accounts of mentally ill patients being raped in hospitals and other institutions.[114] The *Vivier* case is an important step towards addressing broader state accountability for gender-based violence, such as the extent to which specific service providers, such as the police, could be held liable to victims of violence for the damages resulting from their failure to exercise their duties properly. Courts in South Africa and Canada have already moved in this direction, for example,[115] and Namibia's High Court has suggested that the Namibian law of delict should be developed by 'looking to (among other things) the way in which the issue in question is handled in other comparable systems of jurisprudence and perceptions of the attitudes of the surrounding community'.[116] Namibia's Supreme Court recently found that the police had a duty of care in respect of delictual liability for their failure to take reasonable steps to prevent looting from an overturned beer truck.[117] This decision is a move in the direction of holding police liable for their failure to act to protect citizens, and could be a stepping-stone, in combination with the case discussed here, to holding police

liable for omissions of duty in respect of rape cases. Thus, the time seems right to attempt to build upon these developments in the common law to apply a duty of care in respect of gender-based violence, in line with the international law concept of 'due diligence'.[118]

3 Strategies

The cases reviewed here show that litigation on its own is often insufficient to advance human rights. In order to ensure that cases that assist individual complainants will also serve the interests of the broader public, it is necessary to select cases rigorously and perhaps even ruthlessly, to combine litigation with complementary advocacy strategies and to explore more creative litigation stances.

3.1 Careful case selection

Namibia is a nation with a small population, which is not particularly litigious, thus narrowing the possibilities at the outset of the already difficult process of test case selection. It is well established in Namibian law, as in many other jurisdictions, that a court should 'decide no more than what is absolutely necessary for the decision of a case'.[119] This means that it is important to choose cases with the best possible factual profile when seeking to establish helpful jurisprudence—something that is true in every jurisdiction, but perhaps more challenging in a situation when there are fewer potential public interest clients. One solution might involve more proactive efforts to identify potential litigants (mindful, of course, of the ethical obligations restricting the solicitation of clients), with a view to bringing cases that have the best possible chance for producing useful jurisprudence.

3.2 Combining litigation and advocacy

A crucial strategy would involve situating key test cases within an overarching strategy that involves advocacy. One possible way to combine advocacy and litigation involves the Namibian courts' emphasis on the values and ideals of the Namibian people, and the legal convictions of the community. Advocacy around an issue preceding a court case could stimulate public discussion on particular issues and give courts more insight into the range of public opinion, which is not always well-represented by parliamentarians, the media or any of the other institutional sources that the courts have cited. In some instances, public discussion of issues can also illuminate or alter public attitudes, as people answer questions and engage in discussions that expand upon or challenge their initial views.[120]

A second approach would be to ensure that alternatives are developed and ready to put forward when the courts are asked to invalidate a law on constitutional

grounds. Namibian precedent indicates that a constitutional challenge is quite likely to result in the striking down of offending rules without replacing them, or in a directive to parliament to replace them within a certain time frame.[121] This may, as in the *Berendt* case discussed here, result in an unsatisfactory new law. It might be better to attempt advocacy on broad and recurring problems, resorting to litigation to move these law reforms forward if the requisite political will is lacking.

Thirdly, positive, constructive action around a particular issue, rather than litigation, might be more helpful to a larger pool of people. For example, the Legal Assistance Centre regularly receives complaints about wrongful actions by executors of deceased estates. Instead of instituting litigation in every instance, we have been liaising with the Master of the High Court to explore ways to address this issue. As another example, where a specific group of civil servants, such as immigration officials or marriage officers or officials who register births, are failing to apply the law properly, an offer to conduct a training course or to prepare a simplified manual might lead to more prompt and sustainable results than a lengthy court case with an unpredictable outcome.

A fourth potential function of advocacy linked to litigation would be to spend more effort disseminating information about positive case outcomes, which might inspire others to assert their rights, or at least to feel that the courts are accessible and provide effective remedies. When a new gender law is enacted, the Legal Assistance Centre usually makes this a basis for educational materials, media coverage, community workshops and other awareness-raising activities. Similar efforts at educational publicity could be brought to bear on successful litigation.[122]

Of course, one drawback to advocacy is that it is usually a long-term approach that will not help the individual clients who call attention to a problem. It may, therefore, seem rather heartless to turn an individual, often indigent, client away while focusing on another strategy, such as law reform. Yet the whole point of public interest litigation is to assist a broader pool of people than that which individual advice and representation could ever achieve. So, unfeeling as it may seem, strategic concerns and the effective use of limited resources may require strategies that prioritise the affected group over an affected individual. Advocacy is often slower and far less glamorous or exciting than litigation, and is therefore often a somewhat neglected part of the equation. Yet the ideal public interest stance involves a strategic use of both advocacy and litigation.

3.3 Exploring different avenues for litigation

Another possible strategy involves advocacy *about* litigation. Article 25(2) of the Namibian Constitution allows 'aggrieved parties' to bring an action in a court of law:

> *Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.*

Although there have been some indications of a recent trend towards a somewhat broader interpretation of this phrase,[123] it remains doubtful that NGOs would qualify as 'aggrieved parties' for issues affecting their constituencies in most cases. This contrasts to the much broader South African approach. Section 38 of the South African Constitution states:

> *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—*
>
> (a) *anyone acting in their own interest;*
>
> (b) *anyone acting on behalf of another person who cannot act in their own name;*
>
> (c) *anyone acting as a member of, or in the interest of, a group or class of persons;*
>
> (d) *anyone acting in the public interest; and*
>
> (e) *an association acting in the interest of its members.*

The Legal Assistance Centre attempted to expand the concept of *locus standi* in respect of environmental issues in the case of *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd*.[124] However, the High Court disposed of the matter on technical grounds and so did not reach the issue of *locus standi*, and the Supreme Court declined to decide the issue of standing on the basis that the substance of the original application for review had become moot, and the court should decide constitutional issues only when it is absolutely necessary.[125]

The Gender Research and Advocacy Project of the Legal Assistance Centre recently published a set of papers discussing access to justice as a human right and exploring different methods for broadening access to litigation—including proposals for broadening the rules of standing, a consideration of the role of costs and contingency fees and proposals for court rules that would explicitly allow the participation of *amici curiae* ('friends of the court') who are not parties to the case. The papers examine the approaches to these issues in other jurisdictions and make recommendations on how Namibian law might be appropriately developed in some of these areas.[126] One of the key recommendations is that Namibia should introduce a statute to reform the common law on standing, so as to permit (a) representative

standing to litigate on behalf of another whose rights have been violated; (b) public interest standing, which would allow a litigant to challenge the legality or constitutionality of a statute or a government action without demonstrating that it violated the rights of a particular individual; and (c) class actions, in which a number of actions with common issues, claims or defences are consolidated to be litigated together.

4 Conclusion

Public interest litigation is a useful and desirable tool in establishing and enforcing legal rights. It can assist individual complainants, as well as create precedent with a broader legal effect. It can also develop the law to advance gender equality, mobilise public discussion and opinion, and create pressure on government for legal change. However, there are also inherent risks in public interest litigation and limits to what litigation on its own can accomplish. Litigation on gender issues might be more successful if it is integrated into broader strategies with components such as research, public consultation and education and increased publicity of positive case results, which might inspire others to assert their rights. At the same time, developing new approaches to litigation might expand the range of public interest issues that can be successfully tackled. The law is a multi-faceted discipline, and public interest groups should make greater efforts to link the different facets.

Endnotes

1 Namibia became an independent country with its own Constitution on 21 March 1990 (hereafter the 'Constitution') after having been under South African control since World War I.

2 The Legal Assistance Centre is a public interest law centre based in Windhoek, Namibia. It was established in 1988 to provide legal services in impact cases to indigent clients, and initially focused on challenging human rights violations under the apartheid system. After Namibia became independent in 1990, the Legal Assistance Centre turned its attention to strengthening Namibia's constitutional democracy and building a culture of human rights through education, law reform, research and lobbying — in addition to continuing its work in the areas of litigation and legal representation.

3 Article 20(1) of the Constitution (n 1) states that '[a]ll persons shall have the right to education'.

4 *Karuaihe-Samupofu v Minister of Basic Education, Sport and Culture*, High Court of Namibia, unreported case no. (P) A 12/2005, 10 February 2005 at 10.

5 *Karuaihe-Samupofu* (n 4).

6 *Karuaihe-Samupofu* (n 4) at 10–11.

7 *Karuaihe-Samupofu* (n 4) at 11.

8 *Karuaihe-Samupofu* (n 4) at 12.
9 Letter from the Principal, Windhoek High School, addressed to Mr and Mrs Karuaihe, dated 16 February 2005, appended to Supplementary Affidavit of Seuaa Karuaihe-Samupofu, 24 February 2005, in *Karuaihe-Samupofu v Minister of Basic Education, Sport and Culture,* High Court of Namibia, unreported case no. (P) A 12/2005, 3 March 2005 (second application).
10 Letter from the Principal, Windhoek High School (n 9).
11 Letter from the Minister of Basic Education, Sport and Culture, addressed to Mr Norman Tjombe (attorney for Seuaa Karuaihe-Samupofu), dated 1 March 2005, appended to Affidavit of Seuaa Karuaihe-Samupofu, 7 March 2005, in *Karuaihe-Samupofu v Minister of Basic Education, Sport and Culture*, High Court of Namibia, unreported case no. (P) A 12/2005, 23 March 2005 (third application) at paragraph 1.8(b).
12 *African Charter on the Rights and Welfare of the Child,* OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.
13 *Karuaihe-Samupofu* (n 11) at 5–6.
14 *Karuaihe-Samupofu* (n 11) at 7.
15 *Karuaihe-Samupofu* (n 11).
16 *Karuaihe-Samupofu* (n 11) at 8.
17 Ministry of Basic Education, Sport and Culture. (2005). 'Media release: Policy on pregnancy amongst learners', appended to Answering Affidavit of Stanley Mutamba Simataa, Acting Permanent Secretary, Ministry of Basic Education, Sport and Culture, 26 January 2005, in *Karuaihe-Samupofu v Minister of Basic Education, Sport and Culture* (n 4).
18 National Society for Human Rights. (2006). *Shadow Report: UN Convention on the Elimination of All Forms of Discrimination against Women, NGO Comments on Country Report Cedaw/C/Nam/2*–3. Windhoek: National Society for Human Rights.
19 United Nations Committee on the Elimination of Discrimination against Women. (2007). *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Namibia*. 2 February, U.N. Doc. CEDAW/C/NAM/CO/3, paragraph 22.
20 The new policy was ultimately given the title 'Education Sector Policy for the Prevention and Management of Learner Pregnancy'. See (2009) 'Cabinet adopts policy on pregnant schoolgirls', *The Namibian*, 3 November. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews%D=61362&no_cache=1 (accessed April 2012).
21 *Roe v Wade* 410 US 113 (1973).
22 *Roe v Wade* (n 21) at 125, quoting *Southern Pacific Terminal Co v ICC* 219 US 498 (1911) at 515.
23 *Roe v Wade* (n 21).
24 *Roe v Wade* (n 21). The Namibian position on mootness is not entirely clear. However, at least one recent case states that 'a Court has no discretion to grant an interdict to protect a right that does not exist anymore': *Clear Channel Independent Advertising Namibia (Pty) Ltd and Another v Transnamib Holdings Limited and*

Others 2006 (1) NR 121 (HC) at paragraph 49 (139E–F), citing *Plettenberg Bay Entertainment v Minister van Wet en Orde* 1993 (2) SA 396 (C) at 401E. The first applicant requested the court to review the lessor's decision to enter into a contract with another party for the erection of billboards after a lease agreement with the applicant for this purpose had expired. The court's reasoning was as follows: 'A Court is usually requested to determine the *locus standi* of a person or party to bring a review application. Even if it has to be determined whether first applicant … had an interest in future contracts for the lease of the premises of first respondent for the purpose of erecting billboards thereon, and I have to consider what is being regarded mainly in administrative law as *locus standi in judicio*, the applicants do not have the required interest' (at paragraph 44 (138E–G)). The court concluded that the requisite interest to establish standing was therefore lacking (at paragraph 50 (139F–H)).

25 The 2007 Labour Act, which came into force subsequently, provides a more clear and detailed definition of sexual harassment. Section 5(7)*(b)* of the Labour Act 11 of 2007 defines sexual harassment as follows:

> *sexual harassment means any unwarranted conduct of a sexual nature towards an employee which constitutes a barrier to equality in employment where—*
>
> *(i) the victim has made it known to the perpetrator that he or she finds the conduct offensive; or*
>
> *(ii) the perpetrator should have reasonably realised that the conduct is regarded as unacceptable, taking into account the respective positions of the parties in the place of employment, the nature of their employment relationships and the nature of the place of employment.*

26 Hubbard, D. & Coomer, R. (2008). 'Can employers afford to ignore sexual harassment?' *The Namibian*, 31 October. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=49862&no_cache=1 (accessed 16 April 2012).

27 Halfkenny, P. (1995). 'Legal and workplace solutions to sexual harassment in South Africa (Part 1): Lessons from other countries', *Industrial Law Journal* 16: 1–14 at 13. No reported or unreported cases on sexual harassment have been located since this date.

28 In 2007, the Legal Assistance Centre submitted proposals to the Ministry of Labour on its draft Code, which will hopefully be incorporated to strengthen the Code and give it more detail. The expected Code had not yet been promulgated at the time of writing.

29 As will be discussed later, subsequent cases canvassed both of these issues.

30 The case was brought against the employer and the medical doctor alleging the following: that the employees were tested for HIV without giving informed consent; that the employer used false representation to get the employees to consent to the tests (which were represented as being for general hygiene); and that the doctor disclosed their test results to third persons, thereby breaching the patient–doctor confidentiality relationship. See Isaacs, D. (2009). 'Illegal AIDS testing case to go to court', *The Namibian*, 17 July. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=57454&no_cache=1 (accessed 16 April 2012).

31 (2009). 'And justice for all', *The Namibian*, 24 July, Responses on issues of the day. Available at http://www.namibian.com.na/indexphp?id=28&tx_ttnews{tt_news]=57754&no_cache=1 (accessed 16 April 2012).

32 The reply from the Director of the Legal Assistance Centre stated:

> *Firstly, whilst the LAC takes on cases in the public interest, with the view of challenging discriminatory laws, policies and/or practices, our primary professional responsibility lies towards our client or clients. In the recent HIV testing case, our clients were offered, and counter-offered, an out-of-court settlement, which was ultimately agreed to by the litigating parties, and we have no option but to adhere to the clients' instructions. Whilst the case did not go on trial, the LAC and its clients believe that the issue which would have been contested in the trial — that of the testing for HIV without the appropriate consent — has publicly been raised to the extent that many people are now aware of their rights and duties, particularly employers, employees and medical practitioners by the publicity that the case was subjected to. Obviously, the LAC and its partners will remain vigilant to prevent further violations of the rights of people, and take it up in appropriate forums, whether it be through litigation, research, advocacy and or education.*

The reply went on to express appreciation for the reader's interest in the work of the Legal Assistance Centre. (2009). *The Namibian*, 28 July, Responses on issues of the day. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=57825&no_cache=1 (accessed 16 April 2012).

33 The normal prescription period is three years (section 11*(d)* of the Prescription Act 68 of 1969). In terms of section 3 of this Act, prescription of a minor's claim takes place three years after the date on which the minor attained majority.

34 Article 10(2) of the Constitution (n 1) states: 'No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

35 *Frans v Paschke* 2007 (2) NR 520 (HC).

36 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

37 *Myburgh v Commercial Bank of Namibia* (n 36) at 263F. The *Myburgh* case contrasted the wording of article 66(1) of the Constitution (n 1) with the wording of article 25(1)*(b)* of the Constitution that '*any law* which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional' (emphasis added) and article 140(1) of the Constitution which states: 'Subject to the provisions of this Constitution, *all laws* which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court' (emphasis added). The court found that these references to 'any law' and 'all laws' must refer only to statutory enactments and not to the common law, concluding that the Constitution thus 'set up different schemes in regard to the validity or invalidity of the common law when in conflict with its provisions and the statutory law'. *Myburgh v Commercial Bank of Namibia* (n 36) at 263G–I.

38 Section 16(2).

39 Section 26(1) states that the Act 'applies to all children or persons, where applicable, and to all matters relating to children or persons, where applicable, irrespective of whether the children or persons, where applicable, were born or the matters arose before or after the coming into operation of the Act'.

40 Section 26(2).

41 Ministry of Gender Equality and Child Welfare. (2008). Commencement of the Children Status Act 6 of 2006, GN 266 *GG* 4154 of 3 November.

42 *Frans* (n 35) at 529A.

43 Article 14(3) of the Constitution (n 1) states: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' The Constitution does not define 'family'.

44 Menges, W. (2007). 'Ruling deals blow to centuries-old discrimination', *The Namibian*, 13 July. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=35547&no_cache=1 (accessed 16 April 2012). The next legal hurdle was to settle a dispute as to whether the value of the unjust enrichment to the person who was heir before the common-law exclusion of 'illegitimate' children was struck down must be determined as at the date of summons or the date of judgment. On the principle that the issue should be decided in a manner that recompenses the plaintiff to the fullest possible extent for his damage, the court decided that the relevant date is the date on which the court, after having heard evidence on the value, reserves judgment. *Frans v Paschke*, Case No. 1548/2005, High Court judgment issued on 25 June 2012, as yet unreported. The holding on this issue was, at the time of writing, being appealed to the Supreme Court. Personal communication with Mr Frans's attorney, 2 August 2013.

45 Section 2(2).

46 See article 10(2) of the Constitution (n 1), quoted in n 34 above.

47 *Myburgh* (n 36) at 267C–D.

48 *Myburgh* (n 36) at 267D.

49 Section 9 of the Aliens Act 1 of 1937 provides:

> *(1) If any person who at any time bore or was known by a particular surname, assumes or describes himself by or passes under any other surname which he had not assumed or by which he had not described himself or under which he had not passed before the first day of January 1937, he shall be guilty of an offence unless the Administrator General or an officer in the Government Service authorized thereto by him, has authorized him to assume that other surname and such authority has been published in the* Official Gazette*: Provided that this subsection shall not apply when—*
>
> (a) *a woman on her marriage, assumes the surname of her husband;*
>
> (b) *a married or divorced woman or a widow resumes a surname which she bore at any prior time …*
>
> *(2) No such notice as is mentioned in subsection (1) shall be issued unless—*
>
> (a) *the person concerned has published in the manner hereafter prescribed once in each of two consecutive weeks in the* Official Gazette *and in each of two daily newspapers which circulate in the district in which the said person*

resides and which have been designated for such publication by the magistrate of that district, a notice of his intention to assume another surname; and

(b) *the Administrator General or an officer in the Government Service authorized thereto by him, has satisfied himself from a statement submitted by the said person and from reports furnished by the Commissioner of the South West African Police and by the said magistrate, that the said person is of good character and that there is a good sufficient reason for his assumption of another surname.*

50 *Müller v President of the Republic of Namibia* 1999 NR 190 (SC).

51 *Mwellie v Minister of Works, Transport and Communication* 1995 (9) BCLR 1118 (NmH) at 1132F. See also 1134G–135A.

52 *Müller* (n 50) at 199F–I.

53 *Müller* (n 50) at 200B–D.

54 The Court looked to South Africa and India on this point.

55 *Müller* (n 50) at 203.

56 The court emphasised the need to break with the past and to right past wrongs: *We have a background history of discrimination which was rife and which was based on all of the enumerated grounds set out in Article 10(2)* [of the Constitution]. *On top of this we still have a legacy of legislation that was inherited on Independence, some of which gave the force of law directly or indirectly to such discrimination or inequality. To apply without more to such a situation a fine-tuned approach which was developed over many years in a developed and sophisticated society which did not have our background history of discrimination may lead to a perpetuation of those inequalities which may still exist rather than to eliminate them* (at 198B–E). Thus, the court found it necessary to consider the purpose of the discrimination in question, including the impact of the discrimination on the victim and any previously disadvantaged groups in society (at 202I–J and 203A–B).

57 *Müller* (n 50) at 204B.

58 Since this case was decided, it has become increasingly common for prominent married urban women — such as parliamentarians — to use their own surnames together with their husbands' surnames in hyphenated form. There are even a few isolated instances where both husband and wife have adopted such hyphenated surnames.

59 United Nations Human Rights Committee. (2002). *Communication No. 919/2000*, 28 June, CCPR/C/74/D/919/2000. At paragraph 6.8, the committee said: 'In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant.' Also see Menges, W. (2002). 'Swakop man makes gender equality history', *The Namibian*, 11 July.

60 As of mid-2013, the Ministry of Home Affairs and Immigration is in the process of revising Namibia's legislation on birth and death registration. The forthcoming law is expected to revise the offending statutory provision in question at long last.

61 Bonthuys, E. (2000). 'Deny thy father and refuse thy name: Namibian equality jurisprudence and married women's surnames', *South African Law Journal* 117(3): 464–475.

62 Since the *Müller* case (n 50), it has emerged that there is a high level of public interest in more general issues relating to the law on surnames. The Children's Status Bill, drafted by the Ministry of Gender Equality and Child Welfare for presentation to parliament in 2004, originally included some amendments to the Births, Marriages and Deaths Registration Act 81 of 1963, which were intended simply to make the provisions for registering the birth of a child born outside marriage gender-neutral. This was intended to correspond with the underlying legal change in the Children's Status Bill, which gives mothers and fathers of such children equal opportunities to become the child's custodian and guardian. However, the group submission to the Parliamentary Committee that was examining this Bill, prepared by the Legal Assistance Centre and joined by more than 30 groups, proposed the deletion of these proposed amendments in favour of a complete revision of the Births, Marriages and Deaths Registration Act 81 of 1963 as a separate, future project. The rationale for this decision was general public dissatisfaction with the law on surnames, stemming from its failure to cater for the cultural naming practices of many of Namibia's ethnic groups. Many people consulted felt that it would be unfair to improve the existing law in respect of some children while leaving the problems experienced by so many others unaddressed. At the time of writing, the general rules on surnames of children and married persons are being examined as part of an overall reform of the law on birth and death registration and name change procedures.

63 *Berendt v Stuurman* 2003 NR 81 (HC).

64 Section 2 of Regulation GN 70 *Official Gazette of South West Africa* 1818 of 1 April 1954, which was promulgated under section 18(9) of the Native Administration Proclamation 15 of 1928, provides that:

> *If a native dies leaving no valid will, his property shall be distributed in the manner following—*
>
> (a) *If the deceased, at the time of his death, was—*
>
> *(i) a partner in a marriage in community of property or under antenuptial contract; or*
>
> *(ii) a widow, widower or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage,*
>
> *the property shall devolve as if he had been a European.*
>
> (b) *If the deceased does not fall into a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom.*

65 Committee on the Elimination of Racial Discrimination. (1996). *Reports Submitted by States Parties Under Article 9 of the Convention: Namibia*, 3 January. U.N. Doc. CERD/C/275/Add.1, at paragraph 12.

66 Section 18(1) of the Native Administration Proclamation 15 of 1928 provides that '[a]ll movable property of whatsoever kind belonging to a Native and allotted by

him or accruing under native law or custom to any women with whom he lived in a customary union, or to any house shall upon his death devolve and be administered under native law and custom'. It should be noted that this section uses overtly sexist terminology, and is silent on what happens when an African *woman* dies. This omission probably stems from the fact that women were regarded under customary law as perpetual minors who could not own property. Section 18(2) of the Native Administration Proclamation provides that: 'All other movable property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.' The application of the Native Administration Proclamation to 'South West Africa' was convoluted. As a result, sections 18(1) and (2) (along with section 18(9) and Regulation GN 70 *Official Gazette of South West Africa* 1818 of 1 April 1954 promulgated in terms of that section), apply to the whole of Namibia, with the exception of Kavango, Eastern Caprivi and Ovambo. See Legal Assistance Centre. (2005). *Customary Laws on Inheritance in Namibia: Issues and Questions for Consideration in Developing New Legislation.* Windhoek: Legal Assistance Centre, at Chapter 6.

67 As another remnant of colonial history, the deceased estates of 'Basters' of the Rehoboth community are governed by the Administration of Estates (Rehoboth *Gebiet*) Proclamation 36 of 1941 *Official Gazette of South West Africa* 920 of 15 October 1941. As of mid-2013, a draft Administration of Estates Bill, which would apply to all persons in Namibia,was under discussion.

68 In making this ruling, the court followed the South African case of *Moseneke v The Master* 2001 (2) SA 18 (CC).

69 The court noted that the Native Administration Proclamation 15 of 1928 does not explicitly give magistrates the power to appoint executors in respect of the estates that fall under that law, but this power has been assumed by magistrates 'by necessary implication' (*Berendt* (n 63) at 86C). The court agreed with the assertion that 'magistrates in Namibia have followed the practice of issuing letters of administration in the estates of black persons dying intestate as a practical measure of giving effect to the wishes and decisions of the deceased's family' (at 86I).

70 The government's argument was that it needed more time to come up with a uniform law on succession and administration of deceased estates in Namibia because of the complexity of the task and the need to consult widely with stakeholders. During the extended time period, the government's Law Reform and Development Commission circulated several drafts for comment, but received significant criticisms from stakeholders on all the proposed approaches.

71 Section 1. Section 2 of the same Act takes precisely the same approach to the law that applies to the estates of Rehoboth 'Basters'. The new law came into force on 29 December 2005.

72 The Legal Assistance Centre has had no instructions from the client to take the matter further at this stage.

73 Section 3(3) and (4).

74 The Act does not apply retrospectively, with the effect that magistrates were to

continue to oversee the distribution and liquidation of estates that were in the process of being finalised when the new law became operative. However, any person with an interest in such an estate may request the Master, in writing, to administer the estate.

75 Law Reform and Development Commission. (2012), *Report on Succession and Estates (Project 6), LRDC 19.* Windhoek: Law Reform and Development Commission; personal communication with Chairperson of Law Reform and Development Commission, July 2013.

76 *Frank v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

77 *Frank* (n 76) at 264B–D.

78 *Frank* (n 76) at 264D–F.

79 *Frank* (n 76) at 265E.

80 *Frank* (n 76) at 266C–D.

81 *Frank* (n 76) at 268E–269B.

82 *Frank* (n 76) at 269D.

83 *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC); majority opinion (O'Linn, AJA joined by Teek, AJA) at 109J–110A; minority opinion (Strydom, CJ) at 171B, 174C–D.

84 *Chairperson of the Immigration Selection Board v Frank* (n 83); majority opinion (O'Linn, AJA joined by Teek, AJA) at 110B; minority opinion (Strydom, CJ) at 174I–175A.

85 *Chairperson of the Immigration Selection Board v Frank* (n 83); minority opinion (Strydom, CJ) at 174I.

86 *Chairperson of the Immigration Selection Board v Frank* (n 83); majority opinion (O'Linn, AJA joined by Teek, AJA) at 135H.

87 *Chairperson of the Immigration Selection Board v Frank* (n 83) at 136A, quoting *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 (SC) at 280F.

88 *Chairperson of the Immigration Selection Board v Frank* (n 83) at 139E.

89 *Chairperson of the Immigration Selection Board v Frank* (n 83) at 137A–C and 141I–142B, quoting in part, *Namunjepo v Commanding Officer, Windhoek Prison* (n 87), (O'Linn, AJA, writing for a majority of the court). Other cases have also indicated that constitutional interpretation must be carried out in the context of Namibian values. For example, Berker, CJ, stated in a concurring opinion in a 1991 case that 'the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspiration and a host of other established beliefs of the people of Namibia'. *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 197H–J.

90 It noted further that 'Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people'. *Chairperson of the Immigration Selection Board* (n 83); majority opinion (O'Linn, AJA joined by Teek, AJA) at 137H–I, citing *Namunjepo v Commanding Officer, Windhoek Prison* (n 87). The court also listed as sources of information about values: 'debates in parliament and in regional statutory bodies and

legislation passed by parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of Court; referenda; publications by experts' (at 138C–D).

91 *Chairperson of the Immigration Selection Board* (n 83) at 138G, quoting *S v Vries* 1998 NR 244 (HC).

92 For more information on discrimination against homosexuals in Namibia, see Human Rights Watch and Gay and Lesbian Human Rights Commission. (2003). *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa.* New York: Human Rights Watch; Lorway, R. (2006). 'Dispelling "heterosexual African AIDS" in Namibia: Same-sex sexuality in the township of Katutura', *Culture, Health & Sexuality* 8(5): 435–449. For a detailed discussion of the problems in the approach to values taken by the *Frank* case, see Hubbard, D. 'The paradigm of equality in the Namibian Constitution: Concept, contours and concerns', in A. Bösl et al. (eds). (2010). *Constitutional Democracy in Namibia; A Critical Analysis After Two Decades*. Windhoek: Konrad-Adenauer Stiftung, 215–249.

93 *Chairperson of the Immigration Selection Board* (n 83); majority opinion (O'Linn, AJA joined by Teek, AJA) at 150G.

94 '[T]he President of Namibia as well as the Minister of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that when the issue was brought up in Parliament, nobody on the Government benches, which represent 77% of the Namibian electorate, made any comment to the contrary.' *Chairperson of the Immigration Selection Board* (n 83) at 150D–F. The court also noted that '[t]he opposition against the decriminalising of sodomy in Namibia is part and parcel of the Government resistance to promoting homosexuality' (at 150H–I).

95 *Chairperson of the Immigration Selection Board* (n 83) at 146F–H.

96 *Chairperson of the Immigration Selection Board* (n 83) at 145D–E.

97 United Nations Human Rights Committee. (1994). *Communication No. 488/1992*, 4 April, U.N. Doc CCPR/C/50/D/488/1992. The United Nations Human Rights Committee examined the case of *Toonen v Australia*, which challenged the existence of laws criminalising consensual sodomy in the Australian state of Tasmania. The committee concluded that the criminal laws on sodomy constituted an unreasonable interference with Mr Toonen's right to privacy under article 17 of the International Covenant on Civil and Political Rights, which states: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' See *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976. Without further elaboration, the committee then made the observation that 'sex' in the provisions on discrimination includes 'sexual orientation', and concluded that

Mr Toonen's rights under article 2(1) of the *International Covenant on Civil and Political Rights* had also been infringed. See Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

98 Article 144 of the Namibian Constitution states: 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

99 *Chairperson of the Immigration Selection Board* (n 83); majority opinion (O'Linn, AJA joined by Teek, AJA) at 155E–F.

100 *Chairperson of the Immigration Selection Board* (n 83) at 156H.

101 See the definition of 'domestic relationship' under section 3 of the Combating of Domestic Violence Act 4 of 2003. The definition of marriage is not limited in this way, as only people of different sexes can marry in Namibia. But the limitation is applied to people who 'live or have lived together in a relationship in the nature of marriage' and to people who 'are or were in an actual or a perceived intimate or romantic relationship'.

102 Deputy Minister of Justice. (2002). *Debates of the National Assembly*, 22 October. Another parliamentarian similarly stated that it was 'of utmost importance' that the Domestic Violence Bill 'does not give protection to any homosexual relationship', adding that his argument 'can be attested to by the case of two women who wanted to be recognized as a married couple and were disqualified by a court decision because it is contrary to the Namibian customs and traditions'. (2002). *Debates of the National Assembly*, 15 November.

103 *Vivier NO v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 (HC).

104 *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 (1) SA 389 (SCA) at 395H–396D, as quoted in *Vivier* (n 103) at paragraph 29.

105 *Vivier* (n 103) at 36–40.

106 *Vivier* (n 103) at 43.

107 *Vivier* (n 103) at 44.

108 *Vivier* (n 103) at 40.

109 *Vivier* (n 103) at 48: 'In my view, the question which needs to be answered is whether the reasonable person in the position of Ms Gennison [the hostel superintendent] would have foreseen that harm could come to A should she leave the hostel. It is not the precise or exact manner in which the harm occurs which needs to be foreseeable but the general manner of its occurrence must be reasonably foreseeable.'

110 *Vivier* (n 103) at 54.

111 *Vivier* (n 103) at 82.

112 *Minister of Basic Education, Sport and Culture v Vivier NO* 2012 (2) NR 613 (SC). The government chose to appeal on the basis that the court erred in finding that the child had been raped rather than challenging its holding on the duty of care; paragraph 14. The only thing overturned on appeal was the quantum of damages awarded to the grandmother, which was reduced from N$ 25 000 to N$ 10 000, with a small amount of additional damages in respect of medical expenses for the

grandmother being disallowed; paragraphs 37–43. The Supreme Court summarises the findings of the High Court on the duty of care at paragraphs 10–12, without comment. The appeal case was heard on 7 April 2008, but the judgment was handed down more than four years later, on 29 June 2012. Such delays in issuing judgments have become frequent in Namibia in recent years, constituting yet another obstacle to the effectiveness of litigation as a public interest strategy. See, for example, Mongudhi, T. (2012). 'Inching forward', *insight*, 13 July; Rickard, C. (2012). 'Lawyers covering themselves with cowardice', *Without Prejudice* 12(5): 52–53; Menges, W. (2012). 'Delayed judgements to the fore at court opening', *The Namibian,* 17 January; Smit, N. (2011). 'Uproar over long judgment delays', *The Namibian*, 22 December; (2009). 'Judging the judges', *insight,* 3 June; (2008). 'Wheels of justice moving at last', *insight*, 4 September; Mongudhi, T. (2008). 'Justice denied', *insight*, 2 August.

113 Yet another similar situation involved a wheelchair-bound patient in the tuberculosis ward in a state hospital, who was suffering from a brain dysfunction resulting from alcohol abuse. She was allegedly raped by a stranger in the hospital compound, who found her outside where she had been left by the nurses to enjoy the sunshine. The rape incident was witnessed by other patients, and both a clinical psychologist and a psychiatrist concluded that she did not have the mental ability to consent to sexual acts or to communicate her unwillingness to engage in sexual intercourse. The Legal Assistance Centre was contemplating litigation on the duty of care in this case, but the patient died before the case went forward.

114 See, for example, Isaacs, D. (2006). 'Woman raped in mental ward at hospital', *The Namibian*, 21 July. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=25283&no_cache=1 (accessed 17 April 2012); (2005). 'Institution unaware of rape among patients', *New Era*, 23 August. Available at http://www.newera.com.na/article.php?articleid=8481 (accessed 17 April 2012).

115 See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* 1998 (39) OR (3d) 487 (Ont Gen Div). For a summary of these cases, as well as differing approaches taken in the UK and Australia, see Legal Assistance Centre. (2006). *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 2000.* Windhoek: Legal Assistance Centre, 504ff.

116 *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at 164D–G, citing former South African Chief Justice Corbett in Corbett, M.M. (1987). 'Aspects of the role of policy in the evolution of our common law', *South African Law Journal* 104(1): 52–69, at 67–68. In this case, the High Court considered and approved an extension of the law on delict to allow a plaintiff to be awarded damages arising from an engineering defect, even though the plaintiff was not the owner of the property in question at the time of the defect.

117 *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC).

118 The United Nations Committee, which monitors the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), recommended in 1992:

'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.' Committee on the Elimination of Discrimination against Women. (1993). *CEDAW General Recommendation No. 19: Violence against Women*, adopted at the 11th Session, 1992 (contained in U.N. Doc. A/47/38) at 1. In 1993, the United Nations General Assembly Declaration on the Elimination of Violence Against Women also advised states to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. United Nations General Assembly. (1993). *Declaration on the Elimination of Violence against Women*, 20 December, U.N. Doc. A/RES/48/104. This exact wording was again used in Beijing in 1995 in the United Nations Fourth World Conference on Women. (1995). *Beijing Declaration and Platform for Action*, 4–15 September, Beijing, China, U.N. Doc. A/CONF.177/20.

119 *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC) at 184A, quoting Bhagwati J (as he then was) in *M M Pathak v Union* [1978] 3 SCR 334, in relation to the practice of the Supreme Court of India.

120 For example, a public opinion survey on commercial sex work, conducted by the Legal Assistance Centre in 2001, found that most respondents were opposed to the decriminalisation or legalisation of sex work, yet somewhat inconsistently felt that sex workers needed greater rights and increased protection against abuse. Legal Assistance Centre. 2002. *'Whose Body Is It?' Commercial Sex Work and the Law in Namibia.* Windhoek: Legal Assistance Centre, 145–146. Another example involving public consultations was that around the Child Care and Protection Bill, spearheaded by the Ministry of Gender Equality and Child Welfare and the Legal Assistance Centre during 2009. Here, too, we observed individuals' opinions on controversial issues, such as the age of access to contraceptives, evolving as the pros and cons were explored in discussion.

121 Article 25(1)*(a)* of the Constitution (n 1) provides that a competent court, instead of declaring an unconstitutional law or action to be invalid, 'shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it'.

122 One model here is the use of a film entitled *Carry My Weight*, produced by the Land, Environment and Development Unit of the Legal Assistance Centre in November 2005, to educate the public about a woman's efforts to enforce section 26 of the Communal Land Reform Act 5 of 2002, which gives a surviving spouse the right to remain on land allocated to the deceased spouse. Even though this case was settled shortly after the film was made, the film remains an effective way to educate the public about the law and how to use it.

123 The Namibian courts initially interpreted constitutional standing as being identical to standing under the common law. See *Kerry McNamara Architects Inc v Minister of Works, Transport & Communication* 2000 NR 1 (HC). However, the 2009 case

of *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) seems to point in the direction of a more liberal approach to standing in respect of constitutional issues. The question of whether constitutional standing is, in fact, broader than common law standing seems to remain unsettled, however. In the unreported High Court case of *Maletzky v Attorney General* [2010] NAHC 173 (HC) the High Court rejected an applicant's contention that 'any person aggrieved by a violation of the fundamental right of another may approach the high court for an appropriate relief'; at paragraph 25. In this case, the High Court affirmatively rejected this interpretation of article 25(2), of the Namibian Constitution, differentiating it from the South African Constitution; at paragraph 31. In contrast, the *Uffindell* approach was followed in an even more recent, unreported High Court case, *Petroneft International Glencor Energy UK Ltd v Minister of Mines and Energy* [2011] NAHC 125. However, on appeal, the Supreme Court proceeded on the assumption that the applicants had standing, but because of its approach found it unnecessary 'to decide whether this assumption is legally correct or not'; *Petroneft International Glencor Energy UK Ltd v Minister of Mines and Energy* 2012 (2) NR 781 (SC) at paragraphs 37 and 51. In another case, *Trustco Insurance t/a Legal Shield Namibia v Deed Registries Regulation Board* 2011 (2) NR 726 (SC), the Supreme Court similarly found it 'unnecessary to consider the argument raised by the appellants concerning the scope of the phrase "aggrieved persons" in Article 25 of the Constitution' because it found that the applicants in question had *locus standi* at common law; at paragraph 19. The question, therefore, remains unsettled in Namibian jurisprudence.

124 *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd.* High Court of Namibia, (P)A 78/08, 18 April 2008, reviewed Supreme Court of Namibia, SA 25/2008, 19 May 2011.

125 The Supreme Court's decision was also based on the fact that another case between the same parties was already before the High Court under Case No. A 41/2009, and might still address the issue of *locus standi*. However, this case fell away for unrelated reasons.

126 The series of four papers, all available at www.lac.org.na, is entitled *Access to Justice in Namibia: Proposals for Improving Public Access to Courts* (2012); see Hinson, Z. & Hubbard, D. (2012). 'Access to justice as a human right', in Legal Assistance Series, *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*; Hinson, Z. & Hubbard, D. (2012). '*Locus standi*: Standing to bring a legal action', in Legal Assistance Series, *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*; Hinson, Z. & Hubbard, D. (2012). 'Costs and contingency fees', in Legal Assistance Series, *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*; Hinson, Z. & Hubbard, D. (2012). '*Amicus curiae* participation', in Legal Assistance Series, *Access to Justice in Namibia: Proposals for Improving Public Access to Courts*. See, as a related example, South African Law Commission (Project 88). (1998). *Report on the Recognition of Class Actions and Public Interest Actions in South African Law*.

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CHAPTER 2

Constitutionalism and the law of inheritance: Recent experiences from Uganda

Florence Akiiki Asiimwe

1 Introduction

In many countries, widows have the authority to register the home in their names if they were not originally included in the title deed. They can sell the property or use the title deed for collateral upon the death of their husbands. In Uganda, however, as in some other African countries, statutory law does not guarantee such inheritance rights to widows.[1] As Miraftab observes, when women's rights to inherit the home are not guaranteed, one major door through which women could own property is closed.[2] Statutory law in Uganda, in particular the Succession Act (Amendment) Decree No. 22/1972 (hereafter the 'Succession Act') promotes a male-dominant system in which land and housing devolve along the patrilineal line (from father to son).[3] As a result, women without children are particularly vulnerable to dispossession of the matrimonial home.[4] In some cases a widow with young children is obliged to marry one of her brothers-in-law if she is to exercise user rights to the home. If she refuses she has no alternative but to return to her natal family. In effect, statutory law serves to reaffirm patriarchal customary law, values and beliefs, rather than uphold rights to equality guaranteed by the Constitution.

This chapter explores the ways in which statutory law on intestate succession deprives widows in Uganda of home ownership upon the death of their husbands. It also explores the complex dynamics and inconsistencies between the Constitution, the law of succession and the Registration of Titles Act 1924 (Cap. 230). Through life stories and case law, weaknesses in the statutory framework with regard to widows' inheritance rights will be made evident. In doing so, however, I also recognise what Munalula has aptly stated:

> *Changing the law to ensure women have equal access to and power over property is empowering only in that it provides the framework within which rights can be enforced and claimed but it does not guarantee that those rights will be achieved in practice.*[5]

Nonetheless, despite the potential limitations, an analysis for the amendment of the framework is a crucial first step towards promoting women's empowerment.

2 The legal framework of succession and inheritance

States generally have rules governing inheritance matters based on whether a person died testate or intestate. Most of these rules are formalised in the succession laws of each country, and determine whether a widow is entitled to the matrimonial home or not. In most countries in Africa, inheritance matters are regulated through a pluralistic legal framework that includes customary law, civil law and common law. While the focus of this chapter is on statutory inheritance law, it is important to make a preliminary note on the impact of customary law on the dynamics of widows' rights to inheritance in Uganda.[6]

2.1 Customary laws and inheritance

Customary law plays a crucial role in the allocation of property because it is on these laws that decisions are often based, especially when a spouse or parent dies.[7] As Ngwira and others have argued, customary laws regarding property ownership and inheritance have the effect of assigning entitlements; that is, they define whether women and men have rights and, in this case, whether they are entitled to own property.[8] In many African societies, customary law on inheritance is based on a patrilineal system of descent, which some authors refer to as agnatic descent, as opposed to matrilineal or uterine descent and cognatic kinship inheritance.[9] In patrilineal descent, the inheritance of title, property, and position as family head is passed down through the male line of the family, for example, from father to son.[10] Sebina-Zziwa argues that it is only in terms of succession and lineage tracing that the paternal side is automatically assumed.[11] She further argues that the discourse about property inheritance in the African context centres mostly on men regardless of whether women are involved in the acquisition of the property.[12] Giddens also affirms the position that, although there are variations in the roles played by men and women, there is no known instance of a society where females are more powerful than men.[13] Hence, in communities where custom dominates inheritance matters, widows tend to be deprived of inheritance rights.

Like most African countries, Uganda has a pluralistic legal system that includes the application of both customary and statutory laws. Before the introduction of

British colonial law, inheritance of land in Uganda was governed by patriarchal customs in many communities. The custom dictated, and still does, that transfer of land to an individual had to be through a male relative. If a man had no sons, neither his wife nor daughters could inherit his estate. Rather it would devolve to the nearest male relative, such as a brother or nephew.[14] However, in special and exceptional circumstances, where there was no suitable male heir, daughters were permitted to inherit the home.[15] Decisions regarding the allocation of land were in the hands of men as heads of families or clan leaders. Even when the natal family gave land to a woman, she was not allowed to dispose of it to an outsider, except through the male or clan head.[16] It was impossible for many women to inherit or own land from their natal families or marital families because of the patriarchal custom. Thus, in many cases women had only user rights to land. Hence, after widowhood, women were merely guardians or trustees of the minor male heirs.[17] Widows with adult sons had land user rights. To ensure continued use of the land, a widow without sons would have to marry a brother-in-law. Refusal to be 'inherited' by her brother-in-law meant losing user rights to the land.

Customary law also does not recognise any equitable contribution of a wife to matrimonial property.[18] Therefore, if a woman who has contributed to the matrimonial home dies, the entire family property is presumed to belong to the husband and the male widower will automatically inherit the home.[19]

Colonial administrators did not change the patriarchal customs, but instead introduced a commercial economy with new property ownership laws where an individual had the right to own land. The colonial economy introduced new kinds of ownership of land, such as freehold and leasehold. Although the new statutory law on land ownership could have benefited women, the colonial administrators did not change the patriarchal customary laws, which did not allow women to inherit land. As a result, the customary practice of giving land to a male heir was extended to the new economic system. Men acquired title deeds, but upon their death it was still their male heirs who inherited the home. In this system, too, women did not have legal ownership rights. Furthermore, with land now a commodity that could be bought and sold at market value, men were free to sell land at will, because the title deeds were registered solely in their names. Moreover, the commercialisation of land made women's user rights even more temporary than before, because men with title deeds could use these to get loans without consulting the women.[20] Hence women were further marginalised.

Today, long after independence from colonial rule, Uganda is still largely a patrilineal society and therefore most of the customary beliefs and practices are based on a patriarchal paradigm. Customary practices, which place women in an inferior position, continue to operate in many communities. Since customary law

is unwritten, there are no fixed provisions to guide inheritance matters. Moreover, the custodians of the law, who are mainly male, tend to apply the law to suit themselves. Women's inheritance rights still depend on the decisions of men. Nor, as the next section will show, have the post-independence Ugandan statutory laws on succession improved the inheritance rights of women.

2.2 Statutory inheritance laws in Uganda

In Uganda, there are two national statutory laws that govern inheritance matters: the 1995 Constitution and the Succession Act of 1972. Uganda's supreme law with regard to the inheritance of women is the 1995 Constitution.[21] According to article 31(1) and (2) of the Constitution, a widow has a right to inherit her husband's property. However, parliament bears the responsibility of implementing such rights by creating specific laws that define and govern inheritance matters.[22] Without the necessary Acts of Parliament, the word 'property' in the Constitution remains vague, essentially leaving the widow at a disadvantage in terms of asserting her property right.

The Constitution also stipulates under article 247 that the State should facilitate the administration of estates by making the constitutional framework more accessible to ordinary people.[23] Unfortunately, very few male Ugandans leave behind valid wills and thus most deceased estates in Uganda are administered under the provisions of intestate succession.[24] The current intestate succession law, however, guarantees the widow only user rights to the matrimonial home, which is inherently in conflict with the Constitution.[25] Parliament has not made substantial reform in the family and succession laws since the enactment of the Constitution, although there has been a demand for change from NGOs and other civil society groups representing women's rights.[26]

While on the surface intestate succession law seems to grant a widow the right to inherit the property of the deceased, close scrutiny of these intestate rules reveals that the widow does not have inheritance rights to the matrimonial home, but only user rights. The matrimonial home belongs to the legal heir who is defined as the eldest son of the deceased. The widow is legally allowed to continue living in the matrimonial home as long as she keeps it safe and tidy and she does not remarry.

Whereas the Constitution seems to be gender sensitive, the current Succession Act still displays elements of customary law ideology, as its provisions continue to emphasise male dominance, which disregards women's contributions to the home. The Succession Act, therefore, needs to be amended to specifically mention what property the widow is entitled to inherit if it is to give effect to the Constitution's guarantee of widows' rights to inherit property.

2.2.1 The Succession Act (Amendment) Decree No. 22/1972: History and context

The Succession Act (Amendment) Decree No. 22/1972 (hereafter the 'Succession Act') came into effect as an amendment to the Succession Ordinance of 1906, which was based on English common law. For a long time the 1906 Succession Law, also known as the 1906 English Elite Law, applied only to Europeans living in Uganda, hence leaving Ugandans to handle most succession matters through customary law.[27] In 1966 the Attorney General allowed the 1906 English Elite Law to apply also to Ugandan elites who had acquired land. However, the 1906 English Elite Law applied only to cases where a person died testate. In spite of the availability of the more progressive Succession Ordinance, the majority of Ugandans, both elites and non-elites, continued to apply the customary norms of inheritance as if there was no statutory law in place. Most Ugandans, particularly women, were unaware of the existence of the law, and the customary norms were strongly entrenched in their communities and mindsets. It was not until 1972 that the 1906 Succession Ordinance was amended by a Decree.[28]

The Succession Act of 1972 was a clear attempt to put in place a uniform law of succession that would apply to both intestate and testate succession.[29] The Act also aimed at addressing gender issues and customary laws and practices.[30] As a result, it shifted adjudication of all succession matters from the hands of clan leaders to the courts of law. The Succession Act is divided into two parts: one part deals with properties of persons who die leaving wills (testate) and the second part deals with properties of persons who die without leaving wills (intestate). Here, only aspects of the legislation that deal with intestate succession in relation to the matrimonial home and the 1995 Constitution will be analysed.

2.2.2 Provisions on intestate inheritance of the matrimonial home

In Uganda, most inheritance matters fall under intestate provisions since the majority of the population dies without leaving a valid will disposing of his or her property.[31] For example, only five out of every hundred cases reported to the Administrator General's office die testate.[32] Many Ugandans prefer not to prepare a will due to a commonly held superstition that writing a will hastens one's death.[33] Other reasons include not realising the necessity for a written will and not knowing how to write a valid will.

For those that die without a will — most married men with property — the law provides the appointment of a personal representative of the deceased to administer and distribute the estate of the deceased person according to fixed percentages defined in the Act.[34] According to the legal distribution Schedule in the Act, a

widow acquires only 15 per cent of the entire estate, excluding the matrimonial home, the children acquire 75 per cent, the legal heir[35] acquires 1 per cent, while the dependants[36] acquire 9 per cent.

The personal representative of the deceased, referred to as the administrator, acquires Letters of Administration before she or he can effect distribution of the property according to the Schedule laid down.[37] However, the matrimonial home, legally referred to as the principal residential holding, is not among the list of items distributed, as reflected in sections 26(1) and 29(1) of the Succession Act:

> *The residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house and chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act.*[38]

Section 29(1) further emphasises non-distribution of the matrimonial home:

> *No wife or child of an intestate occupying a residential holding under section 26 and the Second Schedule to this Act shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the wife or child may be entitled under section 27.*

This means that the matrimonial home is not part of the value of the estate to be distributed according to the percentages mentioned above. It is left intact under the ownership of the 'legal heir'.[39]

If the legal heir is still under the age of 18 years, the matrimonial home is kept in trust by the widow for the legal heir until he has reached 18 years of age.[40] The widow has only user rights and cannot register the home in her own name. Where there are no sons, the nearest male relative of the deceased inherits the home.

3 Implications of the Succession Act for inheritance

Since the law of intestate succession prefers the male child in the appointment of a legal heir, the law effectively promotes patriarchal inheritance customs, which have generally discriminated against women. Essentially, while one might expect the inheritance statutory law to protect the widow, it instead supports the historical, cultural ideology that encourages male dominance and authority.

Nor does the intestate law recognise the widow's financial contribution to the matrimonial home, unless her name is also on the title deed. The law views the widow as a dependant and not as a contributor to the home. Not only are the widow's inheritance rights to the matrimonial home denied but her plight is made worse by making her occupation of the matrimonial home conditional. The widow

loses her user rights to the matrimonial home if she decides to remarry, if she leaves the home of her own free will, or if she fails to keep the matrimonial home in good condition.[41]

The widow is also not allowed to build another house on the plot of land on which the matrimonial home is located, nor is she allowed to make any changes to the matrimonial home without the legal heir's consent. The widow can have user rights as long as she does not break any of the above provisions of the law.

The user rights of the widow to the matrimonial home are more assured if she gets a Certificate of Occupancy from the court showing that she has a legal right to occupy the matrimonial home. If the matrimonial home has a title deed and is registered in the Titles Registry, the Certificate of Occupancy is a notice to everyone who may wish to buy, rent or otherwise occupy the matrimonial home that the person named (the widow or heir) in the certificate has a priority right to occupy it.

The Succession Act also fails to protect adequately widows' inheritance rights in a number of special circumstances: widows with joint tenancy, widows who were separated from their husbands, and those in cohabiting relationships.

3.1 Joint ownership

While joint ownership of land in Uganda is not common among married couples, this trend is likely to change as married couples become aware of their rights, especially in urban areas. However, the Succession Act is silent on the rights of the widow in cases where the matrimonial home is jointly owned. This may indicate an underlying patriarchal belief that the matrimonial home usually belongs to the man. The Succession Act also does not provide any guidance with regard to allowing the widow to change the title deed into her name only. Hence, if a husband dies the widow will likely find it difficult to acquire a mortgage using the title deed as collateral. Without provisions on joint ownership, a widow is placed in an uncertain situation: will she now retain user rights only, while the eldest son (or another relative) inherits? Will she be required to join her title to her husband's successor (likely the eldest son)?

In addition to these uncertainties, her situation becomes more unpredictable if her husband had children outside marriage.

3.2 Women in a separated relationship

According to the intestate succession law, a widow loses her interest in the matrimonial home if, at the time of the husband's death, she was separated from him. The only exception is if her husband dies while the wife is away from home for further studies that preclude her from being at home.[42]

The intestate law is silent on the inheritance rights of a separated wife whose name is on the title deed of the home. Does this mean that a widow, who was in joint ownership of the home but separated from her husband before he died, cannot claim her share of the matrimonial home? The home would most likely have to be sold and, with the help of a lawyer, she might be able to obtain half of the money.[43] But even before that can transpire, the widow would probably find it difficult to acquire Letters of Administration to retain her share in the home, as illustrated by the following two cases. In *Mboijana v Mboijana*,[44] the plaintiff (stepson) applied to administer his father's estate and the defendant (widow) opposed the grant on the ground that as a lawfully wedded wife of the deceased, she was entitled to the estate of the deceased. The stepson submitted that although the defendant remained legally married to the deceased until his death, she was not entitled to any estate of the deceased by virtue of section 31 of the Succession Act because she had been separated from the deceased for 20 years. On the other hand, the defendant submitted that she was the only legal wife of the deceased at the time of his death and a dependant relative under section 3 of the Succession Act, that marriage breakdown was not due to culpable or faulty behaviour of the defendant and that separation alone was not sufficient to exclude a wife from taking interest in the husband's estate. She also contended that section 31 of the Succession Act gives a court the discretionary power to ignore the legal provisions, which exclude the wife from taking interest.

Tsekooko J held in favour of the stepson, explaining:

> *… it does not mean, in my considered view, that it is enough for the defendant to merely assert that she is the legal wife of the deceased so as to entitle her to be called or treated as a dependant relative … Her own evidence is far from satisfactory in proving that she was wholly or substantially depending on the deceased … I therefore hold that the defendant has not on the balance of probabilities proved that she was a dependant wife of the deceased within the meanings of a 'dependant relative'… the defendant has no interest in the estate of the deceased … The* caveat *lodged by the defendant against the plaintiff's application for Letters of Administration is vacated.*[45]

In *Rwobuganda v Banemuka*,[46] the deceased husband had married the defendant (first widow) in church in 1964, but they separated only a year later. Although they were not legally divorced, the defendant (first widow) did not return to the matrimonial home until after the death of the deceased in 1977. Subsequent to the separation, the deceased had taken on the plaintiff (second widow) as a wife in 1967, and paid bride price for her in 1978. The plaintiff contended that she was therefore validly married to the deceased under customary law since her marriage

was a result of *okusigura*, among the Bakiga a form of elopement accepted as the customary way of marrying.

At the hearing, a will of the deceased was produced, in which he appointed the defendant (first widow) as his executor, which was not challenged by the plaintiff.

Butagira J (as he then was) held:

> *Although the plaintiff (second widow) was married under customary law, the marriage would have been invalid by virtue of Section 37 of the Marriage Act; such marriage, having been contracted before 1st October 1973 would, by virtue of Section 11(1) of the customary marriage (registration) Decree, which came into force on 1st October 1973, be valid.*
>
> *... The plaintiff's marriage to the deceased fell within the second category of contracting marriage under Kikiga Customary Law and since, on the evidence, bride price had been paid in August, (1970), the marriage had been concluded and, therefore, at the time of the deceased's death, there was a valid marriage between the deceased and the plaintiff.*
>
> *In terms of Section 56(1) of the Succession Act, every Will is revoked by the marriage of the maker, since the Will exhibited in Court … was made in August 1966, it stood revoked when the deceased married the plaintiff in 1970, and there being no subsequent Will, the deceased would be regarded as having died intestate.*
>
> *In terms of Section 31(1) of the Succession Act, no spouse of an intestate shall take any interest in the estate when that spouse was separated from the intestate as a member of the same household. Since it was found as a fact that the deceased's first wife had separated from the deceased since 1965, up to the time of the deceased's death, she would therefore take no interest in the estate of the deceased.*
>
> *There was overwhelming evidence to show that the plaintiff (second widow) was an industrious woman who kept the deceased's business going, to the extent of completing one of the buildings left unfinished by the deceased and therefore managed the estate very well, and was therefore a fit and proper person to be granted the Letters of Administration of the deceased's estate.*
>
> *Therefore, as against the deceased's first wife and defendant, the plaintiff was the only one entitled to Letters of Administration, and as the Administrator General indicated no objection to the plaintiff administering the estate of the deceased, the plaintiff would be granted the Letters of Administration accordingly.*[47]

3.3 Women in cohabitation relationships

Cohabitation in Uganda is becoming increasingly common, especially in urban areas, though it is not considered as a form of marriage.[48] A study revealed that 80 per cent of women and men in relationships in Uganda are in cohabitation relationships.[49] There are various reasons for this new phenomenon, which include,

among others, modernisation, the breakdown of social customs, high levels of poverty that inhibit young people of marriageable age from paying bridewealth, and the cost of organising a wedding.

The intestate succession law does not recognise a cohabitee woman.[50] Thus a cohabitee 'widow' is denied both inheritance rights and user rights of the home — even where the woman contributed to the 'matrimonial home', except under the guardianship of their children, as the life story below vividly portrays.

3.3.1 The life story of Jane

Jane is a widow who was unable to inherit the matrimonial home upon the death of her husband because her name was not on the title deed, even though she indirectly financed the home project. Jane's user rights of the home were in jeopardy because she was not legally married. She was only able to remain in the home as a guardian of her four children.

After her school education, Jane attended a one-year secretarial course and qualified as a secretary. She worked for over 27 years in this capacity and earned a good income.

Jane met George in 1972 at one of her places of employment, where, although they had worked for the same company for some time, she earned more than George. The couple cohabited and had four children, one boy and three girls. Jane later joined another company. After cohabiting for a number of years, Jane requested George to formalise their marriage, but he refused. For over 20 years of cohabitation the couple lived in rented houses paid for by Jane's employer.

During their 20 years of cohabitation, Jane advised George to save all his income to buy a plot of land and build a family home, while she met all the domestic expenses and payment of their children's school fees. To her, culturally it is a husband's role to build a home for the family, while the woman's role is to take care of the family in terms of food and school fees. As many authors have observed, women tend to identify themselves as homemakers and accord less value to their work and their contribution to the home; they regard their husbands as homeowners, breadwinners and decision-makers.[51] Jane's expenditure pattern confirms what studies have revealed: that women tend to spend their money on domestic activities, while men spend theirs on housing investments.[52]

Relieved of the domestic expenses, George bought a plot of land in Banda, registered it solely in his name, and constructed a home without Jane's knowledge. George's action to exclude her name from the title deed implies that he did not want her to be part owner of the family property, despite her indirect financial contribution to the home project. George's action can be interpreted to reflect the prevailing patriarchal belief that a home belongs to the man.

Jane knew about the home only when George fell ill and asked the family to move into it in 1997. Two months after the family had moved into their new home in Banda, George died intestate. After the burial, George's clan chose a male heir to take care of the deceased's family. They chose Jane's stepbrother-in-law as the customary heir because he seemed to be a responsible man. Jane's stepbrother-in-law was supposed to look after the children and Jane.

In a meeting, the family agreed that Jane and her stepbrother-in-law should administer the deceased estate. The family's decision for Jane to only *co-administer* the deceased estate could be attributed to the patriarchal belief that George's property had to be protected by the clan through the heir (stepson), thus deterring Jane from taking the family property to her clan.

Thereafter, her stepbrother-in-law asked for the title deed of the home on the pretext that the lawyers wanted it to process the Letters of Administration. Without suspecting him of ill intentions, she gave him the title deed, to realise only later that he wanted to deprive her of the title deed. Since the family had agreed that Jane would co-administer George's estate, she had to obtain Letters of Administration with her stepbrother-in-law.[53] Although the Administrator General issued a Certificate of No Objection to Jane and her stepbrother-in-law to enable them to acquire Letters of Administration from the High Court, Jane withdrew her intention. As a result, her in-laws lodged a court injunction.[54]

When Jane reported the case to the Administrator General, she called a family meeting to solve the conflict between herself and her in-laws. In the meeting, the Administrator General asked Jane's in-laws to remove the court injunction to allow administration of the estate. The Administrator General could neither allow Jane to administer George's estate on her own, because she was not legally married, nor allow the heir to administer George's estate because he might evict Jane. The only option, and the route chosen, was for the Administrator General to take over the administration of George's estate. Although not legally married, Jane was able to remain in the matrimonial home because the children were still dependants. A widow's user right of the matrimonial home is jeopardised if she is not legally married.

Jane's life story demonstrates that the law of intestate succession does not address the inheritance rights of cohabiting women. The aforementioned cases illustrate that women who were separated from their husbands at the time of the husbands' deaths find it difficult to obtain inheritance rights.[55]

3.4 Women in polygamous marriages

The type of marriage into which the widow entered determines the share she is likely to obtain from her deceased husband's estate. The 1995 Ugandan Constitution recognises five types of marriages: customary (polygamous, but

in effect polygynous), church (monogamous), civil (monogamous), Muslim (polygynous) and Hindu. The Succession Act takes polygamous marriages into consideration. Widows in polygamous marriages have to compete with their co-wives over resources for themselves and for their children. The case of *Christine Male and Others v Sylfiya Mary Namanda and Others*[56] illustrates the difficulties for such widows where there are other widows and children and no joint tenancy.

Christine Male was legally married to the deceased and had three children. However, her husband had extramarital relationships and had 12 children from different mothers. Christine applied for Letters of Administration. Another widow with four children, as well as Christine's mother-in-law, each lodged *caveats* to the effect that Christine Male should not be granted the Letters of Administration on the grounds that she had only three children by the deceased and hence she could not impartially care for the other children. The mother of four of the children argued that she was the guarantor of the loan that the deceased had used to purchase the matrimonial home and, therefore, she was entitled to stay in it. Although the judge ruled in the legal widow's favour, this case illustrates the difficulties when there are other children and widows, and where there is no joint tenancy. Thus, joint tenancy ensures that the widow will inherit the matrimonial home, but even this becomes tenuous where the deceased had many wives and children from each or some of his wives.

3.5 Succession law and women without children

Aside from the possibility of having to endure the psychological torture inflicted by the deceased's family,[57] where a childless widow's name is on the title deed of the home before the death of her husband, the issue of inheriting the house that is already legally hers does not arise. But the widow without title deeds or children is in the most precarious situation.[58] The life story below demonstrates how not only was a widow's right to inherit the matrimonial home hindered, but also her user rights of the home, because she did not have children with the deceased.

3.5.1 The life story of Nabukera

Nabukera is a widow who was unable to inherit the matrimonial home, even though her husband had left behind a valid will in which he bequeathed the matrimonial home to her as sole executor and sole beneficiary. Her husband died before he acquired the title deed of the home. Nabukera was unable to inherit the matrimonial home because she had no children of her own with her late husband and her husband left behind children from previous relationships. As a result, her stepchildren would not allow her to transfer the land on which the matrimonial home was built into her sole name.

Nabukera married Philip in the 1960s. The couple had two sons, but were later divorced.

In 1970 Nabukera entered into a second legal marriage to Mukwasi, a parish chief. This marriage, though long, was childless. Mukwasi already had five children from other women and lived in a home on untitled land (*kibanja*). The original owner of the land had allowed him to build a home and use the land with the understanding that he would collect taxes from the other squatters as a parish chief. Before Mukwasi died, he divided the land among his five children, keeping only the plot on which he had built the matrimonial home.

In 1990, Mukwasi died testate. In the will, Mukwasi bequeathed the matrimonial home solely to Nabukera, since he had already given each child a share of the land. In the will, Nabukera's husband also advised his relatives not to evict Nabukera from the home. However, in spite of the will, Nabukera's in-laws took all the property from the home, including her husband's clothes.

Later, the original owner of the land, on which the matrimonial home was built, died. His children threatened to evict all the squatters on the land, locally known as *bibanja*[59] holders. One of Nabukera's stepsons bought the land, which in Buganda is termed *kwegula*, literally meaning rebuying the land in the hope of acquiring the title deed.

Although Nabukera's stepson informed Nabukera of his plan to acquire the title deed in the names of the three brothers (the two sisters were excluded), she could not stop him. She was reluctant to assert herself to be included on the title deed due to lack of knowledge about her inheritance rights and her social insecurity due to being childless from this marriage. Furthermore, she had no income to pay for the plot of land on which the matrimonial home was built. But, even if she had had the money, her stepsons would probably not have allowed her to register the plot of land on which the matrimonial home was built solely in her name. Since the land is registered in Nabukera's stepsons' names, the matrimonial home legally belongs to them. As a result, Nabukera is at the mercy of her stepsons and her user rights to the home are in constant jeopardy.

Nabukera's story demonstrates that when a widow has no children, despite having been legally married and despite having been bequeathed the matrimonial home in her husband's will, she is not guaranteed her inheritance rights if her deceased husband had other children.

This life story confirms the finding of Dengu-Zvogbo et al. that, in cases where there were children of the deceased from a previous marriage, the widow does not inherit anything. Instead, the eldest son of the deceased, by his previous marriage, inherits the home, and, once it has been registered in his name, usually evicts the widow.[60] The findings of the Dengu-Zvogbo et al. study reveal that widows were

able to inherit the matrimonial home only if there were no other children to claim inheritance rights in the home.

The rules of intestate succession assume that families are monogamous — with the surviving spouse and her children as the only beneficiaries of the estate. In cases of polygamous marriages, this rule becomes irrelevant. An interview with the Administrator General revealed that in situations where there is only one matrimonial home in the urban area and there are children from different mothers, the Administrator General usually advises the family to sell the home and divide the proceeds among the widows, dependants and children. From all of the above, one can infer that a widow is able to register the matrimonial home only through the support of her own children.

Findings in this study also concur with findings in other studies on the importance of having one's name on the title deed. Studies in southern African countries reveal that widows whose names were already on the title deeds before their husbands died automatically took over the homes, since they legally owned them.[61]

4 Recent challenges to the law of intestate succession

Litigation at the Constitutional Court is one of the most effective tools to address unconstitutional provisions regarding women's rights, because the jurisprudence of the Constitutional Court provides guidelines on the interpretation of the various laws of the country. What is debatable, though, is whether women are able to change the dominant inheritance practices at the interpersonal level where patriarchal customary beliefs still prevail. One therefore has to ask whether constitutional litigation is worth the time and money. This section presents recent attempts by some women's organisations to challenge the contradictory discriminatory provisions under the intestate succession law. The aim is to show how Ugandan women have taken up initiatives to change the dominant gendered succession in homeownership.

4.1 *Law and Advocacy for Women in Uganda*: The 2007 case

Law and Advocacy for Women in Uganda, one of the NGOs in Uganda, recently petitioned the Constitutional Court to declare a number of clauses in the Succession Act unconstitutional.[62] On 5 April 2007, the Constitutional Court declared unconstitutional section 27 of the Succession Act, which guarantees a widow only 15 per cent of the value of the estate, while children born in and out of wedlock acquire 75 per cent, and rule 8*(a)* of the Second Schedule, which provides for a widow's right of occupancy only until she remarries. Despite this declaration

of unconstitutionality by the Constitutional Court, more than four years later the legislature has still not responded by appropriately amending the Succession Act.

Thus judges must resort primarily to common sense to make a judgment on any matter of contestation in the distribution of intestate property. As one judge wrote after the Constitutional Court ruling:

> *The possibility of applying Section 27(3) of the Succession Act that allows beneficiaries subject to consent of court to agree on a mode of distribution other than the statutory scheme is not available, if Section 27 is void, as declared by the Constitutional Court. In this situation common sense would have to take over which is rather scarce when parties are quarrelling about distribution of an estate. Rather than leave it to common sense and pending the response of Parliament to the decision of the Constitutional Court, is it not possible for the High Court to read the decision of the Constitutional Court, together with Article 2 of the Constitution, and find that in effect the condemned sections are void, to the extent of the inconsistency.*
>
> *... What the Constitutional Court did not do was to discuss to what extent the impugned provisions were inconsistent with the Constitution or what the offending matter in the impugned provisions was.*[63]

Accordingly, it appears that although constitutional litigation is one way of addressing women's rights, this alone does not automatically resolve the inconsistencies within the laws. Moreover, the vacuum created by the failure of parliament to amend unconstitutional provisions presents difficulties for judges in interpreting the law. This leaves each judge to make a decision on the same type of matters, the outcomes of which are sometimes inconsistent.

4.2 Limitations of the *Law and Advocacy* judgment

In *Law and Advocacy for Women in Uganda v Attorney General*,[64] the Constitutional Court declared unconstitutional only the clause that states that a married woman loses occupation of the matrimonial home if she remarries. However, the clause that states that the matrimonial home should not be part of the estate to be distributed remains contentious. Questions on the widow's right to transfer the matrimonial home into her name after her husband's death remain unanswered. Since the widow is unable to transfer the title deed of the matrimonial home into her name, it becomes difficult for her to use her husband's title deed as collateral for a loan. The widow is left in an inflexible position regarding the way she can utilise the matrimonial home to generate more income for the family.

5 Alternative venues: The potential of community courts

Constitutional litigation through formal courts is time-consuming and costly. Moreover, formal litigation often creates tension among the family members, which they would often rather avoid. Consequently it can be argued that the focus should rather shift to improving community-based decision-making.

Indeed, allowing local councils to govern inheritance matters, and requiring them to do so under statutory and constitutional guidelines, might provide a more efficient, effective and easy-to-access forum to enforce the constitutional right to inherit. Currently, local councils, which exist at every level of government from village to district and are mandated to handle social problems within their community, are not authorised to adjudicate inheritance matters.[65] Individuals must seek redress with the (formal) magistrates' courts when it comes to inheritance matters.

Expanding the mandate of local councils would create two forums through which widows' inheritance matters could be addressed: the community court and the formal court. If community courts are held at different levels (village, parish, subcounty and district), a widow will have the opportunity to take her case to a higher court if she feels the lower courts have not addressed her problems. Litigation at community level, if fairly done, presents an alternative solution for family members to pursue resolution to an inheritance dispute with potentially less friction and cost.

However, adjudication at the local or community level faces several challenges. For one, the language used in the Constitution is often too technical and difficult for members of the council to comprehend. Another challenge is that many community leaders seem predisposed to the same cultural notions of sexism, and males tend to dominate in these matters. In effect, even if Uganda requires community courts to adhere to the Constitution, in practice they might only reinforce the patriarchal custom of denying a widow's right to inherit the matrimonial home. In civil courts of law, women are not guaranteed inheritance rights; at community level, the same situation may also prevail. In effect, women will remain disadvantaged as far as inheritance of a home is concerned so long as the patriarchal notions exist both in statutory and customary law.

6 Advocacy education and the Registration of Titles Act

What can women do under the current unclear circumstances to ensure that they have a right to inherit the matrimonial home upon the death of their husbands? The answer is that civil society and all women activists should, through campaigns and advocacy work, inform women about their options to exercise inheritance rights,

including the application of the Registration of Titles Act. The 1964 Registration of Titles Act allows any Ugandan citizen to purchase and own land as long as the land is registered in his or her own name.[66] The Registration of Titles Act provides specific guidance on how property can be jointly owned. In the absence of an amendment to the Succession Act, an alternative to litigation is to educate women to ensure that their names are recorded on the title deed of the matrimonial home at the outset of their marriages. In that case, when a husband dies intestate there is no need to contest ownership of the matrimonial home.[67]

The Registration of Titles Act provides for 'joint ownership' and 'ownership in common'. Section 56 states:

> *Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the land as joint tenants; and in all cases where two or more persons are entitled as tenants in common to undivided shares in any land, those persons shall in the absence of any evidence to the contrary be presumed to hold that land in equal shares.*[68]

Accordingly, where land is jointly owned or owned in common, the persons whose names appear on the title deed are presumed to hold it in equal shares. However, under 'ownership in common' one is allowed to indicate how much in common is owned. Where no clause is indicated regarding the percentage of ownership in common, it is assumed then that the persons whose names appear on the title deed have equal shares in the property. Although sections 55 and 56 provide for joint ownership and ownership in common and transfer, this has to be explicitly stated at registration stage and should not be presumed.

The Registration of Titles Act further provides for the owners to decide on whether their entitlements are transferable to survivors of a deceased owner. Section 57 states that

> *… two or more joint proprietors of any land or of any lease of freehold land may by writing under their hands direct the registrar to enter the words 'no survivorship' upon the certificate of title or instrument relating to the property.*

Section 57(3) further states that where the statement 'no survivorship' was signed by the registrar, it is illegal for any persons, other than the proprietors registered on the title deed, to transfer or deal with the property without an order of the High Court.[69] This means that a couple may decide not to transfer their interest to any third party apart from themselves. In a case where one spouse dies, the surviving spouse is the only person who can transact any business on the property.

The Registration of Titles Act therefore provides choices to individuals to decide how they would like to own property. There is no gender discrimination as far as

registration of land is concerned, yet in Uganda few women hold titles to land.[70] Since home ownership in Uganda is male dominated, married women should be urged to negotiate having their names included on the title deed of the plot of land on which the matrimonial home is built. Failure to use the Registration of Titles Act will guarantee a widow only user rights of the home upon the death of a husband.

7 Conclusion

This chapter has demonstrated not only the contradiction that exists between the major statutory instruments that determine a widow's right to inheritance, but also lack of statutory provision for specific issues, such as joint ownership, separation under joint ownership, and distribution of property under polygamous marriages. It has also shown how both the Succession Act and customary laws deny a widow inheritance rights to the matrimonial home. Although the Constitution stipulates that a widow has a right to inherit her husband's property, statutory law does not specify what property a widow may inherit. While on the surface intestate succession law seems to grant a widow the right to inherit the property of the deceased (from which she acquires 15 per cent of the estate), close scrutiny of these intestate rules reveals that the widow does not have inheritance rights to the matrimonial home, but only user rights. The matrimonial home belongs to the legal heir, who is the eldest son of the deceased. The widow is legally allowed to continue staying in the matrimonial home as long as she keeps it safe and tidy and she does not remarry. The intestate law also does not recognise the financial contribution of the widow to the matrimonial home.

The Registration of Titles Act gives freedom to married couples to register the home in whichever way they wish. However, the Succession Act is not clear as to what happens to the matrimonial home when the widow holds joint ownership of the matrimonial home with her husband. The intestate law is not clear on whether the widow automatically claims both her share and her husband's share in the home or inherits half of the value of the matrimonial home. The Registration of Titles Act, the Succession Act and the Constitution seem to contradict one another.

Not only is the intestate succession law silent on the rights of the widow in cases of joint ownership of the home, it is also silent on the instance where the matrimonial home is jointly owned but there are other beneficiaries, for example, children born outside the marriage. This is an indication of the patriarchal slant of the Succession Act: that the matrimonial home usually belongs to the man.

Notwithstanding all these challenges, this chapter urges married women who are aware of their legal rights in the home to use the Registration of Titles Act to exercise inheritance rights, since this legal route seems to override the provisions of the Succession Act.

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37 Letters of Administration are legal documents that the High Court gives to the administrator of the deceased estate. They are usually given in cases where the deceased died without leaving a valid will; see Nanyenya (n 28), 20, at Qn. 62. See Schedule 2, paragraph 9(1) of the Succession Act (n 34), as amended in 1972.

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42 This clause was included presumably to protect married women from being denied inheritance rights by their deceased husbands' relatives, using the argument that the wife neglected her husband and therefore she could not inherit any of the property. There is a tendency for relatives of the deceased to find a variety of reasons to deny a widow inheritance rights of whatever nature. It is not uncommon for a widow, on returning from abroad on the death of her husband, to find all the property already taken by her in-laws. In court, she will be accused of having neglected her husband.

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and methodological consideration', in S. Sithole-Fundire, A. Zhou, A. Larsson & A. Schlyter (eds). *Gender Research on Urbanization, Planning, Housing and Everyday Life, Gruphel, Phase One*. Harare: Zimbabwe Women's Resource Centre & Network, 218; Musyoki, A. (1998). 'Perceptions on gender and access to housing in Botswana', in M. Mapetla, A. Larsson & A. Schlyter (eds). *Changing Gender Relations in Southern Africa, Issues of Urban Life*. Roma: Institute of Southern African Studies, National University of Lesotho, 276; Sayne, P. (1993). 'Ideology as law: Is there room for differences in the right to housing', in H. Dandekar (ed.). *Shelter, Women, and Development.* Ann Arbor, MI: George Wahr, 98.

52 Yngstrom, I. (2002). 'Women, wives and land rights in Africa: Situating gender beyond the household in the debate over land policy and changing tenure systems', *Oxford Development Studies* 30(1): 21–40, at 24; Kalabamu, F. (2005). 'Changing gender contracts in self-helping housing construction in Botswana: The case of Lobatse', *Habitat International* 29(2): 245–268, at 246–247; Larsson, A. & Schlyter, A. (1995). 'Changing gender contracts and housing conflicts', in S. Sithole-Fundire, A. Zhou, A. Larsson & A. Schlyter (eds). *Gender Research on Urbanization, Planning, Housing and Everyday Life, Gruphel, Phase One*. Harare: Zimbabwe Women's Resource Centre & Network, 217.

53 'Letters of Administration' is the authority granted by the court to a person to administer an estate where a person dies without leaving a will, or where, even though he leaves a will, no person is named in it as executor or the named executor cannot act as such. See Nanyenya (n 28), 10.

54 A court injunction is a legal action that stops anyone from administering a deceased person's estate.

55 Kanabahita (n 3), 18; Wagubi (n 25), 44.

56 *Christine Male and Others v Sylfiya Mary Namanda and Others* (1982) HCB 140.

57 Dengu-Zvogbo, K., Donzwa, B., Gwaunza, E., Kazembe, J., Ncube, W. & Stewart, J. (1994). *Inheritance in Zimbabwe: Law, Customs and Practice.* Harare: Women and Law in Southern Africa Research Trust (WLSA) SAPES Trust, 125.

58 White, S., Kamanga, D., Kachika, T., Chweza, A. & Chidyaonga, F. (eds). (2002). *Dispossessing the Widow: Gender Based Violence in Malawi.* Blantyre, Malawi: Christian Literature Association in Malawi (CLAIM), 56; Kwesiga (n 14); Narayan et al. (n 3).

59 *Bibanja* is plural for *kibanja*; *kibanja* is a plot of land managed by a *de facto* owner, while it belongs to a *de jure* landowner. Often, though not always, it applies to tenants on mailo land. See Nabwire, S. (2003). 'The impact of health user fees on women's role in household health care decision-making in Mukono District, Uganda: A gender analysis'. PhD dissertation, Queen Margaret University College, UK, 213.

60 Dengu-Zvogbo et al. (n 57), 88–89.

61 Dengu-Zvogbo et al. (n 57), 125.

62 *Law and Advocacy for Women in Uganda v Attorney General* Constitutional Petitions Nos. 13/05 and 05/06 [2007] UGCC 1 (5 April 2007).

63 This is an internal e-mail message that Judge Fredrick Egonda-Ntende wrote to his

fellow judges after the Constitutional Court ruling, which he kindly shared during an interview on matters concerning the Constitutional Court ruling, the Succession Act (n 34) and the applicability of this ruling in the normal court processes. According to him, there is a constitutional crisis and, indeed, a vacuum in matters concerning inheritance and more especially the distribution of intestate property. This partly answers the question: Under which circumstances is constitutional litigation a valuable investment of time and money? There is no doubt the Constitutional Court accomplished its task and it was thus a worthwhile effort for the NGO that contested the unconstitutional provisions in the Succession Act. However, it would be a disservice to the nation if parliament does not rapidly amend the Succession Act. Another question posed to Judge Egonda-Ntende during the interview was whether there were alternative but effective forums to which civil society could turn regarding women's rights? The response from Judge Egonda-Ntende was that everything depends on parliament and that a Bill — whether a Private Member's Bill or a government Bill — was needed.

64 *Law and Advocacy for Women in Uganda v Attorney General* (n 62).

65 Uganda's decentralised system entails five levels of governance: Level 1 is the village, Level 2 is the parish, Level 3 is the subcounty, Level 4 is the county, and Level 5 is the district.

66 Okumu-Wengi, J. (1997). *Weeding the Millet Field: Women's Law and Grassroots Justice in Uganda.* Kampala: Uganda Law Watch Centre, 44. See Registration of Titles Act 1924 (Cap. 230 of the Laws of Uganda), and Registration of Titles Act 1964 (Cap. 205 of the 1964 Laws of Uganda).

67 Registration of Titles Act 1924 (n 66).

68 Registration of Titles Act 1924 (n 66), at section 56.

69 Registration of Titles Act 1924 (n 66), at section 56.

70 Okumu-Wengi (n 66), 44.

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CHAPTER 3

Gender equality in customary marriages in South Africa

Mikateko Joyce Maluleke

1 Introduction

African cultures, social systems and religions have, in the past, promoted patriarchy and the oppression of women. In some instances this still remains the case, so that women have to approach the courts for relief and the protection of their constitutional rights. Discrimination against women has taken a variety of forms, from disenfranchisement to various forms of abuse. In South Africa, discrimination against women was compounded by the apartheid system and the non-recognition of customary marriages. The inclusion of non-sexism in the founding values of the South African Constitution, 1996, and the entrenchment of women's rights in the Bill of Rights[1] were measures taken by the first democratic government to address women's rights and to ensure gender equality in all walks of life.

In order to ensure that the women's rights entrenched in the Bill of Rights were put into practice, specific legislation had to be enacted that directed how these rights are accessed and how they create legal remedies for redress when the rights are transgressed. One example of such legislation is the Recognition of Customary Marriages Act 120 of 1998 (RCMA). This law was promulgated to rectify the injustices against black women that were perpetuated by patriarchy and exacerbated by the apartheid laws, such as the Black Administration Act 38 of 1927 (BAA). While the law *per se* may be unable to overcome gender inequalities that have their origins elsewhere (for example, in beliefs and ideologies),[2] it can prevent the external manifestation of prejudicial beliefs and ideologies and ensure equitable outcomes such as equality of recognition and proprietary rights in customary marriages.

The purpose of this chapter is to critically examine whether the RCMA is an apt instrument to promote gender equality between women and men in customary marriages. The debate on whether polygyny discriminates against women or not

is not discussed here, because the customary marriages that the RCMA sought to recognise are those where polygyny has been the practice, where a man is allowed to marry many wives but a woman may not marry many husbands. Further, the right to practice one's culture entrenched in section 30 of the Constitution includes the right to marry according to its customs.[3] The history of customary marriages prior to the promulgation of the RCMA will be discussed, to illustrate challenges that were meant to be addressed by the legislation. An analysis of the RCMA, jurisprudence and research on customary marriages and practices show that challenges in attaining gender equality in customary marriages continue to exist.

I argue that numerous obstacles, such as gaps in the law, interpretation of the RCMA by the judiciary, poor service delivery by government officials and insufficient awareness about the RCMA, make it nearly impossible for many women to benefit equally with men in these marriages. These obstacles will be discussed in light of a report by the Department of Justice and Constitutional Development[4] (DoJ&CD). This chapter demonstrates that statutory provisions enacted to override customary norms may not achieve their purpose if the law-reform process does not include effective mechanisms to overcome deep-rooted cultural practices and attitudes that undermine gender equality and thus impact negatively on the consequences of that statute. In order to achieve gender equality, these underlying social norms and attitudes, including government officials' attitudes, need to be addressed.

2 Background

Prior to the coming into effect of the RCMA, one of the most severe disadvantages suffered by women married under customary law was the inferior status accorded to their marriage and consequent rights in relation to civil marriages.[5] Due to the history of colonialism and apartheid in South Africa, there was a distinction between customary and civil marriages — the former being regarded as a 'union', not a marriage, governed by the BAA and the lived customary law[6] and the latter by the South African common law and later by the Marriage Act 25 of 1961. Customary marriages were not recognised by the South African legal system because of their polygamous nature. They were presumed to be inferior to civil marriages and, therefore, spouses in such marriages, especially women, were not afforded the same legal protection as those in civil marriages.[7] For example, if a husband in a customary marriage entered into a subsequent civil marriage with another woman, the customary marriage was automatically nullified.[8] However, if a man in a civil marriage married a second wife, whether civilly or customarily, the *subsequent* marriage was invalid. The preference of civil marriages over customary marriages was ameliorated only with the introduction of the Marriage

and Matrimonial Property Law Amendment Act 3 of 1988, which amended section 22 of the BAA to give protection to customary law spouses whose husbands had subsequently entered into a civil marriage.[9]

Furthermore, the BAA, which regulated most personal aspects of the life of black people, included a provision that deemed black women married under customary law to have the same legal status as a minor under civil law (section 11(3)*(b)* of the BAA).[10] This placed black women married by customary law under the tutelage of their husbands. As a result, black women married under customary law lacked capacity to contract or to litigate without the assistance of a male relative (section 11(3)*(b)* of the BAA). In addition, women were consequently denied the following rights: the right to custody of their children; the right to contract; the right to direct property ownership; and the right to inheritance from their husbands and other family members. The denial of inheritance rights to black women was further consolidated by section 23 of the BAA, read with Regulation R200, which provided that the estate of a black man must devolve in terms of black custom (the so-called 'primogeniture rule').[11]

On 15 November 2000, the provisions of the BAA that regulated marriages were repealed by the RCMA, which was promulgated to recognise customary marriages, including polygyny and to extend the legal protection of civil marriages to customary marriages. Furthermore, the aim of the RCMA, as stated in its Preamble, is 'to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in a customary marriage'. The next section discusses the national and international legal framework on marriages and the empowerment of women.

3 International legal framework and the South African Constitution

While the promulgation of the RCMA was welcomed by some, others argued that the RCMA violates women's constitutional right to equality. The following section therefore provides an overview of the constitutional and international human rights framework in which the RCMA was enacted.

Since the advent of democracy, South Africa has been a member of the international community and has ratified, signed or acceded to many treaties, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[12] which was ratified by South Africa in 1996 without a single reservation.[13] Given that South Africa also ratified the Optional Protocol on CEDAW, which strengthened existing enforcement mechanisms, South Africa has committed itself to be bound by the provisions of CEDAW and its Optional Protocol.[14]

Article 16 of CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Further, article 16 of CEDAW obliges state parties to ensure that 'the betrothal and the marriage of a child shall have no legal effect and all necessary actions, including legislation, shall be taken to specify a minimum age for marriage, and to make the registration of marriages compulsory'.

South Africa is also bound by the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (*Protocol to the African Charter*),[15] which contains important provisions on, among others, reproductive rights, marriage, divorce and inheritance rights. Article 6*(c)* of the *Protocol to the African Charter* enjoins state parties to encourage monogamy as the 'preferred form of marriage', while at the same time protecting the rights of women in polygamous marriages. This means that those who are already in polygamous marriages should be protected, but that these types of marriages should from now on be discouraged.

Article 8(1) of the Southern African Development Community (SADC) *Protocol on Gender and Development* sets out that '[s]tate parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage',[16] and article 8(3)*(c)* provides that 'every marriage, including civil, religious, traditional or customary is registered in accordance with national laws'. These international instruments are important because section 39(1) of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

Nonetheless, section 4(1) of the RCMA provides that the spouses of a customary marriage have a duty to ensure that their marriage is registered; however, section 4(9) provides that failure to register a customary marriage does not affect the validity of that marriage. Despite, the statutory guarantee that non-registration does not affect the validity of a customary marriage, in reality the consequences of failing to register a customary marriage are many and substantial, rendering its statutory validity unreliable, especially for women in those marriages. For example, if a husband in an unregistered customary marriage is deceased, the Master of the High Court, many civil and private institutions, companies, pension funds and others require a marriage certificate to prove the existence of a customary marriage before the wife can be appointed as an executor or to receive the pension funds and/or other benefits. The challenges will be discussed further later.

In addition to the international commitments, the South African Constitution enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom (section 7 of the Constitution) and declares its supremacy (sections 1*(c)* and 2 of the Constitution) and provides that any law

or conduct inconsistent with it is invalid.[17] The Constitution provides that the right to equality is non-derogable: 'with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion, or language'. Gender is not included in the non-derogable category, even though gender equality is affirmed as one of the fundamental pillars of the Constitution. On the other hand, the Constitution also provides for and protects the right to culture (sections 15(3), 30 and 31 of the Constitution) and recognises traditional leadership (sections 211 and 212 of the Constitution), which could be interpreted as protecting polygamy, as well as related practices such as 'spouse inheritance',[18] *ukuthwala*[19] and other customary practices, which have the impact of undermining the constitutional guarantee of gender equality.[20] However, the provisions protecting the right to culture[21] explicitly include a qualification stipulating: 'no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'. But what does this mean in practice? Does it mean that members of the judiciary will balance the rights when interpreting conflicting rights that are both entrenched in the Bill of Rights (such as gender and culture), or does it mean that people will suddenly stop the practices they have employed for many years? No, it takes more than just the Constitution and statute.

Customary practices such as *ukuthwala*, virginity testing and others are entrenched and, in practice, take precedence over equality where they are carried out. It is therefore questionable whether the constitutional protection of gender equality is making a difference to women living in communities with strong commitments to traditional norms and practices, and practices such as *ukuthwala* continue unabated, despite being a crime.[22] These compromises on women's right to equality can thus be interpreted to mean that women, as opposed to men, do not have inherent rights. While there are numerous examples of gender equality being compromised, the following sections explore whether the RCMA has succeeded in promoting a distinct aspect of gender equality: women's equality in customary marriages.

4 Implications of the Recognition of Customary Marriages Act (RCMA)

The RCMA recognises the equality of husband and wife in terms of status, decision-making, property and children, and sets out the requirements of a valid customary marriage. What follows provides an overview of the RCMA and discusses problematic or ambiguous provisions of the legislation, failure by the state to take social context into consideration when providing services, and the practical implications for women in customary marriages.

5 Essential requirements for a valid customary marriage

5.1 Definition of customary law

The RCMA defines a customary marriage as 'a marriage concluded in accordance with customary law' (section 1(iii)) that is fraught with interpretation challenges,[23] and sets out the essential requirements for a customary marriage to be valid or recognised in law (section 3).

5.2 Status of customary marriages

The RCMA recognises customary marriages that were valid at customary law and that existed at its commencement. Section 2 of the RCMA, at subsections (1) and (2), provides for the recognition of customary marriages:

> *(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.*
> *(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.*

One of the questions that has arisen under subsection 2(1) of the RCMA is when should the 'existing' customary marriage have been concluded? Does it matter whether such marriage existed before or after December 1988 when the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 (Marriage and Matrimonial Property Act) was enacted? There are two schools of thought, each of which attaches a different meaning to the word 'existing'. Instead of the ordinary meaning of the word, which means 'in place before the Act', one school of thought interprets it to mean existing in the eyes of the law. The argument is that, prior to the Marriage and Matrimonial Property Act, a customary marriage superseded by a civil marriage no longer 'existed' in the eyes of the law (that is, the BAA) and therefore could not be resuscitated by the RCMA. The other school of thought argues that these marriages were valid and existing under customary law and therefore *remained* valid under customary law, unless the husband divorced the customary wife, and are therefore recognised by the RCMA.

The definition of customary law under the RCMA supports the latter view. The RCMA defines customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people' (section 1(ii) of the RCMA). Accordingly, the question is whether a marriage existed under customary law. It can thus be concluded that the term 'existing' customary marriage includes those customary marriages where a man subsequently entered into a civil marriage with another woman without

dissolving the customary marriage(s), because *under customary law* the customary marriage was not considered to be dissolved. In most instances, the husband's family would consider the civil wife the second(ary) wife, and the 'discarded' wife/wives, as per the BAA, were deemed to be the first wife/wives under customary law. This is one of the areas in which the RCMA is ambiguous and its interpretation will have to be resolved by the courts when a suitable case avails itself,[24] or be addressed by the legislature through the amendment of the RCMA. The challenge in this area is whether women in these circumstances, first, are aware of the RCMA and the probability of the recognition of their marriage(s), and second, if they are, whether they have the resources to enforce their rights.[25]

5.3 Entering into marriage

In some traditions, the most essential requirement for a valid customary marriage was the institution of *lobolo*. The handing over of *lobolo* formed the cornerstone of most marriages concluded customarily among many of the tribes in South Africa and this custom is generally practised and accepted among the indigenous people as forming an integral part of a valid customary marriage. However, as indicated above, customs differ from community to community, and in some communities *lobolo* is not the essential requirement.

The RMCA stipulates that for a customary marriage to be valid, it must be 'negotiated and entered into or celebrated in accordance with customary law' (section 3(1)*(b)*), which usually requires negotiations between the respective families of the bride and groom and often, but not always, involves agreement on the *lobolo* — a price paid from the man's side to the woman's family — to be paid, and payment of such *lobolo* or part thereof.[26] In terms of the RCMA, however, *lobolo* is not an essential requirement. Therefore, even if *lobolo* was not paid, as long as there was an agreement and the customs and usages traditionally observed among the family or community were complied with, a valid marriage exists.

The argument that full provision of *lobolo* is not necessarily required was given impetus in the obiter statement in the case of *Bhe v Magistrate, Khayelitsha*.[27] The court wrote that:

> [I]*t has never been a prerequisite under African Customary Law to pay* lobolo *before marriage is consummated. There must be agreement, however, as regards* lobolo*. It may be deferred as long as circumstances do not permit payment. It is not uncommon that lobolo be paid upon the couple's eldest daughter being* 'lobolaed'.

Despite *lobolo* not being an essential requirement under the law, women encounter practical problems when they cannot prove that *lobolo* has been paid. The Department of Home Affairs (DHA), for instance, requires proof of payment

of *lobolo*, together with other documents and witnesses, when applying for the registration of a customary marriage.[28] Although proof of payment of *lobolo* is only required 'if available', the DHA officials will, in practice, not issue the registration without such proof of payment. Thus far, this practice by DHA has not been challenged in court.

In instances where *lobolo* has been paid, proof of such payment could be used as evidence to prove that there was a marriage if the marriage is later disputed. The need to prove the validity of a customary marriage often arises after the death of the husband because of inheritance disputes with the in-laws or with other women who claim to have been married to the deceased and, therefore, an heir.[29] The decision in *Fanti v Boto and Others* is a case in point.[30] The court held that the applicant failed to prove that rituals and celebrations required for a customary marriage had been performed or that *lobolo* had been paid or that acceptable arrangements for its payment had been made. The court thus dismissed the applicant's application for the right to bury the deceased.[31]

It may also be difficult for a court to determine exactly when a marriage was concluded. During workshops conducted nationally by the DoJ&CD, traditional leaders differed considerably on when a marriage is concluded.[32] Some said that a marriage is concluded once the *lobolo* has been paid in full; others claimed the marriage is only concluded after the bride has bought gifts for all the in-laws. Others tied the marriage to the slaughtering of a cow for the groom's family and/or handing over of the bride to the groom, even if *lobolo* was not paid in full. Some traditional leaders argued that it is irrelevant whether *lobolo* is paid in full or not for the conclusion of the marriage. Some ethnic groups, such as the Ndebele and Tsonga, said that customarily, *lobolo* is never paid in full; the groom owes until his death. A court that is required to decide upon the conclusion of a marriage must therefore have knowledge of the practices that apply in the community of the person before the court.[33]

However, due to the diversity of members of the judiciary and their different backgrounds and experiences, one wonders whether courts are equipped to make such decisions. Could the establishment of special customary courts with expertise in customary law be a solution? The answer to this is a definite no. The establishment of special customary courts would be denying women equal access to justice (as guaranteed by section 34 of the Constitution) because women married under other regimes would have access to the 'normal' courts. The solution to this is that the judiciary must equip its members to be able to respond appropriately to this challenge.

Further, as indicated earlier, section 3(1)*(b)* of the RCMA stipulates that for a marriage to be valid, it must be 'negotiated and entered into *or* celebrated in

accordance with customary law' (emphasis added). It does not say '*and* celebrated'. Therefore, this means that if the marriage was 'negotiated and entered into' and there was no celebration, that marriage is valid in terms of customary law; or if there was a celebration according to custom, that is, *ukumeketa* or some kind of handing over of the bride, that marriage is also a valid customary law marriage. The question is what is 'negotiated or entered into'? Is the *lobolo* negotiation not a negotiation as anticipated by the RCMA?

In *Motsoatsoa v Roro and Others*[34] the acting judge argued that the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has been formally and officially handed over to the groom's people, there can be no valid customary marriage.

There is, however, a problem of statutory interpretation in this case. As already stated, section 3(1)*(b)* of the RCMA stipulates that for a marriage to be valid, it must be 'negotiated and entered into *or* celebrated in accordance with customary law' (emphasis added). The words of this section have a plain and straightforward meaning; there is no ambiguity or vagueness in the words of this section that must be resolved by the judge—either there was a negotiation and the marriage was entered into *or* there was a celebration according to custom. The first rule of interpretation essentially states that the statute means what it says. However, the acting judge played down the *lobolo* negotiations, the fact that the deceased and the applicant were living together, and elevated the celebrations according to custom to the detriment of the woman with whom the deceased lived and proclaimed to be his wife.

The South African Law Reform Commission (SALRC) notes that no single description of the requirements of a customary marriage will accurately reflect the marriage customs of all communities. Should either the man or woman challenge the existence of the marriage, the parties should present evidence as to the customs required in their community or to which they agreed in order to complete a customary marriage.[35] Because of the difficulties of identifying when the process of a customary marriage is complete, the courts and customary law have created several rebuttable presumptions to aid in the determination of a valid customary marriage. A customary marriage can thus be presumed in each of the following circumstances:

- If the man and women are living together and hold themselves out to the community as married;[36]
- If a man and woman whose parents have discussed their marriage in accordance with customary law, and who live together and hold themselves out to the community as married, before all the requirements are met;

- If the woman's family retains cattle given to them by the man's family as *lobolo*;[37] and
- If the wedding ceremonies are concluded.

The SALRC further investigated the choice of law issue and published Discussion Paper 76 in 1999, with The Application of Customary Law Bill.[38] This Bill, even though it has not yet been enacted into law, recommends that a court should give effect to an expressed or implied agreement between the parties (section 3). In the absence of an agreement, the Bill recommends that a court apply the customary law closely related to the issue at hand (section 4). The following are the recommended factors to be taken into account in deciding this:

- the nature, form and purpose of the transaction
- where it took place
- the parties' respective ways of life (because of the socio-economic context, people live together and bypass some of the old requirements, therefore women should not be penalised because of that) and
- if the issue concerns land, where such land is situated.

If a woman dies, there is be no need for the man to prove the existence of the marriage because the estate would already be in his name, therefore life would go on as though no one else had contributed to the estate.

The challenge with the interpretation of the RCMA is that it disproportionately affects women more than men, because the reality of South Africa is that poverty bears a feminine face. The report of Statistics South Africa[39] revealed that '[p]overty patterns are inherently influenced by gender' and that this is the result of the past, where women were unable to access the same economic resources and opportunities as men, and because, as indicated above, the BAA afforded women the status of children and denied them the capacity to contract or own property. The resulting inequality was, and still is, intensified by additional race-based discrimination and inequality. Therefore it is always black women who have to prove the existence of a marriage in order to claim their share of the estate. Failure by the courts and government officials to take this into consideration results in indirect discrimination against women who marry under customary law.

5.4 Consent to a customary marriage

Another requirement for the customary marriage to be valid is that the prospective spouses must both be above the age of 18 years and that both parties must consent to marry each other under customary law (section 3(1)*(a)* of the RCMA). Accordingly, if one of the prospective parties has no intention to marry or does not agree, there

is no consent and therefore no marriage. It does not matter if the parents of either party consent to the marriage. If the parents do so without the relevant prospective parties' consent, there is no marriage.

The issue of consent is particularly relevant in terms of the practice of *ukuthwala*. *Ukuthwala* is the practice of bride abduction or bride capture, where a girl or young woman is taken to the future husband's home and, after negotiations with the girl's family and obtaining parental consent, is customarily married to the abductor.[40] *Ukuthwala* is still widely practiced in the Nguni communities in South Africa.[41] The definition of a customary marriage in section 1 of the RCMA provides that a customary marriage means 'a marriage concluded in accordance with customary law'. While it does not specifically mention *ukuthwala*, it is broad enough to cover all customary marriages, including those performed under *ukuthwala*. The bride abduction is meant to be planned, or at least agreed upon, by both future spouses and the girl only 'puts up a show of resistance'.[42] However, there have been reports about children as young as 12 years of age who were forcibly abducted and made wives under this practice.[43] As Koyana and Bekker correctly observe, 'the necessity for the consent of the bride has been put beyond any doubt' since the enactment of the RCMA because '[i]n terms of section 3(1)*(a)* of the Recognition of Customary marriages [sic] Act 120 of 1998 the consent of both prospective spouses of a customary marriage is necessary for the validity of the marriage'.[44] In these instances, the practice of *ukuthwala* would not only render the customary marriage invalid under the RCMA, but would also violate article 16 of CEDAW and the *Convention on the Rights of the Child*,[45] the latter also having been signed and ratified by South Africa.

The requirement of consent may also clash with principles of polygamous marriages.[46] Subsections 2(3) and (4) of the RCMA recognise polygamy. Consent in polygamous marriages is complicated because polygamy includes levirate and sororate unions. Levirate unions occur when the deceased husband's surviving male relative inherits the widow of the deceased. Sororate unions occur where the widower is inherited by the deceased wife's surviving female relative. The inherited widow or widower is then considered a wife or husband to the surviving relative of the deceased. The RCMA is silent on these practices. However, the provision that the marriage must be negotiated and entered into or celebrated in accordance with customary law implies that polygamous practices are included. As levirate and sororate unions are accepted cultural practice, they still occur in some communities.[47] If the inheriting of the deceased's spouse is conducted according to the custom of that community, and the widower or widow and the deceased spouse's relatives consent, that marriage is a valid marriage under the RCMA. It is questionable though whether, in practice, the consent of the surviving spouse is

given voluntarily or freely. The relative might consent only because it is expected of him or her by the family, clan or community. I argue that the consent might therefore be coerced. Where the deceased's surviving spouse or relative is forced into the union after the commencement of the RCMA, that marriage is invalid. However, this matter has not yet been brought to court simply because many people coerced into such marriages do not know about the RCMA and how it can assist them. There cannot be gender equality until all women know their rights, and how to claim and enforce them effectively.

5.5 Civil marriages during the subsistence of a customary marriage

A couple that is married under customary law may enter into a civil marriage with each other (section 10(1) of the RCMA). However, a civil marriage may only be contracted if neither of the spouses 'is a spouse in a subsisting customary marriage with any other person' (section 10(1) of the RCMA). To enter into a civil marriage with a spouse, it is irrelevant whether the customary marriage was registered or not because section 4(9) of the RCMA stipulates that failure to register a customary marriage does not render that marriage invalid. While a person can enter into several customary marriages with the consent of the spouse, section 3(2) of the RCMA states that a *civil* marriage may not be concluded with an additional spouse.[48]

Sadly, the RCMA does not address what happens when the husband does marry another wife under the civil law without dissolving his customary marriage. Husbands marrying additional wives under civil law leads to problems for women married customarily. Many women are unable to register their marriages due to the (incorrect) insistence of the officials at the Department of Home Affairs that both parties be present at registration, as will be elaborated below.[49] This results in many women forfeiting their rightful estate and inheritance from their deceased spouses because the Department of Home Affairs refused to register their marriage or failed to assist them to register their marriage when the spouse was still alive.

6 Registration of a customary marriage

Section 4(1) of the RCMA provides that 'the spouses of a customary marriage have a duty to ensure that their marriage is registered'. While failure to register a customary marriage does not render that marriage invalid (section 4(9) of the RCMA), a customary marriage certificate constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate (section 4(8) of the RCMA). Section 4(2) of the RCMA provides that 'either spouse may apply to the registering officer at the Department of Home Affairs offices for the registration of his or her customary marriage'. Accordingly, either the wife or husband can apply to have their marriage registered.

However, in practice, officials from the DHA have been reported to be turning away women who try to register their marriages on their own.[50] In fact, the DHA has been in the process of reviewing the RCMA to request an amendment of the Act, which amendment would require both spouses to be present when applying for the registration of the customary marriage.[51]

The spouse has to furnish the registering officer with the information that is necessary to satisfy the registering officer as to the existence of the marriage (section 4(2) of the RCMA). The specific information is outlined in the Regulations of the RCMA,[52] for example, copies of their valid identity books and a *lobolo* agreement. Furthermore, the following witnesses should accompany the spouse(s) to the Home Affairs offices:

- at least one witness from the bride's family
- at least one witness from the groom's family and/or
- the representative of each of the families.[53]

The documents and witnesses are primarily to assist the registration officer with proof that the marriage did indeed take place and that the requirements of a valid customary marriage were satisfied. Traditional leaders may sometimes be called as witnesses by the registration officer if the celebration was reported to the traditional leader, as is the case in many rural villages. The involvement of traditional leaders may, however, be problematic, because for the assistance of the traditional leader his 'subjects' (that is, people in his community) are required to pay levies and taxes.[54] Unfortunately, these levies and taxes can include university fees for the chief's children, or cars and gifts for the traditional leader's wives.[55] Taxes are even imposed on community members' grant money.[56] If a member of the community cannot afford to pay the tribal levies and taxes, the traditional leader will not help him or her.[57]

Although non-registration does not invalidate the marriage, in practice women are faced with the burden of proving the existence and validity of their marriages if unregistered. This shows how 'law' is gendered and affects men and women differently.[58] If a man wants to register his customary marriage, he simply takes his wife to the Home Affairs office to register the marriage, even against her will. Due to power imbalances, the wife cannot simply take along her husband if he does not want to register the marriage. At the same time, Home Affairs officials turn away women who attempt to initiate the process of registering the marriage on their own. Not even the woman's attempt to register the marriage is recorded, which then forces women to try to register their customary marriages after the death of their husbands.[59] While women require the registration in order to inherit from the deceased's estate, men do not need to register the customary marriage for this purpose because the property is generally in their name anyway, as they are more

likely to have been employed. Accordingly, if the wife dies, life continues as usual for the husband.

Mamashela rightly points out that 'the possibility that a statute might affect men and women differently is seldom considered', and lawmakers often fail to consider this gendered impact of legislation.[60] In this case, the legislature deliberately omitted compulsory registration so as to make it easier for the users, especially women. The lawmaker understood the social context of the communities that would be affected by the RCMA and the challenges of women, especially black women, in terms of accessing justice services; challenges which are aggravated by their oppression based on gender, race, class, culture, language and other factors.[61] However, in practice, the lack of a registration requirement exonerates government from its failure to ensure proper administrative arrangements that facilitate access for registration of customary marriages.

The consequences of non-registration impact negatively on women when their spouses are deceased, because they have the burden of proving the existence of the marriage. This is where proof of payment of *lobolo* is critical. But in most instances, after such an elapse of time, the necessary documents have been lost and the witnesses to the marriage are either deceased or have an interest in the deceased estate and, therefore, will not testify to the existence of that marriage. Government must implement its commitment to CEDAW and other international treaties on marriage in order to ensure that registration of customary marriages is compulsory, and must set up administrative rules to compel both spouses to register their marriage. This will facilitate the achievement of equality in law and outcomes.

It is not just the courts that interpret statutes; government also has the responsibility to interpret legislation purposively when implementing it, in order to achieve its objectives. The first rule for interpreting the statute states that the statute means what it says. It is presumed that a statute will be interpreted so as to be internally consistent to ensure that the objectives of the Act are achieved. A particular section of the statute shall not be divorced from the rest of the Act. The purpose of the RCMA is to promote substantive gender equality between women and men; therefore, the DHA has a constitutional duty to assist women to register their customary marriages. Failure to assist women to register their marriages as provided for by section 4(2) of the RCMA constitutes indirect discrimination against women and it is unconstitutional.

7 Consequences of a customary marriage

7.1 Equal status of spouses

The RCMA accords the wife equal status and rights as those of the husband. This includes full legal status and capacity, incorporating equal capacity to enter into

contracts and to acquire and dispose of assets (section 6 of the RCMA). In theory, this puts an end to the minority status of women, as bestowed by the BAA in the past.

It is important to note that when spouses are married in community of property, certain commercial transactions require the consent of both spouses. Under the Matrimonial Property Act 88 of 1984 (MPA), the formal (written) consent of a spouse is, for instance, necessary in respect of purchasing immovable property, shares, jewellery, investments, entering into a credit agreement and signing a deed of surety.[62] Other transactions require informal (verbal) consent and some require no consent at all.[63] However, in most cases women in these marriages do not know when their consent is required, or what to do if that consent was not sought. Legally, a transaction in which the husband buys property without the wife's consent could be invalidated if the wife chose to invalidate it.

Men in customary marriages sometimes establish new families,[64] that is, they cohabit with other women and buy properties for those women using the money that is supposed to be the indivisible property of the customary spouses. In this case, the customary wife does not know how to claim her indivisible half share. The RCMA is quiet on this aspect. Again, it is the non-registration requirement of customary marriages that benefits the husband disproportionately. It gives the husband an opportunity to seek a mortgage bond as if he is an unmarried man. While the mortgage contract may be invalid — because in a community of property marriage the bank requires the signature and consent of the other spouse — women often do not know about this. Even if they find out later, enforcement of their rights requires means, which they mostly do not have, for costs such as litigation fees. Women in customary marriages tend to be more socially disadvantaged and their disadvantaged position is compounded due to the intersection of race, class and gender, a condition historically referred to as 'triple oppression'.[65] Contrary to the aims of the RMCA, women do not therefore, in practice, have equal status in the matrimonial property system, because they face insurmountable challenges to prove the existence and validity of their marriages. The man does not have to prove the existence of the marriage because, in most instances, the estate is in his name.

8 Proprietary consequences of customary marriages

Until recently, the RCMA drew a distinction between marriages concluded before and after its coming into operation on 15 November 2000. Section 7(1) of the RCMA provided that the proprietary consequences of a customary marriage entered into before the commencement of the RCMA (for ease of use here called 'old marriages') continue to be governed by customary law. A customary marriage entered into after the commencement of the RCMA ('new marriages'), in which a spouse is not a

partner in any other existing customary marriage, will be in community of property and of profit and loss between the spouses, unless the parties agree to follow another matrimonial property regime (section 7(2) of the RCMA). Accordingly, the Act introduced an automatic community of property marital regime in the case of a *de facto* monogamous 'new marriage' only. This was changed by the decision in *Gumede v President of the RSA* in which the Constitutional Court declared sections 7(1) and (2) of the RCMA inconsistent with the Constitution and invalid.[66] As a result, the position of 'old' monogamous customary marriages is now the same as for 'new' monogamous customary marriages.

Despite this positive development, there remain many challenges to the statutory attainment of the proprietary consequence of community of property in monogamous customary marriages.[67] For example, Mamashela submits that salaries and wages constitute a new form of property, which is portable and mobile, as opposed to the 'old property' that consisted of assets such as land and cattle.[68] She argues that this new form of property and 'the financial competition posed by "a new family" questions the implementation and thus benefit of the new law for women in customary marriages, especially rural women'.[69] I agree with her argument that the community of property envisioned by the RCMA is 'likely to remain an illusion rather than becoming a reality' due to the reality of women's lives and the persistent inequalities between women and men,[70] exacerbated by the reluctance of the Department of Home Affairs to assist women who cannot bring their husbands to the Home Affairs offices to register their customary marriages.

In terms of polygyny and proprietary rights, the RCMA prescribes that if the husband wants to enter into a subsequent customary marriage, he must make an application to court 'to approve a written contract which will regulate the future property system of his marriages' (section 7(6) of the RMCA). The wording of section 7(6) of the RCMA suggests that the contract must be entered into and approved by a court *before* entering into the additional customary marriage with another woman.[71]

A major gap existed in the law with regard to the consequences of failure to apply to the court for the approval of the contract until *MM v MN and Another*,[72] where Justice Bertelsmann declared the second marriage void from the time of its inception because it did not comply with the requirement to obtain a court-approved contract in section 7(6) of the RCMA.[73] The court expressed that section 7 of the Act was:

> *… aimed at protecting both the existing spouse or spouses and the new intended spouse by ensuring that the husband must obtain the court's consent to a further customary marriage, albeit that such consent is expressed in proprietary terms.*[74]

Accordingly, section 7(6) provides the court with the power to decide not only whether their marital property agreement was fair but also whether persons could enter into a polygynous marriage at all. Therefore the court went on to state that section 7(6) imposed a mandatory duty on polygynous husbands to obtain the court-approved contract before entering into a further marriage. Non-compliance with the provision necessarily resulted in the further marriage being legally void.[75] Furthermore, the court suggested that the process of obtaining a court-approved contract would enable existing spouses' and children's needs to be accounted for and protected before a new spouse joins the family.[76]

It is crystal clear that the RCMA still promotes patriarchy; it is the man who should facilitate the registration of the polygynous marriage as is the case in monogamous marriages. The fact that many women are required to register their customary marriages posthumously (after the death of the husband) is an indication that most men do not want to register these marriages. The courts, the DHA, the Master of the High Court and others should take this fact into consideration when providing a service to women whose customary marriages are not registered. Until the *Mayelane* Constitutional Court decision, which will be discussed below, failure to register in terms of section 7(6) of the RCMA invalidated the subsequent marriage to the detriment of the prospective wife. Whichever way, women bear the brunt, men do not. Women cannot even seek recourse through claims for damages under civil law[77] due to the cost of South African litigation, among other factors.

Mayelane v Ngwenyama and Another[78] also dealt with non-registration in terms of section 7(6) of the RCMA. The North Gauteng High Court held that failure to comply with the mandatory provisions of section 7(6) of the RCMA invalidates the subsequent customary marriage.

The first respondent, threatened with the deprivation of status[79] and financial benefits that accompany the official recognition of a customary marriage, successfully challenged the High Court ruling in the Supreme Court of Appeal. The Supreme Court of Appeal (SCA) deemed both marriages to be valid customary marriages.[80]

The SCA recognised that, despite the mandatory wording of section 7(6), the Act did not include, and also did not intend, a sanction against persons who failed to obtain the court-approved contract before entering into a post-commencement polygynous marriage.[81] The Appeal Court noted that while the High Court recognised that both existing and prospective spouses deserved legal protection, its ruling protected only the first wife.[82] The unequal power relations existing between wives and their polygynous husbands were acknowledged, along with the fact that often wives have no control over the decisions of their husbands — including whether or not they will comply with the section 7(6) requirement.[83] To invalidate

the marriages of these women and deny them the status and benefits associated with marriage would severely impact on their rights and the rights of any children born to the marriage.[84]

Lastly, the SCA observed that the RCMA structure separates validity requirements in section 3 from proprietary consequences in section 7 and that a polygynous customary marriage's validity requires compliance with only the age, consent and ceremonial specifications in section 3.[85] Therefore, the section 7(6) requirement can affect only the property arrangements, not the validity, of polygynous marriages.[86] If section 7(6) is not complied with, polygynous marriages will automatically be out of community of property.[87]

The first wife challenged the SCA's judgment in the Constitutional Court. The Constitutional Court confirmed the findings of the SCA on the question of the consequences of failing to comply with section 7(6).[88] The court stated that

> … [Section 7] *deals with the applicable matrimonial property regime. To interpret it as imposing validity requirements over and above those set out in section 3 would undermine the scheme of the Recognition Act. For these reasons we endorse the Supreme Court of Appeal's interpretation of section 7(6).*[89]

However, the Constitutional Court proceeded to invalidate the second wife's marriage on other grounds. The majority held that, at the time of the conclusion of the purported marriage between the first respondent and the deceased, Tsonga customary law required that the first wife be informed of her husband's subsequent customary marriage. The first respondent's marriage was found to be invalid because the applicant had not been informed. The recognition of the requirement of the first wife's consent by the court confirms what was said earlier, that customary law varies from community to community. The gap that was referred to earlier has been decisively addressed by the Constitutional Court: that a customary husband's failure to obtain a section 7(6) contract before marrying a further wife cannot affect that further marriage's validity. However, the court has not addressed the instance in which the wife is consulted, her consent requested and she refuses to consent.

The laws affect women in rural areas differently from women in urban areas. Mamashela argues that the extension of the MPA to customary marriages has no meaning for the women in KwaZulu-Natal because of the very patriarchal context and the fact that land tenure is still communal and thus not subject to private ownership, and allocated to married men.[90] She submits that the nature of ownership of land and property in KwaZulu-Natal and the patriarchal nature of the communities in this area make it difficult to see how the provisions of the MPA can be attained.[91]

9 Dissolution of a customary marriage

The RCMA has introduced important changes to the manner in which divorce in respect of customary marriage is to be conducted, and the rights of parties upon divorce. Any of the spouses in a customary marriage may apply for divorce to the court on the ground of the irretrievable breakdown of the marriage (section 8(2) of the RCMA). Whereas in the past traditional leaders exercised powers with regard to dissolving customary marriages or unions, under the RCMA only a court may grant a divorce decree (section 8(1) of the RCMA). Furthermore, the portion of matrimonial property to be received by each of the divorcing spouses can be determined only by a court of law.[92]

In terms of section 8 of the RCMA, the tribal authorities no longer have the authority to dissolve customary marriages. However, the Women's Legal Centre (WLC) *Report on the Recognition of Customary Marriages Act*[93] (the WLC report) revealed that this continues to be a problem and that it is possible that some traditional leaders and courts remain ignorant about the provisions of the RCMA and that it is also possible that tribal courts are choosing to disregard the legislation. The WLC report discusses the case of Mrs Sikhosana that exemplifies the problems encountered when traditional courts exercise extra-judicial authority in matters having to do with the dissolution of customary marriages. In 2001, Mrs Sikhosana had her marriage dissolved by the Mkobola Tribal Authority because she had moved out of her marital home. The tribal court ordered that she forfeit property rights and custody of her child. The WLC was able to have the order set aside on the basis that the traditional court did not have jurisdiction to hear the case. Despite these provisions, in reality, most men do not go to court for divorce—he will merely desert his wife or wives and cohabit with another woman, and if the customary marriage was not registered, he simply marries another woman, which defeats the objective of the RCMA.[94]

10 Gains and losses

To a certain extent, the RCMA has managed to restore the dignity and promote the rights of women in customary marriages. For instance, while customary marriages were previously not recognised and women, therefore, were not protected against their husband's subsequent civil marriage with another woman, this is now prohibited during the existence of the customary marriage. Furthermore, the RCMA has introduced community of property in monogamous customary marriages, whereas the older legislation provided that the property belonged to the husband as the head of the family.

However, the DoJ&CD report on monitoring and evaluation of the implementation of the RCMA revealed that there are many implementation

challenges that have 'bedevilled' the Act and thus minimised women's benefit from its provisions.[95] For many women, the implementation of the Act results in inequalities in outcome and creates more difficulties for them than before the Act was promulgated.[96] One challenge is the general lack of knowledge of the RCMA both by those charged with the responsibility to implement it and by those who are meant to benefit from it. According to the report, members of the public, for example, did not know about the implications of failing to register a polygamous marriage in terms of section 7(6) of the RCMA.[97] Further, as has been shown earlier, even if they knew, practical difficulties may be relevant. Given that the RCMA requires a court order to register a polygamous marriage at the DHA, women would have to succeed in the complicated court process and find the resources for the high attorney costs. The report raised concerns about applicants being sent from pillar to post[98] and about fraudulent marriages that are registered by DHA officers and religious officials.[99]

The report brought to light the fact that the interpretation of the RCMA by officials of the Master of the High Court office also proved problematic. In some instances, where officials should have appointed a woman as the executor of her husband's estate, the estate was treated as having belonged to a man who had not married. Officials from the Master of the High Court office understand the RCMA to mean that if there was no celebration, then there is no marriage — despite the fact that *lobolo* was paid and that the spouses might have been living together for many years and have children together.[100] The RCMA requires proof that the marriage was negotiated and entered into *or* celebrated, but not both. The practice of the officials from the Master of the High Court is, therefore, not in line with the legal requirements.

Lastly, the report identified gaps in the law.[101] As noted earlier, there is lack of clarity on the status of those customary marriages that were concluded before December 1988 and where the husband subsequently married another woman by civil marriage.[102] The Act is also silent on customary marriages superseded by civil marriages that were concluded after 1988 but before the RCMA's enactment in November 2000. The court has not yet decided on this matter. Some scholars believe that these marriages were dissolved by the civil marriage, save for proprietary consequences, however, in my view, these marriages are invalid.

The findings of the report reveal that, despite the RCMA, women in customary marriages continue to be subjected to abuse and discrimination, and that there is a gap between the ideals of the Constitution and the reality of women's lives. Over and above the RCMA itself, public education and communication, public dialogues, monitoring and evaluation, and review of the law and administrative processes are critical for the implementation of the RCMA to produce equality in law and outcomes.

11 Conclusion

The struggle for gender equality is far from over, especially within customary marriages. While the RCMA has, to a certain extent, introduced *de jure* equality in customary marriages, real equality is still to be achieved. The implementation of the RCMA has been confronted by a number of hurdles, which emanate from interpretation difficulties and lack of knowledge of the Act by public officials and the general public, among others. Despite the absence of explicit sanctions for non-registration in the Act, there are many indirect sanctions for those who have not registered their customary marriages, especially women who have to prove the existence of the marriage for many reasons, including getting their inheritance or share of the estate. Although these customary marriages are not statutorily invalidated by non-registration, many civil and private institutions regard registration as the yardstick for validity. Companies, pension funds and government departments require people to produce a marriage certificate whenever their marital status is questioned by other women also claiming to be wives or by the in-laws.[103]

In conclusion, even though law should not be disregarded altogether, in and by itself it cannot produce social change. The law should therefore be coupled with adequate and informed implementation mechanisms, such as public dialogues and public education, to change public perceptions, as well as the training of those who are charged with the implementation of the Act. Public officials should respond to the social context and needs of women in order to promote gender equality, as envisaged by the RCMA. In this way the law could play a decisive role in transforming social and cultural practices that continue to undermine gender equality in customary marriages.

Endnotes

1 Chapter 2 of the Constitution.

2 Anleu, S.R. (2005). 'Courts and social change: A view from the magistrates' courts'. Paper presented at the Social Change in the 21st Century Annual Conference, Queensland University of Technology, Brisbane, 28 October, 4.

3 People have a right to choose the kind of relationships they want to engage in, unless they are compelled into those marriages, which would make it a criminal offence and the marriage would be invalid. Section 39(3) provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are organised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. If women choose to be married in that way, all we have to do is to ensure that there is equity in their proprietary interest, which is the result of non-recognition of customary marriages. The debate over whether polygyny discriminates against women or not may lead to instances where we replicate apartheid's attitude to polygyny and inflict serious injustice to people in those marriages.

4 Department of Justice and Constitutional Development. (2006). *Recognition of Customary Marriages Act: Monitoring and Evaluation of Implementation.* Pretoria: Department of Justice and Constitutional Development. The evaluation was conducted through radio talk shows that were held in all nine official 'African' South African languages and 26 workshops were held for traditional leaders. The purpose of the evaluation was to assess the knowledge, understanding and utilisation of the RCMA by the public and all stakeholders and to enhance awareness of the RCMA and its provisions. Further, the evaluation was conducted to gather information of the traditional leaders' involvement in the implementation of the RCMA and to provide training on the provisions of the RCMA. The project also raised awareness on the Constitutional Court decision in *Bhe v The Magistrate of Khayelitsha* 2005 (1) SA 580 (CC), which will be discussed later.

5 South African Law Reform Commission (Project 90), (1998). *The Harmonisation of the Common Law and the Indigenous Law: Customary Marriages.* Discussion Paper 74, Pretoria: South African Law Reform Commission, 8–9.

6 For the purpose of this chapter, a distinction is drawn between 'official' and 'living' law, the latter denoting law actually observed by African communities; Sanders, A.J. (1987). 'In search of disciplined law reform', *Comparative International Law Journal of Southern Africa* 20: 405, 450; see also South African Law Reform Commission (n 5).

7 South African Law Reform Commission (n 5).

8 *Nkambula v Linda* 1951 (1) SA 377 (A).

9 The amendment required an African male to declare whether he was married customarily or not before he could marry civilly, therefore, it can be presumed that failure to declare the existence of a customary marriage by the male was supposed to invalidate the subsequent marriage. However, in practice failure to declare resulted in the co-existence of the customary union and the subsequent civil marriage, as the law saw it, instead of invalidating the subsequent civil marriage. The only protection for the customary wife was on proprietary rights.

10 South African Law Reform Commission (n 5), 20.

11 Department of Justice. (1987). *Black Administration Act (38/1927): Regulations for the Administration and Distribution of the Estates of Deceased Blacks* GNR 200 *GG* 10601 of 6 February. See also South African Law Reform Commission (n 5). The primogeniture rule is discussed in detail in the case of *Bhe* (n 4). In this decision, the Constitutional Court declared this rule unconstitutional.

12 *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, entered into force 3 September 1981.

13 South Africa ratified CEDAW in 1996 and presented its first Country Report in 1998. Country Reports on CEDAW are available on the UN website, http://www.un.org/womenwatch/daw/cedaw/reports.htm (accessed 5 April 2011).

14 The *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force 22 December 2000, was signed by

South Africa on 18 October 2005 and came into effect on 18 January 2006.

15 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, CAB/LEG/66.6 (13 September 2000), entered into force on 25 November 2005.

16 The SADC *Protocol on Gender and Development* was signed by SADC members including South Africa in 2008; *Protocol on Gender and Development*, adopted in Johannesburg in 2008 (accessed 7 October 2011).

17 The Constitutional Court has reiterated the supremacy of the principle of equality in the face of indigenous law, which discriminated against women in several ways. See *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC); *Bhe* (n 4).

18 This will be briefly discussed at 7.5.4.

19 The practice of *ukuthwala* will be briefly discussed at 7.5.4. For a detailed discussion of this customary practice, see Koyana, D.S. & Bekker, J.C. (2007). 'The indomitable *ukuthwala* custom', *De Jure* 1: 139–144.

20 Section 9 of the Constitution explicitly acknowledges the intersectionality of different grounds of discrimination as prohibited. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) recognises patriarchy and discrimination on the grounds of sex and gender as being of such a prevalent and serious nature that it specifically singles out these forms of discrimination for special treatment. In addition to outlawing unfair discrimination, the Equality Act contains provisions that encourage both the public and private sectors to create a non-sexist society.

21 Sections 15(3), 30 and 31 of the Constitution.

22 Maluleke, M.J. (2012). 'Culture, tradition, custom, law and gender equality', *Potchefstroomse Elektroniese Regsblad* 1: 11.

23 Langa D.C.J. in *Bhe* (n 4); *Shibi v Sithole and Others* Case CCT 69/03; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* Case CCT 50/03, where at paragraph 25 the Court stated '[t]he difficulty lies not so much in the acceptance of the notion of "living" customary law ... but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights'.

24 *Alexkor Ltd and Another v the Richtersveld Community and Others* 2004 (5) SA 460 (CC) at paragraph 51, footnote 51: 'Although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually

lived by the people'.

25 The submission of the Legal Resources Centre revealed that many women become aware of the RCMA when their spouses are deceased and they have to comply with some of its requirements; Legal Resources Centre & Legal Aid Board. (2009). *Joint Submissions of the Legal Resources Centre and the Impact Litigation Unit of the Legal Aid Board to the Department of Home Affairs on the Draft Recognition of Customary Marriages Amendment Bill*, 3, available at http://www.lrc.org.za/files/DraftRecognitionCustomaryMarriages.pdf (accessed 28 June 2011).

26 It is important to note that customs differ from tribe to tribe, and from family to family within the same tribe. For example, South African Law Reform Commission (Project 90) at 35 provides that 'Customary law varies from community to community; it is flexible and liable to constant and imperceptible change'. See also Molokomme, A. (1990). *The Legal Situation of Women in Southern Africa.* Harare: Women and Law in Southern Africa (WLSA), 13, for example, regarding the capacity of women in Botswana.

27 *Bhe v Magistrate, Khayelitsha* (n 4).

28 According to the Department of Home Affairs (DHA), the registration of a customary marriage requires the presence of both spouses with copies of their identity books and, 'if available', a lobolo agreement. See the website of the DHA, www.dha.gov.za/Marriage certificates.html (accessed 31 March 2011).

29 Legal Resources Centre and Legal Aid Board (n 9) at 3.

30 *Fanti v Boto and Others* 2008 (5) SA 405 (C).

31 *Fanti v Boto and Others* 2008 (5) SA 405 (C) at 23 and 25.

32 Department of Justice and Constitutional Development (n 4) at 25.

33 This was done by the Constitutional Court in *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14 (30 May 2013) at paragraph 44.

34 *Motsoatsoa v Roro and Others* Case no: 46316/09, 1 November 2010, Unreported decision of the Gauteng South High Court.

35 South African Law Reform Commission (Project 90) (n 5) at 40.

36 Olivier, N.J.J., Bekker, J.C., Olivier, N.J.J. Jr. & Olivier, W.H. (1995). *Indigenous Law*. Durban: Butterworths, 22. See also Justice College, Department of Justice and Constitutional Development. (2004). *Customary Marriages Bench Book.* Pretoria: Justice College, in Chapter 3 at 13.

37 Olivier et al. (n 36).

38 South African Law Reform Commission (Project 90), (1998). *Harmonisation of Customary and Common Law: Conflict of Personal Laws.* Discussion Paper 76. Pretoria: South African Law Reform Commission.

39 Statistics South Africa. (2011). *Social Profile of Vulnerable Groups in South Africa 200–2010.* Report no 03-19-00. Pretoria: Statistics South Africa.

40 Koyana & Bekker (n 19) at 139.

41 Koyana & Bekker (n 19) at 139.

42 Koyana & Bekker (n 19) at 139.

43 Department of Social Development. (2009). 'Briefing of the Committee on the Victim Empowerment Programme on *ukuthwala*'. Presentation made to the

Parliamentary Committee on the Victim Empowerment Programme, 15 September, available at http://www.pmg.org.za/report/20090915-victim-empowerment-programme-ukuthwala-departmental-briefings (accessed 31 March 2011).

44 Koyana & Bekker (n 19) at 140.

45 *Convention on the Rights of the Child,* G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990.

46 Polygamy is the practice whereby a person may customarily marry more than one spouse. The term 'polygyny' is preferred because, in practice, it is generally men (and not women) who are allowed, in terms of customary law, to marry more than one spouse. However, the Recognition of Customary Marriages Act uses the term 'polygamy'; hence it is also used in this paper.

47 Bennett, however, suggests that the practice of this custom is 'rare and obsolescent'. See Bennett, T. (2004). *Customary Law in South Africa.* Cape Town: Juta, 347. The reality is that in KwaZulu-Natal and other rural areas it is still practised and a woman who refuses to be married to the deceased's brother loses her estate and children.

48 Section 3(2) of the Recognition of Customary Marriages Act reads: 'Save as provided in Section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.'

49 South African Law Reform Commission (n 5) at 46. As will be discussed later, the presence of both spouses is not a requirement of the Recognition of Customary Marriages Act.

50 South African Law Reform Commission (n 5). The additional requirement of both spouses to appear at the DHA is also mentioned on the departmental website, available at www.dha.gov.za/Marriage certificates.html (accessed 31 March 2011).

51 See section 4*(a)* of the draft Recognition of Customary Marriages Act Amendment Bill; Department of Home Affairs. (2009). *Publication of the Draft Recognition of Customary Marriages Amendment Bill, 2009 for Comments*, GN 416 *GG* 32198 of 8 May.

52 Department of Justice. (2000). *Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998): Regulations*, GNR 1101 *GG* 21700 of 1 November.

53 See the website of the DHA, available at http://www.dha.gov.za/Marriage certificates.html (accessed 31 March 2011).

54 After hearing testimony after testimony of abuses by traditional authorities, members of parliament concluded that the issues raised by the submissions centred on the sweeping powers granted to traditional authorities, which stemmed from the legacy of the Black Authorities Act 68 of 1951 and were perpetuated by the Traditional Courts Bill [B15–2008] and the Traditional Leadership and Governance Framework Act 41 of 2003. The crux of the matter was the imposition of unwarranted tribal levies and financial abuse of these funds. The hearing was seen as a first step to correct these problems. See Parliamentary Monitoring Group. (2010). *The Black Authorities Act Repeal Bill: Public Hearings*, 12 July, available at http://www.pmg.org.za/report/20100720-public-hearings-black-authorities-act-repeal-bill-b9-2010 (accessed 17 February 2011).

55 At a workshop on Traditional Courts Bill and Communal Land Rights Act, conducted by the Rural Women's Movement of South Africa and the Association for Rural Advancement, women shared their experiences on the oppression by traditional leaders. They reported the requirement of payment of tribal levies and taxes by all families in their communities, irrespective of whether the person is a pensioner or a woman who receives a child grant. They shared some of the injustices that result from not paying these levies and taxes; Rural Women's Movement of South Africa. (2010). 'Laws affecting the status, powers, roles and functions of traditional leaders'. Presented at the KwaZulu-Natal Provincial Workshop on the Traditional Courts Bill and Communal Land Rights Act, 4–5 November. Also see Parliamentary Monitoring Group (n 54).

56 Rural Women's Movement of South Africa. (2010). 'Laws affecting the status, powers, roles and functions of traditional leaders'. Presented at the KwaZulu-Natal Provincial Workshop on the Traditional Courts Bill and Communal Land Rights Act, 4–5 November.

57 The imposition of unwarranted levies and taxes is such a widespread practice that parliament, at the time of writing, was debating a law repealing the Black Authorities Act 68 of 1951, the legal basis for traditional leaders to claim taxes.

58 Mamashela, M. (2004). 'New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act', *South African Journal on Human Rights* 20(4): 616–641 at 620.

59 The problem is exacerbated by the fact that Home Affairs officials treat the registration of customary marriages in exactly the same way that they treat civil marriages. The contexts of the two marriage systems are different, though, and cannot be superimposed on each other because of the different contexts, processes and procedures applicable to their conclusion.

60 Mamashela (n 58).

61 It is also important to understand that women themselves are diverse and experience the law differently based on this diversity and space.

62 Section 15(2) of the Matrimonial Property Act. According to section 5 of the Recognition of Customary Marriages Act, section 21 of the Matrimonial Property Act is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one wife. However, since the *Gumede* decision, this is also the case for 'old marriages' where it is a monogamous customary marriage; see *Gumede* (n 17) footnote 58.

63 Subsections 15(3) and (7) of the Matrimonial Property Act.

64 Mamashela (n 58).

65 Department of Justice and Constitutional Development. (2004). *Gender Mainstreaming: Assessment Report*. Pretoria: Department of Justice and Constitutional Development, 20.

66 In the *Gumede* case Mr and Mrs Gumede entered into a monogamous customary marriage in KwaZulu-Natal prior to the coming into effect of the Recognition of Customary Marriages Act. Mr Gumede initiated a divorce and claimed that, in terms of the Recognition of Customary Marriages Act, old customary marriages

continue to be governed by customary law and that section 20 of the KwaZulu Act on the Code of Zulu Law provided that the family head is the owner of, and has control over, all family property in the family home. Accordingly, the effect of the provisions of the Recognition of Customary Marriages Act, the KwaZulu Act on Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law (State President of the Republic of South Africa, *Natal Code of Zulu Law*, Proc R151 *GG* 10966 of 9 October 1987) was that Mrs Gumede had no claim to family property, either during or upon the dissolution of the marriage. The KwaZulu-Natal High Court declared the provisions of the Recognition of Customary Marriages Act, as well as provisions of the KwaZulu Act on the Code of Zulu Law and the Natal Code of Zulu Law, to be unconstitutional and invalid. The Constitutional Court confirmed the judgment in *Gumede v President of the Republic of South Africa* (n 17).

67 Please note that cohabitation does not constitute a customary marriage and therefore if a husband in a customary marriage cohabits with another woman it does not constitute a polygamous marriage.

68 Mamashela (n 58) at 616 and 635.

69 Mamashela (n 58) at 616 and 635.

70 Mamashela (n 58) at 641.

71 The court must consider certain factors before approving the written contract (section 7(7) RCMA).

72 *MM v MN and Another* 2010 (4) SA 286 (GNP).

73 *MM v MN and Another* (n 72).

74 *MM v MN and Another* (n 72) at paragraph 22.

75 *MM v MN and Another* (n 72) at paragraphs 24–25. In the case of *MG v BM and Others* 2012 (2) SA 253 (GSJ) at paragraphs 19–23 the South Gauteng High Court disagreed with this interpretation by the North Gauteng High Court.

76 *MM v MN and Another* (n 72) at paragraphs 27–33.

77 *MM v MN and Another* (n 72) at paragraphs 34–35.

78 *Mayelane v Ngwenyama and Another* [2010] 4 All SA 211 (GNP).

79 *Mayelane v Ngwenyama and Another* (n 78). In *Mayelane v Ngwenyama and Another* (n 33) the Constitutional Court notes at paragraph 81 that marital status impacts on other legal issues such as inheritance, citizenship, age of majority and spousal privilege in trial evidence.

80 *Ngwenyama v Mayelane and Another* (474/11) [2012] ZASCA 94 (1 June 2012) paragraph 13.

81 *Ngwenyama v Mayelane and Another* (n 80).

82 *Ngwenyama v Mayelane and Another* (n 80) at paragraphs 19 and 37.

83 *Ngwenyama v Mayelane and Another* (n 80) at paragraphs 17, 19 and 23.

84 *Ngwenyama v Mayelane and Another* (n 80) at paragraphs 21 and 37.

85 *Ngwenyama v Mayelane and Another* (n 80) at paragraphs 22–23 and 36.

86 *Ngwenyama v Mayelane and Another* (n 80) at paragraph 23.

87 *Ngwenyama v Mayelane and Another* (n 80) at paragraph 38. If this is the correct understanding of the Supreme Court of Appeal's (SCA) decision, this interpretation prejudices the first wife because, if her marriage is in community of property, it

cannot be changed automatically to a marriage out of community of property. This has a potential of prejudicing women from rural areas.

88 *Mayelane v Ngwenyama and Another* (n 33) at paragraph 41.

89 *Mayelane v Ngwenyama and Another* (n 33) at paragraph 41.

90 Mamashela (n 58) at 632.

91 Mamashela (n 58) at 632.

92 *Gumede* (n 17).

93 Women's Legal Centre. (2011). *Report on the Recognition of Customary Marriages Act.* Cape Town: Women's Legal Centre, at 20, available at http://www.wlce.co.za/morph_assets/themelets/explorer/relationship%20rights/general/Recognition%20of%20Customary%20Marriages.pdf (accessed 8 August 2013).

94 Mamashela (n 58) at 637.

95 Department of Justice and Constitutional Development (n 4) at 43.

96 As noted earlier, a woman married under customary law is not required to register the marriage after her husband's death. However, the requirement of section 3(1)(*b*) of the Recognition of Customary Marriages Act that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law' is misinterpreted by Home Affairs officials and results in women not being appointed as executors of the deceased husband's estate.

97 Department of Justice and Constitutional Development (n 4) at 46.

98 Department of Justice and Constitutional Development (n 4) at 55.

99 Department of Justice and Constitutional Development (n 4) at 55.

100 Department of Justice and Constitutional Development (n 4) at 25.

101 Department of Justice and Constitutional Development (n 4) at 50.

102 In 1988 the Marriage and Matrimonial Property Law Amendment Act was enacted. Given that prior to 1988 the law stated that a civil marriage that follows after a customary marriage dissolves the customary marriage, it is unclear whether this is still the case under the Recognition of Customary Marriages Act. See earlier at 7.5.2.

103 Cousins, B., Alcock, C., Alcock, R., Dladla, N., Hornby, D., Masondo, M., Mbatha, G. & Makhosi, M. (2011). *Mweli Imithetho yomhlaba yaseMsinga: The Living Law of Land in Msinga District, KwaZulu-Natal*. PLAAS Research Report 43 at 64. Cape Town: PLAAS, University of the Western Cape.

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CHAPTER 4

Enforcing women's rights in Malawi

Maureen Kondowe

1 Introduction

The 1994 Constitution of the Republic of Malawi (the Constitution)[1] has a Bill of Rights that makes provision for various rights that, in theory, women should enjoy. In addition to the Constitution, Malawi has signed both the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[2] and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (the Protocol).[3] Both CEDAW and the Protocol urge the government of Malawi to take adequate measures to ensure that women's rights are not only promoted but also protected. However, some women's rights enshrined in the Constitution, CEDAW and the Protocol continue to be violated without any or sufficient redress. Reasons for the lack of redress include some women's failure to see the need for redress, ignorance of women's rights issues generally, lack of financial means to access legal remedies through the courts and other relevant institutions, as well as insufficient assistance from those whose help is crucial in ensuring that the violations are properly corrected.[4] Any violation of human right calls for appropriate redress that is available under the law, be it under the Constitution, statutory law, the common law, customary law or even regional and international conventions. The right to access justice and the specific right to an effective remedy are recognised concepts across jurisdictions and can be made use of through measures such as litigation, mediation, arbitration and/or conciliation.

This chapter explores women's constitutional rights to access justice and an effective remedy in Malawi by examining selected women's rights issues that are, or have been, subjects of debate in Malawi. In Malawi, most women access justice through traditional structures for resolving the dispute at hand or through formal governmental structures, such as various types of courts, offices of district commissioners, the ombudsman and other administrative tribunals.[5] Women's choices regarding what institution to use in order to resolve violations of their

rights are motivated mainly by the nature of the dispute.[6] This paper, however, focuses on the use of litigation in the formal courts.

2 Legislative protection of women's rights in Malawi

The Constitution has made specific provisions for the rights of women in an attempt to entrench the international human rights standards that instruments such as CEDAW and the Protocol promote. The Constitution provides that 'discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of sex or other status' (section 20 of the Constitution). In addition to this gender-neutral, anti-discrimination clause, the Constitution specifically guarantees '*women's* right to full and equal protection by the law including the right not to be discriminated against on the basis of their gender or marital status' (emphasis added) (section 24(1) of the Constitution). The reason for having a separate provision on women's equality is that the drafters of the Constitution noted that women were more likely than men to suffer discrimination. While there is no definition of what constitutes discrimination in the domestic laws of Malawi, article 1 of CEDAW expressly defines discrimination against women as:

> *… any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

Section 24 of the Constitution, which explicitly protects women, outlines numerous specific rights that are subsumed under this provision. The present discussion singles out and focuses on the right to be accorded the same rights as men in civil law, including equal capacity to enter into contracts (section 24(1)*(a)*(i) of the Constitution), the right to acquire and retain custody of children (section 24(1)*(a)*(iii) of the Constitution), and the right to acquire and retain citizenship and nationality (section 24(1)*(a)*(iv) of the Constitution). Furthermore, any law that discriminates against women on the basis of gender or marital status is invalid and the Constitution has made it imperative that legislation be enacted to eliminate customs and practices that discriminate against women, particularly, among others, practices such as deprivation of property, including property obtained by inheritance (section 24(2)*(c)* of the Constitution), and discrimination in work, business and public affairs (section 24(2)*(b)* of the Constitution). Interestingly, the Constitution sees gender equality as an integral part of the welfare and development of the people of Malawi and therefore section 13*(a)* of the Constitution emphasises:

> [t]*he full participation of women in all spheres of Malawian society; the implementation of the principles of non-discrimination and such other measures as may be required; and the implementation of policies to address social issues such as ... security of the person, lack of maternity benefits ... and rights to property.*

As a member of the Southern African Development Community (SADC), Malawi also subscribes to the letter and spirit of the *Protocol on Gender and Development* (GAD).[7] GAD requires state parties to endeavour by 2015 to enshrine gender equality and equity in their Constitutions and ensure that women's rights are not compromised by any provisions, laws or practices (articles 4(1) and 6 of GAD). Furthermore, article 32*(a)* of GAD urges state parties 'to provide appropriate remedies in their legislation to any person whose rights or freedoms have been violated on the basis of gender'. Moreover, state parties to GAD must ensure that these remedies are administered by competent judicial, administrative or legislative authorities, or by any other competent authority provided by law (article 32*(b)*).

Most recently, Malawi's parliament has passed the Gender Equality Bill, which was assented to by President Banda at the time of writing. This new law, which has not yet been gazetted and is therefore referred to as a Bill, seeks to enact legislation aimed at promoting gender equality and equal integration of men and women in all functions of society. It further seeks to strengthen women's sexual and reproductive rights and to prohibit sex discrimination, harmful social, cultural and religious practices and sexual harassment. Due to the timing of the enactment of this law, this chapter does not discuss the new law in greater detail.

Notwithstanding the legislative commitments, the implementation of women's rights in a manner that ensures their adequate promotion and protection remains a challenge in Malawi. This is so despite the fact that the Constitution stipulates that the human rights and freedoms that it enshrines must be respected and upheld by all organs of government, its agencies and, where applicable, all natural and legal persons in Malawi (section 15(1) of the Constitution). The Constitution further states that any person or group of persons with sufficient interest in the protection and enforcement of rights is entitled to the assistance of the courts, the ombudsman, the Human Rights Commission and other organs of government to ensure not only the protection and promotion of rights and freedoms, but also that grievances that arise in relation to their enjoyment are appropriately redressed (section 15(2) of the Constitution). No wonder then that the Constitution also guarantees the right to access any court or other tribunal with jurisdiction to settle legal issues and the right to an effective remedy by a court or tribunal for any violations of rights and freedoms granted under the Constitution or any other law (subsections 41(2) and (3) of the Constitution). Any person who claims that a fundamental right

or freedom guaranteed by the Constitution has been infringed is thus entitled to apply to a competent court to enforce or protect it. If a court finds that an alleged infringement of a right is proven, it has the power to make any orders that ensure its enjoyment, including the award of compensation to the person who successfully proves the violation of a concerned right (subsections 46(2), (3) and (4) of the Constitution). Despite the constitutional guarantees, any woman who alleges a violation of her rights and freedoms relies greatly on the advocacy skills, innovation and resourcefulness of her legal representative, where she has one. The question is: what happens in cases in which women have no such representation?

3 Critical issues in women's rights litigation in Malawi

Many critical women's rights litigation issues in Malawi touch on themes such as political, socio-economic and cultural rights. However, this chapter reviews four distinct gender-related issues that affect the majority of Malawian women: gender-based discrimination in the workplace; gender-based discrimination in citizenship matters; discriminatory cultural practices in child custody matters; and property rights issues that arise in inheritance matters. The cases on discrimination at the workplace and in citizenship applications are clear examples of gender-based discrimination. In contrast to this, the discussed examples of culturally discriminatory practices in relation to both child custody and property rights can affect both men and women. However, this does not detract from the fact that, in reality, these practices largely affect women.

3.1 Employment-related rights

The Constitution protects the right to freely engage in economic activity, to work and to pursue a livelihood (section 29 of the Constitution) and the right to fair labour practices (section 31 of the Constitution).[8] The state is obliged to take all necessary measures to enable women to realise this right, including providing equality of opportunity for all in accessing employment. The Employment Act 6 of 2000[9] recognises anti-discrimination as one of its fundamental principles. Thus section 5(1) of this Act states:

> *No person shall discriminate against any employee or prospective employee on the grounds of … sex, … marital or other status … in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.*

The examples of case law discussed below illustrate how the Employment Act has been successfully used to challenge violations of women's employment rights in Malawi.

3.1.1 Maternity leave

Pregnancy and the quest for maternity leave have led to litigation by some women against their employers in a bid to enforce both their right to have a child and to remain employed. In *Jumbo v Banja La Mtsogolo* the applicant was employed as a nurse aid in November 1999.[10] In 2001 her employer learnt that she was pregnant. She was warned that her pregnancy had come 'at a wrong time' because she would require four months maternity leave, which would not be granted. She was subsequently dismissed. The Employment Act clearly provides that a female employee is entitled, every three years, to at least eight weeks' maternity leave on full pay (section 47(1) of the Employment Act). This Act further states that during the period when an employee is on maternity leave, her normal benefits and entitlements, including her contractual rights and accumulation of seniority, must continue uninterrupted and her period of employment must not be considered to have been interrupted, reduced or broken (section 47(2) of the Employment Act).

The applicant commenced legal action in the Industrial Relations Court[11] against the respondent and argued that her dismissal was unfair.[12] She sought the remedy of reinstatement. The court allowed her action, ordered her reinstatement and aptly remarked that there was no justification to dismiss the applicant because of her pregnancy.[13] It further held that dismissing a woman because of pregnancy amounts to an offence punishable with a fine of K 20 000 (roughly US$ 141 at the time of writing) and to imprisonment for five years (subsections 49(1) and (2) of the Employment Act). However, the court did not apply this penal provision, but merely cautioned the respondent, adding that 'further legal pursuit might be following them [sic] at their doorsteps'.[14]

The above case illustrates that the employer either did not care about what the law said about pregnant women and their right to maternity leave or was not aware of this right as spelled out in the Employment Act.

3.1.2 Unfair dismissal

There have also been cases in which a female employee's right to employment has been threatened by extraneous factors that had no relevance to the contract of employment, thereby violating her right to contract in her own capacity and for her own benefit as guaranteed by section 24(1)*(a)*(i) of the Constitution. One such case is *Kaunda v Tukombo Girls Secondary School* in which both the applicant and her husband worked for the respondent in their respective capacities of accounts clerk and teacher.[15] The applicant's husband resigned from his employment with the respondent. The respondent then terminated the applicant's employment on account of her husband's resignation, justifying her termination on the ground

that her employment was linked to that of her husband. The applicant commenced legal action against the respondent challenging her dismissal. The court found that the respondent had discriminated against the applicant on account of her marital status.[16] It further held that the effect of the respondent's decision was to prevent married women from seeking and retaining employment in their own right.[17] The reason for the termination of the applicant's employment was held to be invalid, hence her dismissal was found to be unfair. Moreover, the court found that the termination violated the applicant's rights to fair labour practices and to pursue a livelihood through employment as constitutionally guaranteed in sections 31 and 29 of the Constitution, respectively. The court ordered that the applicant be compensated for wrongful termination of employment. In arriving at this decision, the court took into consideration section 5 of the Employment Act, which prohibits discrimination against employees on the basis of sex, and section 57(3)*(a)* of the Employment Act, which stipulates that dismissals based on the employee's sex are unfair. The court also drew on section 20 of the Constitution, which prohibits discrimination and subsections 24(1)*(i)* and (2)*(b)* of the Constitution, which require equal protection of women and protect their right to enter into contracts in their own capacity.

It is shocking that some employers are either still unaware of or choose to ignore the strides that women have made in the struggle for the promotion and protection of their rights in employment. It is hard to understand how anyone, no matter how ignorant they are about a woman's right to contract in her own capacity, would come to the decision that, since the applicant's husband had resigned, this would automatically affect her relationship with her employer, given that she and her husband worked in completely different capacities for the employer.

3.1.3 Sexual harassment

Sexual harassment at the workplace is another form of discrimination against women that is a real challenge in Malawi. *Phiri v Smallholder Coffee Farmers Trust* is a case in point here.[18] The applicant in this case was employed by the respondent as a security guard on a fixed but renewable term. She was subjected to sexual harassment by a fellow male employee in the course of her employment. Towards the end of her contract, the said male colleague attempted to rape the applicant. She shouted for help and her attacker was caught with his pants down. The incident was reported to management, which called both the applicant and her attacker to a hearing a few days after the incident. During this internal hearing, the respondent's human resources officer (HRO) accused the applicant of misconduct for revealing the attempted rape incident to the public by shouting for help.[19] According to him, the applicant had embarrassed the respondent. The HRO

was alleged to have admonished the applicant in the following words: 'You are a disgrace to the organisation. How could you reveal such confidential activity? You have embarrassed us.'[20] The respondent failed to give the applicant notice that her contract, which was going to expire on 31 December, would not be renewed. The applicant therefore suspected that her contract had not been renewed because of the attempted rape incident. The applicant commenced legal action against the respondent, contending that her contract was terminated without justification and that she was a victim of sexual discrimination and harassment.

The court condemned the HRO's conduct and attitude. It was appalled that the person in charge of staff welfare believed that the applicant had probably asked for it '[b]ecause she was of questionable morals'.[21] On the facts of the case, the court rightly stated that 'sexual harassment is a form of gender stereotyping whereby it is considered normal for a man to demand sex or behave in certain ways towards women' and that

> [t]*he Applicant in this case suffered loss of her job because her male boss found that the sexual harassment which she had complained against was an internal matter and … was not an issue. This is what institutionalisation of sexual harassment in the work place is all about. Incidences of sexual harassment in the work place are not handled with the seriousness they deserve; often they are trivialised or personalised, if not considered as natural and inevitable.*[22]

The court, furthermore, took the view that the applicant had reason to believe that her contract would be renewed and that the respondent's failure to renew it was based on the attempted rape incident. The court found that the Employment Act, the Labour Relations Act 16 of 1996[23] and the Constitution all prohibit unfair discrimination in all its forms, including sexual harassment, which is a form of discrimination based on gender. Furthermore, the respondent had breached a contractual term of employment relating to mutual trust and confidence because it had a legal obligation to protect its female employees.[24] Describing the case as an example 'of the worst forms of unfair labour practices' the court held that the reason for the applicant's dismissal was unfair and invalid under section 57(3) of the Employment Act.[25] Under current Malawi labour laws, where a court finds that a dismissal is unfair, it has jurisdiction to remedy this situation by ordering the respondent to reinstate, re-engage or compensate the applicant (section 63 of the Employment Act). Given that a reinstatement was an inappropriate remedy in the *Phiri* case, the court awarded the applicant compensation.

The court also took note of the additional trauma that victims of sexual harassment suffer after the incident by stating that the applicant's family was disrupted, she was exposed to ridicule and humiliation as a result of which her self-

confidence and self-esteem were lost. The applicant also lost her matrimonial peace and harmony. When her husband learnt of her ordeal he could not understand why she was dismissed if, in fact, she was the victim. He therefore took the view that his wife was caught in an act of consensual sex.

The *Phiri* case is a classic example of sexual harassment and the discrimination of women in the workplace. But women experience sexual harassment in numerous circumstances, even at the hands of those who should lead by example, as was the case in *Kamkosi v Office of the Ombudsman* in which the then ombudsman was accused of sexually harassing the applicant.[26] At the time, sexual harassment was not expressly defined in the laws of Malawi. The court in the *Kamkosi* case stressed that sexual harassment can take many different forms, such as:

> *… insults, remarks, jokes, insinuations and inappropriate comments on a person's dress, physique, age, family situation and a condescending or paternalistic attitude that undermines dignity, unwelcome invitations or requests that are implicit or explicit whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caressing, pinching or actual assault.*[27]

The recently passed Gender Equality Bill has introduced an explicit definition of sexual harassment into Malawi law. Section 6 of the Gender Equality Bill defines sexual harassment as:

> [a]*ny form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.*

As a very inclusive definition of sexual harassment that recognises the manifold forms of sexual harassment, this definition provides strong guidelines for courts to assess whether a particular behaviour should be considered as sexual harassment. The explicit definition will also be helpful for employers who, under the new law, are required to develop and implement policy and procedure aimed at eliminating sexual harassment in the workplace (section 7 of the Gender Equality Bill). It remains to be seen whether the new definition will also encourage women to come forward and report sexual harassment at the workplace.

3.1.4 Adequate provision for remedies?

A question that arises at this juncture is whether or not Malawian law makes sufficient provision for remedies so as to compensate women, such as the applicants in the *Phiri* and *Kamkosi* cases, for the violation of their constitutional rights not to

be discriminated against and ensure the effective promotion and protection of their constitutional rights in the future. It is this author's considered opinion that it does, to a certain extent. For instance, in employment cases, section 7 of the Employment Act provides expressly that where an infringement of a right protected under the Act is proved, the court must:

> *… make such order as it deems necessary to ensure compliance with the provisions … including an order for reinstatement of an employee, the restoration to him of a benefit or advantage and an order for the payment of compensation.*

Accordingly, the court is *obliged* to order a remedy and is given flexibility as to what kind of remedy is most appropriate in the relevant case. However, one limitation of the law is that these remedies are usually and mostly ordered against employers, most of which are firms or trusts. It appears that the actual perpetrators in employment-related discrimination cases do not suffer real consequences because it is the employers for which these women work that are required to remedy the violation of their rights. The companies are sued on the basis of the employer–employee relationship because the conduct complained of occurred in the course of employment. The natural person who actually committed the discriminatory act is frequently not joined as a respondent to the proceedings. This is not surprising on account of the vicarious liability principle, which permits the aggrieved person to pursue both the employee who has violated the concerned right and the employer. The usual preference is the employer rather than the natural person perpetrator, due to the employer's better capacity to pay compensation. However, it could be argued that perpetrators who violate the human rights of others must also be held *personally* responsible and accountable for their reprehensible conduct. This would be possible by, for instance, making community service a remedy, which a court can impose on such a person where they are joined as a party to the proceedings; it would obviously remain problematic where they are not.

An additional problem is that some laws with discriminatory provisions continue to exist and the judiciary is, therefore, unable to protect women from all forms of gender-based discrimination. A remedy must be effective if real progress towards dealing with violators of women's rights is to be made.[28] The judiciary could contribute significantly to the promotion and protection of human rights, provided it is empowered with the right remedial measures in the law. The Ministry of Justice and Constitutional Affairs is less responsive than the judiciary, although it has been given the important task of ensuring that it reviews laws and policies and makes suggestions to parliament on how to reform them so that they are in line with established and well-known international and regional human rights standards. The Malawi Law Commission (MLC), which works closely with the Ministry of Justice

and Constitutional Affairs, has reviewed most gender-related laws and policies with a view to ensuring that discrimination no longer forms part of statute law. This, however, has been frustrated by the fact that the reports that it submits to the Ministry of Justice and Constitutional Affairs containing its proposals for law reform, or actual proposed amendments to the law take a very long time before they are debated in parliament. This is true for the reports that led to the recently enacted Gender Equality Bill and the Deceased Estates (Wills, Inheritance and Protection) Act.

3.2 Child custody rights

Another critical area in women's rights litigation is the impact of cultural norms on child custody rights. The social, economic and political development of societies over time inevitably affects cultural value systems by changing certain beliefs, traditions and practices that had been considered the norm. As illustrated by the jurisprudence of the High Court of Malawi, the predominant child custody rights systems that have historically existed in both matrilineal and patrilineal societies of Malawi are no exception. The High Court of Malawi has used its mandate to interpret some key constitutional child rights and parental obligations, which will now be discussed.

Under some customary laws, child custody rights following the death of a spouse raise difficult issues that clash with the promotion and protection of parental rights, particularly where the remaining spouse is a woman. The situation is further complicated by Malawi's legal system. Malawi has a dual legal system in which principles of received English law, as they existed in eighteenth-century England, coexist with principles of customary law, depending on whether one is analysing this from the perspective of patrilineal or matrilineal communities.[29] As a result, a valid marriage can be contracted under statute law[30] or under customary law within the *lobola* system in patrilineal societies and the *chikamwini* system in matrilineal societies.[31] In most matrilineal societies, women tend to wield more power than their male counterparts and children are considered to belong to their maternal uncle, who is duty-bound to look after them in terms of their upbringing and general welfare. In contrast, in most patrilineal societies, men are generally more powerful than women, such that children (especially male children) customarily belong to their father and his family. This divergence in cultural principles, values and beliefs and their inconsistency with constitutional provisions is seen whenever issues relating to child custody arise following the death of either of a child's parents.

The Constitution is precise in terms of the rights of children: children have the right to know, and to be raised by, their parents (section 23(3) of the Constitution).[32] A child is any person aged 16 and below (section 23(5) of the Constitution). The High Court of Malawi interpreted the legal implications of this constitutional

provision in relation to the customary law principle of matrilineal societies that children belong to their mother and her family. The dispute in *John Mitchel v Ramonoth M Chikufenji and Felicitus Chikufenji* arose between a biological father, who sought custody of his child following the death of his wife, and his parents-in-law, who considered themselves more entitled to custody based on customary law principles.[33] The High Court found in favour of the biological father and made a declaration to the effect that any customary law principle that gave any person other than the biological parents of a child a superior right to its custody is repugnant to and inconsistent with section 23 of the Constitution and is, therefore, void and unenforceable according to section 5 of the Constitution.[34] The term 'parents' in section 23 of the Constitution was interpreted as meaning the biological father and mother of a child, without any extension to maternal grandparents, as would be the assumption under customary law.

This is a landmark decision in that it significantly contributes to a fast-tracked transformation of customary law on child custody rights, not only in matrilineal societies, but also in patrilineal societies of Malawi. The biological father of a child generally does not need to apply for a court order at a huge cost to receive and retain the custody of his child (existing exceptions noted).[35] This would equally apply to a biological mother of a child against the family of her husband in a patrilineal society. In most patrilineal societies, women generally have difficulty retaining the custody of their children following the death of a husband. Prior to the High Court decision in *John Mitchel v Ramonoth M Chikufenji and Felicitus Chikufenji*, it was extremely difficult to assist mothers in patrilineal societies because deep-rooted cultural beliefs, traditions and value systems were barriers to change.[36]

Furthermore, it is laudable that the High Court has made it clear that women have equal rights with men when it comes to the custody of their children, as is illustrated by the case of *In re the Estate of Manjaena* in which the brother of a deceased man sought an order for the guardianship of his deceased brother's four children, although their biological mother was still alive.[37] The applicant argued that the respondent was an unfit guardian of her children because she was living with another man with whom she had a fifth child. The respondent argued that according to custom, these children belonged to her and her family (matrilineal side). The court found in favour of the respondent and stated:

> *In appointing a guardian the Court will have regard firstly to the interests of the child and secondly to the wishes of the natural parent. The rights of a mother are the same as those of a father.*[38]

This decision was particularly progressive, given that it was made in 1992 and thus prior to the enactment of the Malawi Constitution.

3.3 Inheritance rights and property-grabbing

Research on the culture and practice of making a will was conducted as part of a national project on deceased estate management in Malawi. According to the findings of this research project, which investigated the degree and extent of intestacy in Malawi, most Malawians, whether male or female, die intestate.[39] More women than men die without leaving a valid will.[40] Reasons for not writing wills range from lack of knowledge regarding how to write one, a perception that wills are made by the rich, and absence of assets, among others.[41] One common problem in the absence of a valid will, which has been addressed through recent law reform efforts, is property-grabbing from a widowed spouse.

3.3.1 Protection from property-grabbing under the Wills and Inheritance Act

Property-grabbing usually occurs when relatives of the deceased dispossess the surviving spouse of the matrimonial real estate or personal property and appropriate it for their own use, without waiting for the formal administration of the estate of the deceased. The prevalence of property-grabbing was so high that government found it necessary to effect an amendment to the Wills and Inheritance Act that made this conduct a crime.[42] Section 84A of the Wills and Inheritance Act prohibited any person who was not entitled to any property under a valid will or upon any intestacy from taking, grabbing or seizing it. Disposal of such property was also prohibited and a person is not allowed to do anything to the property, that occasions, or is likely to occasion, any sort of loss or damage to its rightful beneficiaries (section 84A*(a)* of the Wills and Inheritance Act). Any person who committed any of these prohibited acts was guilty of an offence and liable to a K 20 000 (equivalent to US$ 141 at the time of writing) fine or imprisonment of up to five years (section 84A*(b)* of the Wills and Inheritance Act). Besides this prescribed sentence, a court had jurisdiction to order that any property or its monetary value be restored to the person who is lawfully entitled to it or to the estate of the deceased person (section 84A*(b)* of the Wills and Inheritance Act).

Under customary law, rules of inheritance were such that the nature of a person's marriage determined how the person's property was dealt with if he or she died intestate. Taking cognisance of customary law, section 16(2)*(a)*(i)(ii) of the Wills and Inheritance Act provided that if a man died leaving a wife, issue or dependant surviving him, and his marriage was arranged in an area that practises *lobola*, the persons entitled to his intestate property, as to a half share thereof, were the persons entitled to a fair distribution in accordance with section 17 of the Wills and Inheritance Act, that is, the wife, issue and dependants. The other half went to his heirs in accordance with customary law. In contrast to this, section 16(2)*(b)* of the Wills and

Inheritance Act stated that if the marriage of the deceased man was arranged in an area that practises *chikamwini*, the persons entitled to his intestate property were, as to a three fifths share thereof, his heirs in accordance with customary law, while the remaining two fifths share went to those entitled to a fair distribution of his intestate property. The MLC reviewed these formulae and proposed, *inter alia,* that they should be abolished so that when a deceased person, whether male or female, was married, the only persons entitled to inherit their intestate property should be the widow or widower and their children.[43]

Interestingly, section 84A(2) of the Wills and Inheritance Act exempted from prosecution, those who are entitled to any intestate property under customary law. This proved to be problematic because, as evidenced by case law, customary law heirs are most notorious for property-grabbing. *E.L. Katembo (Female) v D. Katembo* is a case in point here.[44] In this case, a brother of a deceased man acted as if he were the sole beneficiary of his brother's estate, thereby excluding his brother's widow and children. The widow applied to the High Court for orders to prevent him from seizing the property and to direct him to surrender to her the matrimonial home in which she had lived with her deceased husband.

Excluding customary heirs from prosecution therefore seems to defeat the purpose of criminalising property-grabbing. This fact notwithstanding, the courts in Malawi were, until recently, forced to interpret and apply this law in such a way that a property-grabber, who also qualifies as a customary law heir got away with this crime. Another case illustrating the difficulties of prosecuting customary law heirs is that of *Rose Ali v The Republic*.[45]

In this case the appellant was charged with contravention of section 84A of the Wills and Inheritance Act in the following terms:

> *Rose Ali in the year 2002 in Gamulani, Ndirande, Blantyre City, not being entitled thereto upon intestacy … took possession of a house forming part of the estate of a deceased person (Mrs. Loveness Chidothi nee Twaibu) and caused deprivation to Mr. Clement Chidothi who is entitled thereto upon the intestacy*.[46]

The appellant and the deceased were sisters. Mr Chidothi was the appellant's brother-in-law who, upon marriage to the deceased, had been given a piece of land in her village by the father of the deceased. This was done in compliance with the requirements of customary law under the *chikamwini* marriage system in which a man leaves his village upon marrying and goes to live in his wife's village.[47] Mr Chidothi and his wife built a house on this piece of land and lived there until her death when quarrels with her relatives, including the appellant, began over the house. The district commissioner, who administratively handled this matter prior to its being litigated in court,ordered that the house be sold and its proceeds

shared between Mr Chidothi and the relatives of his deceased wife. The appellant and other relatives of the deceased refused to abide by this order. The appellant was consequently arrested, charged with contravention of section 84A of the Wills and Inheritance Act, convicted and sentenced to 18 months imprisonment with hard labour.[48] She appealed to the High Court against both her conviction and the sentence on the substantive ground that she could not be successfully prosecuted under this law because she was entitled to part of her deceased sister's intestate property under sections 16(1) and 17 of the Wills and Inheritance Act. The presiding judge quashed her conviction and set aside her sentence, observing:

> *I have looked at sections 16 and 17 with keen interest and note that the import therein is that the intestate is a male person. It is only section 16(4)*(a) *which mentions a situation where a woman dies leaving children. It was never envisaged that a woman could die and leave a husband to inherit. This may have been a deliberate act to exclude husbands from inheriting from their deceased wives. There could be some historical, cultural or practical reasons for the discrimination. Maybe in our societies until lately only men acquired and held or owned property. Since the woman was reduced to a subservient status she needed the protection of such a law … What does customary law say in respect of surviving sisters and husbands? The complainant* [that is, Mr Chidothi] *planted himself as a mkamwini* [son-in-law] *and he did what a mkamwini was expected to do i.e. build a house or complete it and live there. It should matter less that the land is within the city of Blantyre so long as the place was considered home by the relatives of the deceased. If it was considered as home then what the complainant* [that is, the widower] *had was mere possession and not ownership. Such possession was at the mercy of the people entitled upon the death of the deceased. The Appellant as a sister to the deceased and on behalf of the other family members was entitled to the house especially because the marriage of the deceased and the complainant was not blessed with any children.*[49]

This decision was problematic for several reasons. One concern was the application of the law. The court relied on and quoted section 16(4)*(a)* of the Wills and Inheritance Act, which provided that where a woman died leaving children, such children were solely entitled to her intestate property. No children were born out of the union of the deceased and the widower in this case. There is, however, no plausible reason why, in the absence of such children, the widower should not be able to inherit from his wife.

Another concern was rooted in the law itself. The court's view that sections 16 and 17 of the Wills and Inheritance Act never envisaged that a woman could die intestate and leave some property, probably, to some extent, reflects the social context of the year 1967 when parliament first enacted this law. It is, however,

lamentable that this kind of provision remained in the Wills and Inheritance Act until recently. The Constitution mandates that discriminatory laws, such as these provisions of the Wills and Inheritance Act, ought to be expunged in order to promote not only women's, but also men's right to inherit and dispose of property as they see fit.[50] Whether this law really protected women as suggested by the court is also questionable. This view merely attempts to place the provision in the historic context. It should be considered that the law's very basis dates from a time when women were generally viewed as chattels.[51] The Wills and Inheritance Act was certainly a law that was inconsistent with the Constitution due to its obvious discriminatory nature, and therefore ought to be null and void according to section 5 of the Constitution.

Finally, the decision did not serve justice, considering that Mr Chidothi not only found himself homeless following the death of his wife, but also lost whatever he had expended in building the house. The case is an example of a total failure of restorative justice as far as Mr Chidothi was concerned. No order was made to the effect that an account be taken to determine how much Mr Chidothi had spent on the house in order for him to receive a refund from the relatives of his deceased wife. Such an order would, in fact, have been unheard of under customary law. Mr Chidothi was thus essentially left without a satisfactory and effective remedy by the court of law. He might have had more success pursuing a civil remedy, such as an injunction based on the constitutional provision that prohibits arbitrary deprivation of property without compensation.

3.3.2 Protection from property-grabbing under the Deceased Estates (Wills, Inheritance and Protection) Act

In 2011, the Wills and Inheritance Act was repealed by the Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011 (the Deceased Estates Act). The new inheritance law addresses certain shortcomings of the Wills and Inheritance Act, some of which will be discussed here in brief. First, the Deceased Estates Act includes stricter punitive measures for the offence of property-grabbing. Section 84(1) of this Act prohibits any person who is not entitled to any property under a valid will or upon any intestacy from taking possession of, grabbing, seizing, diverting or in any manner dealing with it. Any person who commits any of these prohibited acts is guilty of an offence and liable to a fine of *not less than the value of the property* possessed, seized, diverted or otherwise grabbed, or imprisonment up to *10* years. Furthermore, the court shall order that the property or the monetary value thereof be *immediately* restored to the person or persons lawfully entitled thereto or to the estate of the deceased person (section 84(1)*(a)* of the Deceased Estates Act. The court order should also specify the amount of the fine that should

be paid to the person or persons entitled to the property or into the estate of the deceased person (section 84(1)*(b)* of the Deceased Estates Act). It is noteworthy that the Deceased Estates Act does not include a provision mirroring section 84A(2) of the Wills and Inheritance Act—the clause that exempted from prosecution individuals entitled to an intestate property under customary law. The absence of such a clause suggests that under the Deceased Estates Act, customary law heirs can be prosecuted for property-grabbing.

Another positive development of the Deceased Estates Act is that the law followed the recommendation of the MLC to ensure that inheritance law avoids discrimination based on gender. Section 17(1) of the Deceased Estates Act now uses gender neutral language and expressly provides that upon intestacy, the 'persons' entitled to inherit the intestate property are the 'members of the immediate family and the dependants of the intestate'. Furthermore, the new law includes principles that guide the ascertainment of the shares in which intestate property should be inherited. Section 17(1) of the Deceased Estates Act reads as follows:

> (a) *Protection from hardship must be provided to members of the immediate family and dependants of the intestate so far as the property can provide such protection;*
> (b) *Every spouse of the intestate is entitled to keep all household belongings in his or her household;*
> (c) *Any property that remains after its distribution as stated in paragraphs (a) and (b) above must be divided among the surviving spouse(s), the children and the parents of the intestate;*
> (d) *The determination of the shares in which any surviving spouse(s) and the children of the intestate inherit the property must take into account the wishes of the intestate expressed in the presence of reliable witnesses, any assistance by way of education or other basic necessities received from the intestate during his or her lifetime and any contribution made by the surviving spouse or child of the intestate to the value of any business or other property that forms part of the estate of the intestate. Unless evidence to the contrary is tendered, a surviving spouse shall be considered to have contributed to the business;*
> (e) *As regards the children of the intestate their age determines the extent of their share of the inherited property. A younger child is entitled to a greater share than an older child;*
> (f) *In the absence of any spouse or child the property of the intestate must be distributed among his or her dependants in equal shares.*

The new inheritance law thus provides much clearer guidance for courts on how to distribute shares of intestate property. The case of *Angella Margaret Chisanu*

(suing on her own behalf and on behalf of the children of late Stanislus Chisanu) v Rodiana Chisanu Bernard (suing on her own behalf and on behalf of the relatives of Stanislus Chisanu, deceased),[52] one of the first cases tried under the new law, shows how the application of the Deceased Estates Act provides protection to widows and their children. In this case, the defendant, a sister of the deceased, dispossessed the plaintiff, the widow of the deceased, and her children, of the matrimonial home and the personal motor vehicle of the plaintiff. The plaintiff commenced legal action in the High Court seeking orders for the restoration by the defendant to her and her children of both the matrimonial home and the motor vehicle. She also asked the court to order the defendant to render an account for any money or other property used by her from her deceased husband's estate. Finally, the plaintiff sought an order that appointed her the administratrix of the estate of her deceased husband.

The court observed that the deceased husband having died without leaving a valid will, the intestate property that constituted the estate of the deceased needed to be distributed in terms of section 16 of the Deceased Estates Act. The court stated further that under section 17(1)(*a*) of the Deceased Estates Act the persons entitled to inherit intestate property were the members of the immediate family of the deceased, in this case the plaintiff and the children of the deceased, including children from previous relationships. In terms of the extent of the rights of the plaintiff and the children of the deceased, the court relied on the principles of fair distribution of section 17(1) of the Deceased Estates Act. Furthermore, the court held that under section 43 of the Deceased Estates Act the plaintiff was entitled to Letters of Administration. In terms of the dispossessed car, the court held:

> *In the considered opinion of my court, this seems to be a classic case contemplated by section 24(1)*(a)*(ii) of the Constitution which guarantees the right of a woman to acquire and own property jointly or independently regardless of marital status. The Defendant's claim to the vehicle proceeds from the erroneous assumption that whatever assets the couple had must have been bought by her late brother. In the face of clear documentary proof to the contrary, the court finds such a view untenable and indeed indefensible. As such the car would not even form part of the deceased estate. It must be returned to the Plaintiff as of legal right of ownership.*

The above judgment demonstrates that the new law can effectively address the blatant abuse of women's rights not only to inherit but also to own and enjoy possession of inherited property. Through this carefully drafted law the presiding judge was empowered to properly execute his mandate to protect the rights of the widow and her children to the property. The motive of the defendant in seeking to inherit her brother's intestate property over the rights of the widow and her children is subject to speculation since her status and means are not known. What is clear,

however, is that the defendant attempted to enforce her rights to the property under customary law based on her relationship with the deceased as her brother. Yet the new inheritance law and the Constitution have replaced customary law principles of inheritance to a large extent where a widow and children survive a married man who dies without leaving a valid will. Due to the gender neutrality of the provisions in the Deceased Estates Act, the same principles would now also apply where a widower and his children survived a deceased married woman in similar circumstances.

3.4 Right to citizenship

Section 47(2) of the Constitution provides that an Act of Parliament may make provision for the acquisition or loss of citizenship of Malawi by any person, but citizenship must not be arbitrarily denied or deprived. The citizenship of Malawi can be acquired by, among others, marriage or any other means prescribed by an Act of Parliament (section 47(3)*(a)* of the Constitution). In contrast, loss of citizenship is defined in section 47(3)*(b)* of the Constitution as including loss by deprivation, renunciation or any other means prescribed by an Act of Parliament. The Department of Immigration (part of the Ministry of Home Affairs) is mandated by the Malawi Citizenship Act of 1966[53] to implement laws and policies on citizenship. As will be discussed below, the Malawi Citizenship Act contains some of the most blatantly discriminatory provisions against women that exist in the statute books. The MLC proposed amendments to the Malawi Citizenship Act in 1996, but 15 years later (at the time of writing) the law has not yet been amended.[54]

A case in point is the decision taken by the court in *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration*.[55] Mrs Okeke's husband was arrested and deported at the airport when he tried to return from a trip. Mrs Okeke, the applicant, is Malawian while her husband is originally from Nigeria. The applicant sought several reliefs including an order similar to a *certiorari* quashing the decisions of the police and Immigration Department to arrest, detain and deport her husband, as well as an order restraining them from deporting her husband. She also applied for compensation for the wrongful arrest, detention and deportation of her husband, and sought further damages 'arising from these matters'. Furthermore, the applicant challenged the constitutionality of sections 9 and 16 of the Malawi Citizenship Act by arguing that they discriminated against women in violation of section 22 of the Constitution.

The High Court noted that this application was interesting because it—

> …[brought] *to the fore the problem which concerns many scholars and commentators on our Constitution and those interested in the promotion, protection and enforcement of human rights. It requires considering how far the Constitution*

> *goes to protect the fundamental human rights which, among other things, are its most fundamental and revolutionary aspects.*[56]

The High Court quashed the decision of the Chief Immigration Officer and the police to arrest, detain and deport the applicant's husband on the basis that it was wrong in law to deport him without considering his family ties to Malawi. It found the Chief Immigration Officer's decision unreasonable. Furthermore, the court agreed with the applicant that, in addition to violating her husband's rights, the deportation violated the applicant's 'right to marriage, her right to the husband's consortium and the right to be nurtured and taken care of … by her husband' as protected under the Constitution and the general law.[57] While these orders restored, among others, the applicant's right to the consortium of her husband, the court did not deem it necessary to decide upon the constitutionality of sections 9 and 16 of the Malawi Citizenship Act and reserved the applicant's claim for damages for evidence and argument.[58]

It is unfortunate that, despite explicitly raising the human rights implications of the application, the court did not deem it necessary to review the relevant provisions of the Malawi Citizenship Act.[59] A judicial review of these provisions would have been timely. Section 9 of the Malawi Citizenship Act reads:

> *A citizen of Malawi, being a woman, who acquires by marriage the citizenship of some country other than Malawi shall cease on the first anniversary of the date of that marriage to be a citizen of Malawi unless, before that anniversary, she has made a declaration in writing—*
> (a) *in the form specified in the Third Schedule, of her intention to retain citizenship of Malawi; and*
> (b) *in the form specified in the Fourth Schedule, renouncing, so far as it lies within her power, citizenship of that other country.*

According to this provision, Malawian women who acquire, by marriage, the citizenship of another country lose their Malawian citizenship on the first anniversary of such a marriage unless they declare in writing their intention to retain their Malawian citizenship and renounce the citizenship of the husband's country of origin. The wording of section 9 of the Malawi Citizenship Act highlights that it applies only to women, not to men. This differentiation between men and women violates section 24(1)*(a)*(iv) of the Constitution, which states that women have a right to equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status, which includes the right to acquire and retain citizenship and nationality.

Section 16 of the Malawi Citizenship Act raises similar concerns. Under this provision a male citizen of Malawi may marry a foreign woman who would then

automatically become a citizen upon satisfying the requirements of section 13(1) of the same Act.[60] This is not, however, the case for a female citizen whose husband is foreign. Instead of granting her husband citizenship under section 13(1) of the Malawi Citizenship Act, she would run the risk of losing her Malawian citizenship, as highlighted above.

The discriminatory nature of the Malawi Citizenship Act shows that women have to incur great expense to enforce their citizenship rights, while men need not. In any event, such women must hope that the presiding judge will be someone with a progressive mind who will appreciate the key constitutional and women's rights issues at stake and apply the law in light of the constitutional guarantee of non-discrimination. Hopefully, the current activism around citizenship rights in Malawi sparks debate among members of parliament so that the Malawi Citizenship Act will be amended in due course.[61]

4 Enforcing women's rights in Malawi

There is no doubt that Malawi has, to a large extent, complied with international human rights standards as far as specific constitutional provisions for women's rights and freedoms are concerned. However, the question remains: to what extent has the constitutional guarantee of women's rights translated into the effective protection of these rights by ensuring that whenever they are violated an appropriate remedy for their redress is available and accessible? The constitutional guarantee of rights and freedoms seems pointless if rights and freedoms are, in practice, neither effectively protected and enjoyed nor enforceable using the prescribed legal mechanisms.

The case law presented in this chapter, such as *Kaunda v Tukombo Girls Secondary School*[62] and *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration*,[63] highlights that, in practice, women continue to be discriminated against in their daily lives either because the laws protecting them from discrimination are violated or because the law itself remains discriminatory. While the Constitution recognises the need for effective legal remedies (subsections 41(1) and (3) of the Constitution), access to these remedies appears to be limited. Substantive research on women's access to justice in Malawi shows that, while the law is acknowledged as a key instrument in ensuring the empowerment of women, the structures that administer such law and ultimately deliver justice are equally significant.[64] The research found that even in cases in which women knew their constitutional rights and how to go about enforcing them, they were faced with practical obstacles that prevented or discouraged them from doing so.[65] These obstacles included, among others, cumbersome administrative procedures, and gender insensitive courts and other law enforcement personnel. The lack of gender sensitivity can be explained by the substantial patriarchal influence on

the administration of justice. Most institutions that administer justice are male dominated. The majority of the legal profession (that is, magistrates/judges, legal practitioners and clerks of the court) are male. Geographic inaccessibility of courts is also a barrier to accessing justice, which is not surprising given the low number of courts, the insufficient infrastructure and most women's lack of financial means to pay for public transport.[66] These obstacles to accessing the court system undermine the constitutional promise of every person having access to a court of law (section 41(2) of the Constitution). Other barriers are a lack of and/or inadequate and limited knowledge of legal-aid facilities for economically disadvantaged women.[67]

In addition, it seems that even if women succeed in overcoming these challenges in accessing the court and winning the case, this does not guarantee the protection of their rights. Women who choose litigation face problems if the progressive rights of the Constitution have not yet been translated into domestic legislation — where parliament has failed to enact new laws to replace existing discriminatory ones. It is obviously not enough to go to court and get a declaratory order that a certain law is unconstitutional because it is contrary to the Bill of Rights of the Constitution. Such a declaration would make the law null and void, but it would leave a legal vacuum until a new law has been passed by parliament.

Furthermore, the judgment or court order may fail to have a preventive effect for future women's rights violations. For instance, notwithstanding the court's declaration in *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration*,[68] the Department of Immigration allegedly continues to refuse to issue requisite permits to some Malawian women's husbands on the basis of the Malawi Citizenship Act. And lastly, the practice on the ground is not necessarily significantly affected by a judgment if those who are charged with the implementation of this law refuse to abide by the (progressive) court order. A law and a court order are only as good as the people who are implementing them on the ground. As a result, the discriminatory conduct sometimes continues unabated in total disregard of the court order, particularly when effective remedial measures and sanctions are unavailable or not enforced. Disregard for court orders remains problematic despite the fact that such disobedience amounts to contempt of court.[69]

5 Conclusion

This chapter has shown that women in Malawi continue to be discriminated against on the basis of their gender and/or marital status, notwithstanding that the Malawi Constitution as well as international, regional and domestic laws prohibit this form of discrimination. Despite the laudable legal framework, one of the biggest barriers to effectively overcoming discrimination against women (and to some limited extent, men) in Malawi is the slow pace at which laws are enacted or amended by parliament.

Malawi, therefore, still lacks laws that give effect to the ambitious constitutional rights and it continues to have a number of discriminatory domestic laws. While there are many redress measures that women could employ in their attempt to deal with problems such as discrimination, litigation remains the primary tool that most women use for this purpose. This is so because most of the current laws of Malawi make the courts the primary forums in which a remedy must be sought. However, courts are often difficult to access for women, due to a number of practical obstacles. Furthermore, in order to fully overcome discrimination of women, a challenge that needs to be overcome is resistance to change at different levels of society.

Endnotes

1 Republic of Malawi (Constitution) Act 20 of 1994.
2 *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, entered into force 3 September 1981. Malawi signed CEDAW on 12 March 1987.
3 *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, CAB/LEG/66.6 (13 September 2000), entered into force on 25 November 2005.
4 Women and Law in Southern Africa Research and Education Trust (Malawi Chapter). (2000). *In Search of Justice: Women and the Administration of Justice in Malawi.* Blantyre: Dzuka Publishing Company Limited, 1.
5 Women and Law in Southern Africa Research and Education Trust (Malawi Chapter). (2000). *In Search of Justice* (n 4), 20–23.
6 Women and Law in Southern Africa Research and Education Trust (Malawi Chapter). (2000). *In Search of Justice* (n 4), 20–23.
7 Southern African Development Community. *Protocol on Gender and Development*, adopted in 2008; http://www.sadc.int/index/browse/page/465 (accessed 7 October 2011). Malawi signed this Protocol only on 19 October 2009.
8 Furthermore, the right to economic development and its enjoyment are guaranteed to both men and women under section 30(1) of the Constitution.
9 Cap. 55:02 of the Laws of Malawi.
10 *Jumbo v Banja La Mtsogolo* 2008 MLLR 409 (IRC).
11 The Industrial Relations Court (IRC) was established under section 110(2) of the Constitution with original jurisdiction to hear and determine labour disputes.
12 *Jumbo v Banja La Mtsogolo* (n 10).
13 *Jumbo v Banja La Mtsogolo* (n 10).
14 *Jumbo v Banja La Mtsogolo* (n 10) at final paragraph of judgment.
15 *Kaunda v Tukombo Girls Secondary School* 2008 MLLR 446 (IRC).
16 *Kaunda v Tukombo Girls Secondary School* 2008 MLLR 446 (IRC).
17 *Kaunda v Tukombo Girls Secondary School* 2008 MLLR 446 (IRC).

18 *Phiri v Smallholder Coffee Farmers Trust* Case No. 70 [2006] MWIRC 11.
19 *Phiri v Smallholder Coffee Farmers Trust* Case No. 70 [2006] MWIRC 11. The conduct of the HRO during the internal hearing is reported in the judgment.
20 The judgment claims that the HRO made such a statement; *Phiri v Smallholder Coffee Farmers Trust* (n 18) at 3.
21 *Phiri v Smallholder Coffee Farmers Trust* (n 18) at 4. To add insult to injury, the applicant was married. Unfortunately, the judgment does not discuss whether and, if so, what kind of action the respondent took against the applicant's attacker.
22 *Phiri v Smallholder Coffee Farmers Trust* (n 18) at 4.
23 Cap. 54:01 of the Laws of Malawi.
24 *Phiri v Smallholder Coffee Farmers Trust* (n 18) at 4. The court also found, at 4, that the respondent had violated the applicant's right to 'fair labour practices, the right to work, her right to a safe working environment and personal dignity'. See article 11(1)*(f)* of CEDAW (n 2), which urges states parties to protect women's right to protection of health and safety in working conditions, including the protection of the function of reproduction. The applicant might have been exposed to the double risk of contracting HIV and an unwanted pregnancy had her assailant succeeded in his rape attempt.
25 *Phiri v Smallholder Coffee Farmers Trust* (n 18).
26 *Kamkosi v Office of the Ombudsman* Matter Number 70 of 2003 (IRC) (unreported).
27 *Kamkosi v Office of the Ombudsman* Matter Number 70 of 2003 (IRC) (unreported).
28 See the wording of section 41(3) of the Constitution.
29 See British Central Africa Order in Council of 1902 and section 29 of the Courts Act (Cap. 3:02 of the Laws of Malawi).
30 By virtue of either the Marriage Act of 1903 (Cap. 25:01 of the Laws of Malawi) or the Asiatics (Marriage, Divorce and Succession) Act (Cap. 25:03 of the Laws of Malawi).
31 *Lobola* is a cultural practice in which payment is made by the groom's family to the bride's family in the form of a herd of cattle as a token of appreciation for their bringing up a girl who has become his wife. Note that money is now mostly given instead of a herd of cattle. In contrast to this, *chikamwini* is a cultural practice in which a man is required to leave his own village and relocate to the village of his wife following a marriage contracted at customary law.
32 Malawi also signed the 1989 United Nations *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990. It is, however, not domesticated in Malawi.
33 *John Mitchel v Ramonoth M Chikufenji and Felicitus Chikufenji* Miscellaneous Civil Cause Number 36 of 1999.
34 Section 5 of the Constitution declares that any law inconsistent with the Constitution is invalid to the extent of such inconsistency.
35 Exceptions exist in cases in which it is proven that either the biological father or mother is unfit or unable, for financial or other reasons, to properly look after the children's welfare. This is in line with the 'best interests of the child' principle that

the *Convention on the Rights of the Child* provides for, as well as the 'welfare of the child' principle provided for in Sections 4 and 20(1) of the Children and Young Persons Act of 1969 (Cap. 26:03 of the Laws of Malawi). Malawian case law tends to use the phrase 'welfare of the child' more than 'the best interests of the child'.

36 This is clearly exemplified by the case of *Kamcaca v Nkhota* in which it was held that the eldest brother of a deceased father has a right to the guardianship of his brother's children under Chewa customary law (Chewa is one of the biggest tribes of Malawi, found in its central region) irrespective of the child's welfare. See *Kamcaca v Nkhota* (No. 2) 1966–68 (4) MLR 578 (HC).

37 *In re the Estate of Manjaena* 1992 (15) MLR 243 (HC).

38 *In re the Estate of Manjaena* (n 37).

39 Justice Link. (2005). 'The administration and management of deceased estates in Malawi: Research report' (unpublished).

40 Justice Link. (2005). 'The administration and management of deceased estates in Malawi: Research report' (n 39).

41 Justice Link. (2005). 'The administration and management of deceased estates in Malawi: Research report' (n 39).

42 Wills and Inheritance (Amendment) Act 22 of 1998 (Cap. 10:02 of the Laws of Malawi) (the 'Wills and Inheritance Act').

43 Malawi Law Commission. (2004). 'Report on the review of the Wills and Inheritance Act' (unpublished). This report was recently debated in parliament. The Bill proposing these amendments to the Wills and Inheritance Act was, however, not passed by parliament and has since been referred to the Parliamentary Legal Affairs Committee for further scrutiny. One (and a most startling) reason for this is that, according to radio reports, one member of parliament argued that 'women would deliberately kill their husbands in order to be the beneficiaries of their estates'.

44 *E.L. Katembo (Female) v D. Katembo*, Civil Cause Number 1574 of 1996.

45 *Rose Ali v The Republic of Malawi,* Criminal Appeal Number 22 of 2004 (HC) (unreported).

46 This is a quote from the charge sheet of the prosecutor.

47 In *lobola*-paying societies, it is the woman who leaves her village to live in the village of her husband.

48 It is not possible to provide a case reference for the first instance judgment because the first instance court did not make the records available. This case was heard at the Second Grade magistrates' court in South Lunzu, a semi-urban part of Blantyre District in the southern region of Malawi.

49 *Rose Ali v The Republic* (n 45) (paragraph numbers not known).

50 Some women are just as economically powerful or even more so than men; they own property in their own right or jointly with others, which can be inherited by their spouse, partner, children or other relatives. Generally speaking, however, men still wield more economic power than women.

51 One wonders whether there were not also some men who could equally have benefited from such a law.

52 *Angella Margaret Chisanu (suing on her own behalf and on behalf of the children of*

late Stanislus Chisanu) v Rodiana Chisanu Bernard (suing on her own behalf and on behalf of the relatives of Stanislus Chisanu, deceased) Civil Cause Number 275 of 2012.

53 Cap. 15:01 of the Laws of Malawi.

54 These amendments were proposed through the following report: Malawi Law Commission. (1996). 'Review of certain laws on defilement, marriage, affirmation and citizenship' (unpublished). While the Malawi Law Commission website suggests that changes were enacted in 1997, it appears that the discriminatory provisions in the Malawi Citizenship Act have not been amended.

55 *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration* Miscellaneous Civil Application Number 73 of 1997.

56 *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration* (n 55) (paragraphs not numbered).

57 *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration* (n 55) (paragraphs not numbered).

58 The reservation of judgment regarding the damages was necessitated by the fact that, under current Malawi laws, there is no provision that expressly recognises damages as a remedy for the violation of rights, which the applicant in this case suffered. At the time of writing the author was unable to establish whether this reserved part has been concluded and, if so, how it has been concluded and how that conclusion has been arrived at. It is also noteworthy that the law that was applied to detain the applicant's husband in this case would be used rarely against a foreign woman married to a Malawian man.

59 The applicant had claimed that the first year of marriage had not lapsed and therefore she still had Malawian citizenship. As indicated above, the court did not discuss the Malawi Citizenship Act provisions at all.

60 The requirements are that one must ordinarily be resident in Malawi for five years, speak a vernacular language or English, be of good character and show the Minister of Home Affairs that one would be a suitable citizen.

61 While this activism is geared towards a right to dual citizenship, a review of the law may then also lead to revisions of the provisions discussed here. See 'Mixed views on dual citizenship', *The Nation*, 7 October 2010; available at http://www.mwnation.com/index.php?option=com_content&view=article&id=7061:mixed-views-on-dual-citizenship&catid=8:world-news, (accessed 26 October 2011).

62 *Kaunda v Tukombo Girls Secondary School* (n 15).

63 *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration* (n 55).

64 Women and Law in Southern Africa Research and Education Trust (Malawi Chapter). (2000). *In Search of Justice* (n 4), 1.

65 Women and Law in Southern Africa Research and Education Trust (Malawi Chapter). (2000). *In Search of Justice* (n 4), 1.

66 Malawi has four High Courts each situated in the four main cities of Malawi, namely Blantyre, Zomba, Lilongwe and Mzuzu. Blantyre and Zomba are located in the southern part of Malawi at a distance of about 74 kilometres apart. Lilongwe is

in the central part of Malawi, while Mzuzu is in the north. A Constitutional Court comprising a panel of three High Court judges sits to determine constitutional issues. There is a Supreme Court of Appeal situated in Blantyre that acts as the final appellate court for matters coming from both the High Court and the Constitutional Court. The Constitutional Court gives advisory opinions only. It is noteworthy that the research findings of Women and Law in Southern Africa Research and Education Trust (Malawi Chapter) are now almost 12 years old.

67 Women and Law in Southern Africa Research and Education Trust (Malawi Chapter). (2000). *In Search of Justice* (n 4), 1 and 84.

68 *Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration* (n 55).

69 Section 54 of the Courts Act (n 29) as interpreted in *The Republic v Likapa and Manong'a* 1984–86 11 MLR 197 (HC).

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Courts Act (Cap. 3:02 of the Laws of Malawi).

Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011.

Employment Act 6 of 2000 (Cap. 55:02 of the Laws of Malawi).

Labour Relations Act 16 of 1996 (Cap. 54:01 of the Laws of Malawi).

Malawi Citizenship Act of 1966 (Cap. 15:01 of the Laws of Malawi).

Marriage Act of 1903 (Cap. 25:01 of the Laws of Malawi).

Republic of Malawi (Constitution) Act 20 of 1994.

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Angella Margaret Chisanu (Suing on her own behalf and on behalf of the children of late Stanislus Chisanu) *v Rodiana Chisanu Bernard* (Suing on her own behalf and on behalf of the relatives of Stanislus Chisanu, deceased) Civil Cause Number 275 of 2012.

E.L. Katembo (Female) v D. Katembo, Civil Cause Number 1574 of 1996.

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CHAPTER 5

The justice system and women's rights in Côte d'Ivoire

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1 Introduction

Studying women's legal status in most countries in the world brings us back to a constant truth: 'equality in law, inequality in practice', which, in some cases, must be reduced to 'inequality in law and in practice'. While formal equality is guaranteed in Ivorian law, substantial equality constitutes today's real challenge. Which strategies should be implemented in order that equality under the law, and hence equality between men and women, becomes reality on the ground? How can we ensure that women can effectively enjoy the rights guaranteed under legislation? Formal complaint mechanisms, such as court proceedings, appear to be one of the most adequate ways of exercising and enforcing human rights. Judicial proceedings allow for an individual, a group of individuals, as well as private and public entities, to approach a court of law to have their rights recognised and protected. After having heard both parties, the court issues an enforceable decision, which allows the beneficiary, if necessary, to proceed to the enforcement of the decision, with the assistance of law-enforcement authorities. After the judgment, the complainant is theoretically able to enjoy his or her right. Could this type of claims-based mechanism be an effective strategy for the protection of women's rights in Côte d'Ivoire?

This chapter examines whether the Ivorian judicial system offers protection to women complainants and can transform equality from a theoretical concept to a reality. It begins with a brief situational analysis of women's lives in Côte d'Ivoire, and then reviews the legal framework in relation to human rights, including women's rights. Despite the presence of legal protections, their implementation remains problematic because women face numerous obstacles when trying to access the courts. This chapter therefore closes with some recommendations on how to address the challenges faced by women when accessing the judicial system.

2 Quality of life for women in Côte d'Ivoire

Women's quality of life, just like men's, is first and foremost shaped by economic hardship. Côte d'Ivoire is one of the poorest countries in Africa and in the world. According to the International Human Development Indicators, Côte d'Ivoire ranks 149 out of 169 countries in terms of poverty indicators and the overall life expectancy is only 58.4 years.[1] Côte d'Ivoire has an HIV prevalence rate of 7 per cent, which is the highest prevalence in West Africa.[2] While the statistics for the general population are dire, the situation for women is even worse, with the quality of life for women being consistently lower than that of men. According to the *2010 Human Development Report*, Côte d'Ivoire ranks among the 10 lowest countries in the world for gender equality based on indicators of reproductive health, empowerment and labour conditions.[3] Women in Côte d'Ivoire struggle to access education. While literacy rates are generally low, with only 55 per cent of adults aged 15 years and older being literate, women are even less likely to be literate than men: whereas 79 per cent of young males between 15 and 24 years are literate, only 60 per cent of female youth in this age group can read.[4] Similarly, education levels for both sexes are low, but the net enrolment of girls and women in secondary school is just 22 per cent compared to 32 per cent for boys and men.[5]

Women's hardships have been exacerbated by the economic crisis in 1980 and the political conflict that has rocked the country since 1990. In the run-up to the election in 2000, politically motivated violence left 200 people dead. Tension and violence did not cease with the election, but turned into open conflict between the rebel group and the government. Over the past decade, amid continuing violence, several peace agreements were signed but failed in implementation.

The war has had significant detrimental effects on women. Approximately 1.7 million people of the 20 million inhabitants have been internally displaced throughout Côte d'Ivoire, half of them being women.[6] Given that displacement makes women particularly vulnerable to economic exploitation, violence and abuse, rape and other forms of sexual violence have been extremely widespread. Both rebel and government forces have been accused of systemic sexual violence towards women as a tactic to terrorise populations suspected of opposition to their forces.[7] Women suffering the effects of such violence are often shunned. While customary law offers few remedies, the formal court system has largely failed to prosecute perpetrators. In addition to sexual violence, many women have found themselves forced into prostitution in the wake of economic collapse in war-torn areas.[8]

Unfortunately, the most recent election in 2011 has also not appeased the conflict, but rather led to more political violence, including gender-based violence.

Women have been heavily affected by current political hostilities because of their support, alleged support or lack of support for one electoral candidate or another. The political conflict has also exacerbated long-standing ethnic tensions, resulting in gang rape, murder, looting and families being forced out of their homes.[9] In the western part of the country, there has apparently been a marked increase in the number of reported cases of women attacked and raped in their homes or while travelling to markets.[10] The attackers are mostly not caught and the victims have no hope of obtaining justice and reparation.[11]

In addition to politically motivated sexual violence, levels of sexual violence are generally high. The high levels of violence against women in Côte d'Ivoire are exacerbated by the country's lack of infrastructure to hold perpetrators of gender-based violence accountable. As will be discussed below, the absence of a functioning criminal justice system and the widespread corruption among police officers minimises complainants' access to legal remedies.[12]

However, it is worth mentioning that after the violent events of 2010, human rights NGOs, the state and some developmental partners have implemented awareness projects, which take account of the psychological impact of violence, particularly on women and children. Two projects of the Association of Women Lawyers of Côte d'Ivoire (AFJCI), started in 2013, are notable. The first, supported by UN Women, provides support to those who became victims of sexual violence during the 2010 crisis. It comprises four major components: psychological support; counselling centres to restore the social fabric of society; legal support for complainants and those applying for reparation; and a medical component. The other AFJCI activity is concerned with addressing domestic violence. The objective of this campaign is to help victims out of their silence and to put pressure on the police and judicial authorities to assume their respective responsibilities. This project, too, includes a component of counselling and psychological care.

3 The legislative framework

After becoming independent in 1960, the Republic of Côte d'Ivoire showed a strong willingness to become a democratic state, respectful of fundamental rights and freedoms. To this end, Côte d'Ivoire enacted several domestic laws based on the principles of equality and non-discrimination, and signed and/or ratified international conventions on human rights such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.[13] The following section provides a brief overview of the history of constitutional law and the current legislative framework pertaining to women's rights in Côte d'Ivoire.

3.1 Constitutional law

The first legal statute of the independent Côte d'Ivoire is the 1960 Constitution. Through this fundamental document, which is written in the name of the people of Côte d'Ivoire, the government declares its commitment to the fundamental rights as defined in the *Declaration of the Rights of Man and of the Citizen of 1789* and in the *Universal Declaration of Human Rights* of 1948.[14] Under the 1960 Constitution, as well as the subsequent Constitution adopted in 2000, French law remains in force unless it is contrary to the Constitution or has been repealed by the Ivorian legislature.[15] A brief explanation of the 'evolution' of Ivorian law explains the retention of French law.

3.1.1 Historical context of Ivorian law

The evolution of the political status of Côte d'Ivoire has had substantial influence on its legislative apparatus, and can be divided into three main periods. Until 1893, before Côte d'Ivoire was colonised, law was founded in the customs and practices of the tribes and/or ethnic groups living in the territory. From 1893 to 1964, under colonial rule of the French and during the first few years of independence, customary law coexisted with French statutory law. Customary law applied to the indigenous population in accordance with the rules applicable to each tribe or ethnic group, with the exception of criminal law and administrative law, which were regulated by French law. The latter applied to French citizens, whether naturalised or not. Therefore, two legal systems coexisted during this period: customary law, which was unwritten, diverse and fluid; and French law, codified and considered 'modern' and 'superior'.

After independence in 1960, Côte d'Ivoire started adopting legislation, with the 1960 Constitution being the first statute of the young democracy. The legislative process effectively started only in 1964, when the legislature announced that Côte d'Ivoire was to become 'a modern state'. As a result, all customary law was abandoned and, instead, the lawmakers adopted a written and unified body of law, largely inspired by French law. The *Commissaire du Gouvernement* explained during the discussions around the first Bills:

> *Unity in law is now realised and an end will be put to customs, as this constitutes the state of evolution, a survival from the past and which are to a large extent a hindrance to progress … consideration was also given to the fact that French law has profoundly marked Côte d'Ivoire, not because it applied to a minority, but because it contributed, although indirectly, to orientate the evolution of customs in a certain way.*[16]

This choice by the founding fathers, although a sound one, did not bring the anticipated results. Until today, people resist giving up their customs and traditions. Despite the good intention of lifting the 'hindrance to progress', Ivorian lawmakers retained the illusion of French law contributing to 'orientate the evolution of customs in a certain way'. This was a mistake, since what was perceived as a 'relic of the past' was actually the daily reality for the majority of the indigenous people, on whose customs French law never actually had any substantial influence. Asking indigenous people to give up their laws and customs in favour of the legal principles of a *foreign* cultural tradition — and here foreign should be read in the sense of what does not belong to the same group, the same past, the same evolution, and the same culture — was illusory, especially in the absence of any efforts or strategies towards facilitating a transition. There was and still is a need for, among other things, education, awareness, control and sanction. As a result, customs generally did not evolve, and even if they did, they merely reflected problematic French colonial practices.

3.1.2 Constitution of 2000

Following a coup d'état in December 1999, the 1960 Constitution was replaced with the Constitution of 2000. The Preamble of the Constitution expresses its commitment to democratic values applicable to all peoples, including the respect and protection of the individual, as well as collective fundamental freedoms; the separation and the equilibrium of powers; and transparency in the conduct of public affairs. An entire chapter (Chapter 1) of the Constitution is devoted to 'freedoms, rights and duties' in which:

> [t]*he State of Côte d'Ivoire recognises the fundamental freedoms, rights and duties contained in the Constitution and commits to adopting legislative or regulatory measures to assure its effective application.*[17]

Several constitutional provisions allude to equality between men and women, but only in respect of certain rights. For example, individuals are 'free and equal before the law' (article 2 of the Constitution) and have 'equal access to justice' (article 20 of the Constitution). Furthermore, the Constitution guarantees for all its citizens 'equal access to health, to education, to culture, to information, to professional formation and to employment' (article 7). Article 17 of the Constitution explicitly prohibits discrimination against women *in employment* by stipulating that '[a]ccess to public or private employment is equal for all. Any discrimination in the access to or exercise of employment, based on sex, [or on] political, religious or philosophical opinions, is prohibited.' Notably, the Constitution does not include a *general* anti-discrimination clause.

3.2 Domestic law

While in many areas laws have been passed that protect women from discrimination (for example, labour legislation, succession and health law),[18] Ivorian family law, at least to some extent, upholds patriarchal systems and male domination, thereby undermining the equality between men and women. The Law Concerning Crimes against Women,[19] for instance, forbids forced marriage and sexual harassment, but does not include a provision prohibiting domestic violence.[20] Further, there is no clear policy against spousal abuse or domestic violence in the Civil Code.[21] Domestic violence thus continues to be prevalent without legal remedies being available to women, other than by way of criminal charges.[22] However, given that the police, doctors and courts still perceive domestic violence as a 'family problem', complaints, if they are made at all, rarely go anywhere.[23] Although the Civil Code has seen several amendments, these have not resulted in any substantial benefits to women.

3.2.1 Family law according to the 1964 Civil Code

Under the presidency of Houphouët-Boigny, laws continued to be codified to achieve the national goals of 'unity, political stability, and economic prosperity'.[24] As noted earlier, Houphouët-Boigny was adamant in seeking to advance the Western legal model by creating 'progressive' statutes that largely rejected customary practices.[25] However, the 1964 amendments to the Civil Code in fact gave the husband 'powers over financial matters that no patriarch had ever held before'.[26] The Civil Code established community of property as the only marital regime and gave the husband the authority to control all revenues, including inheritance, gifts and salaries, accumulated by *either* spouse.[27] Toungara suggests that the legal amendments

> *... succeeded in enacting on paper that which centuries of traditional practices and decades of customary law under colonialism had dared not tamper with: a woman's right to authority over the destination of profit derived from her external labour (after household responsibilities had been met) and of benefits accrued from personal wealth, such as land or properties inherited from her family.*[28]

The women's movement 'Association des Femmes Ivoiriennes' (AFI),[29] a group of mostly elite, politically conscious women, became active following the amendments introduced by the 1964 Civil Code.[30] Largely concerned with the loss of their customary rights in personal property, women of the AFI 'sought primarily to reinstate women's traditional financial autonomy and self-determination in marriage within the newly adopted legal framework'.[31] The AFI and the Women's

Ministry, established in 1976, lobbied successfully for changes to the 1983 amendments of the Civil Code, including limitations on the husband's authority and recognition of women's autonomy.[32] The law now offered two systems of marriage regimes (that is, community of property or separation of assets) and gave women financial autonomy by allowing them to choose an occupation, to earn and freely dispose of self-generated income and to manage their own bank accounts.[33] While the AFI has thus, to some extent, been successful in advocating for law reform, certain principles of family law remain problematic.[34]

3.2.2 Family law according to the 1983 Civil Code

Despite the amendments of the family law in 1983, the law continues to protect the husband's interests over the interests of the wife, which can be illustrated through several examples. In Ivorian law, the age of majority is 21 years. However, with parental consent, a man can get married at the age of 20 and a woman at the age of 18 years.[35] In spite of this statutory minimum age for marriage, the United Nations documented that 25 per cent of Ivorian girls aged 15 to 19 years were married, divorced or widowed.[36] Other sources estimate the prevalence of marriage within this age range to be as high as 44 per cent.[37] But it is not only ignorance of the minimum age and/or forced marriages that is problematic. So, too, is the requirement of parental consent, because the true discrimination lies in the father or husband's legal status as the head of the family/household, which allows him alone to exercise the rights and obligations of paternal authority. Article 58 of the Civil Code, contained in Chapter 1 of the Code and which chapter is entitled the Law on Marriages, reads: 'The husband is the head of the family. He exercises this function in the common interest of the household and the children.'

The husband's status as the head of the household has pernicious effects for the rights of the wife. As the head of the household, the husband chooses the family residence, which is the husband's home; and the wife has the obligation to reside there, except if there is a judicial authorisation or verdict to the contrary (article 60 of the Civil Code). He furthermore has the right to administer and dispose of marital property with two exceptions: (1) he cannot sell movable or immovable property that is owned in community of property; and (2) he cannot give up or burden rights to immovable property, business rights, etc. that are owned in community of property (article 81 of the Civil Code). He makes all the decisions involving third parties. The wife can stand in as proxy for him only when he is incapable of forming or expressing his intent (article 58 of the Civil Code). The wife takes the husband's surname (article 57 of the Civil Code), which the children automatically take as well. Additionally, a woman can be punished for adultery

wherever the offence is committed, while the man is punished only in the case of 'habitual adultery' (that is, repeated acts of adultery) or adultery that takes place in the marital home (Criminal Code, article 391). In other words, the husband must basically want to be caught! The husband retains his benefits even when he does not provide maintenance for the family. Admittedly, the law provides for certain legal remedies by way of application, such as an application for maintenance, in forfeiture, or a request for the transfer of the exercise of paternal authority. The wife may have her own occupation, separate from that of her husband—but relatives often frown upon this.

While both institutions, the husband as the head of the household and the paternal authority, whose origin can be found in the Roman law of the *pater familias*, are meant for the protection of the wife and children, the situation they create is unacceptable.[38] The legal framework creates the impression that the husband is not the head of the household, but the head of the wife. The institution of the husband as head of the household also perpetuates the image of the woman as a permanent minor, constantly in need of a chaperone. The situation is reinforced by people's resistance to giving up customs and traditions, resulting in a legitimisation of the man's influence and the woman's inferiority. The woman sometimes owes her 'salvation' (that is, peace in the household, peace with her family and her in-laws) to her submission. Since family education has an influence on people's attitudes and behaviour, the image of the woman as inferior to the man is continuously perpetuated.

Another detrimental effect of these patriarchal institutions is that some courts apply the law with the implicit idea that the woman is a minor who must be chaperoned. This situation sometimes results in decisions that are beyond all legal logic. For instance, some courts of law, on receiving an application for divorce from the female spouse, considered her action of summoning her partner to court to be a grave offence and ordered her to pay damages! *Logoué Valentine, épouse Wouné Bléka v Wouné Bléka Jean*, heard in the Civil Chamber of the Appeal Court in Abidjan on 28 February 1992, is an example of such a case. The judge assumed that both parties were at fault for the marital collapse—the husband for being unfaithful to his wife and the wife for impugning her husband's good name by summoning him to appear in court.

Fear of such absurd court orders silences women regarding the management of their possessions and of the possessions of the household. This situation explains both women's financial destitution and their reluctance to undertake something without the support of their husbands.[39] In light of these difficulties, one can only hope that the government will soon act upon its plans to amend the legislation to promote equality between husband and wife.

3.2.3 Polygyny

Polygyny is another example of where the law on paper and the reality on the ground do not match. The 1964 amendment of the Civil Code is founded on the principle of monogamy and requires that marriages are approved by the court registrar.[40] Polygamous marriages are prohibited and traditional marriages entered into before traditional authorities are not recognised under the Civil Code.[41] Marriages celebrated before a religious officer must be preceded by a civil marriage before the registrar. The community is no longer at the centre of the alliances; it is the individual that is now being given prominence. However, indigenous societies remain profoundly attached to polygamy and continue this practice despite its abolition in 1964. Furthermore, marriages are regarded as a union of families, not a union of individuals, and matrimonial transactions have an important role to play. It is naïve of the legislature to assume that by prohibiting or not recognising traditional marriages, people would stop practising their traditions. Such dramatic changes in cultures need preparation, because, as we know, human nature is resistant to change.

For a little over a decade, women's rights activists have urged political authorities to harmonise national legislation with those international conventions that the country has ratified and to change unjust laws. This pressure has brought results. On 25 January 2012, the Ivorian parliament passed Law 2013-33, which repealed article 53, the provision establishing the husband as 'head of the family'. The repeal has resulted in the modification of all the provisions giving powers to a husband, thereby restricting his prerogative power as head of the family. This law, which is good for the promotion of women's rights, was not well received in general, and by women in particular. Two reasons explain this negative attitude. The first and most fundamental reason is that politicians have not learned from past lessons and, like their predecessors, they made changes without preparing people through suitable public consultation. The second reason stems from the population's mistrust of the motives behind the amendments. They saw in these amendments, which occurred at the time when there were discussions in France regarding the legalisation of same-sex marriages in that country, a leaning towards an institution that they are not yet willing to accommodate.

4 Jurisdictional bodies

Domestic and international human rights instruments are meaningless without proper enforcement mechanisms, such as courts of law that guard against and provide remedies for human rights violations. In Côte d'Ivoire, mechanisms for the protection of women's rights can be judicial or non-judicial in nature.

4.1 Courts of law

Since the enactment of the 2000 Constitution, the judiciary has formally constituted the third branch of government and thus became independent from the executive and the legislative branches. Justice is rendered throughout the national territory, in the name of the Ivorian people, by independent courts.[42] The Ivorian judicial system is divided between courts of the first instance and appeal courts. According to article 102 of the Constitution, the Court of Cassation is the highest court for criminal and civil matters and the Council of State is the highest court for administrative matters.[43] However, since the Court of Cassation and the Council of State are not yet operational — over a decade after the enactment of the Constitution — the highest court is currently the Supreme Court, which is subdivided into specialised chambers that hear civil, commercial and criminal matters. Courts are presided over by magistrates or judges who, when exercising their functions, are subject only to the law[44] and are expected to be independent and impartial.

Any person, without any distinction, may bring an action before the courts to obtain recognition, protection or endorsement of their rights. The admissibility requirements are that the complainant has a direct and justifiable interest and representation capacity.[45] The proceedings are adversarial and the parties may be represented by lawyers. The proceedings result in a binding and final judgment. Appeal is possible and, if granted, the beneficiary can obtain enforcement of the decision with the assistance of law enforcement authorities.

4.2 The Constitutional Council

The Constitution of 2000 reintroduces the Constitutional Council[46] as the body that decides on the constitutionality of laws. From 1960 to 1993, the constitutional chamber of the Supreme Court exercised the competences of the Constitutional Council. The latter then regained some autonomy in 1994, but remained subordinate to the judicial authorities. The institution was abandoned after the coup d'état in 1999. The Constitutional Council, under the 2000 Constitution, has more independence and is part of the judicial institutions. It is the only institution that can decide on the constitutionality of laws and is, therefore, seen as ensuring the respect of fundamental rights and liberties. The 2000 Constitution stipulates that any individual can apply directly to have the constitutionality of a law assessed by the Constitutional Council, both before and after a law has been enacted. This step is revolutionary compared to the previous situation where only the executive and legislature could refer a matter to the council, which, of course, they would rarely do because they themselves were the authors of the laws. It is therefore a

big improvement that human rights groups can now submit to the Constitutional Council those Bills that contain provisions affecting human rights, in order to ensure their constitutionality, even before these Bills are enacted (article 77 of the Constitution). Furthermore, any applicant can raise a constitutional objection before the lower courts to request that the Constitutional Council rule on the constitutionality of the laws that are applied in a particular case (article 96 of the Constitution). Decisions from the Constitutional Council cannot be appealed and are binding upon all public authorities, whether administrative, judicial or military, and to all juristic and natural persons (article 98 of the Constitution). However, although the Constitutional Council has officially been operational since 2003, it has not yet heard any cases because the public is largely unaware of its existence.

4.3 Administrative bodies

In order to have a full picture of the national judicial bodies that can rule on human rights claims, three independent administrative authorities should also be mentioned: the National Press Council (CNP); the National Council for Audiovisual Communications (CNCA); and the Ombudsman of the Republic. Whereas the former two bodies are meant to control the media, they also have conciliation mandates. Although the media could be a powerful instrument in promoting women's equality, it often maintains and feeds into gender stereotypes and reports negatively on women. The CNP and CNCA may penalise these forms of reporting and may therefore, through their rulings, protect women's rights and fight gender stereotypes in the media. The Ombudsman of the Republic is mandated to settle, through mediation, all disputes between citizens and governmental institutions, including municipal bodies and public service institutions.[47] The ombudsman may hear complaints filed by interested parties and may act on their own initiative. The decision of the ombudsman waives the parties' right to seek redress in a court of law for the same matter between the same parties.[48]

5 Evaluating the system: Claims-based judicial mechanisms

Several laws protecting women's rights and judicial mechanisms exist for the potential enforcement of these rights. Currently, however, these mechanisms fail to ensure the effective protection of women's rights due to limitations within the law, government procrastination, the inappropriate strategies of women's organisations and the 'wait-and-see' attitude of women themselves. The following section will examine the inaccessibility of the justice system and will make recommendations on how to improve women's access to justice.

5.1 Applicability of international law

Under Ivorian law, an international treaty or convention that has been ratified has, as soon as it is published, authority over domestic legislation (article 87 of the Constitution). As a result, an international instrument that was ratified and published becomes part of national legislation. This applies, for instance, to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), which provides numerous protections for women's rights and was signed by Côte d'Ivoire in 1980 and subsequently ratified in 1995.[49] Despite becoming domestic legislation, judges are generally reluctant to apply an international treaty or convention, even if it has been ratified and published. Indeed, judges claim that enforceability depends upon the direct applicability of the international convention. Thus far there has not been a case on this matter in Côte d'Ivoire, but if there were a case, judges would rely on the French law to determine the question of direct applicability of international conventions.

Under French legal theory, for an international legal instrument to be enforceable in domestic courts it must pertain directly to the legal situation of the individual litigants. This means that the legal standing of those individuals, encompassing both their rights and obligations, must be determined in a clear and sufficient manner. A judge will declare inadmissible a claim that is based on provisions that are too general or that do not clearly define the state's obligations, including which legal and regulatory measures must be enacted to ensure the enforceability of the international instrument. Whereas judges have previously ruled that international instruments are not enforceable at all, more recently the judiciary has ruled that certain provisions are directly applicable.[50] As a result, certain parts of the same convention could be directly enforceable, while others are not.[51]

However, under this theory it will be difficult to plead the direct applicability of CEDAW, as this convention contains more general obligations upon state parties than individual rights that can be directly claimed by women. Therefore, the direct applicability of international conventions like CEDAW requires the enactment of domestic legislation. The need for legislatures to become active is unfortunate, because governments tend to show a lack of eagerness in fulfilling their obligation to domesticate international conventions, thereby denying complainants mechanisms to enforce their human rights. In Côte d'Ivoire, despite article 1 of the Constitution under which the state 'is committed to adopting all necessary legislative and regulatory measures to ensure implementation' of the fundamental rights and freedoms contained in the Constitution, domestic legislation has still not been harmonised with the international conventions on women's rights, like CEDAW. The Constitution was adopted in 2000; at the time of writing, we are

still waiting for the domestication of CEDAW. Perhaps, in fairness, one should not forget the crisis that followed the 2002 coup d'état.

5.2 Accessibility of laws

Another difficulty in enforcing women's rights in Africa is that laws are often inaccessible to the general public because people do not understand their meaning and content. Côte d'Ivoire is no exception to this. The French saying '*nul n'est censé ignorer la loi*' ('all are presumed to know the law') suggests that individuals are supposed to know the law that can be invoked against them and that they can invoke against someone else. However, in this part of the world, it seems that this will remain an illusion. Indeed, the state does not only fail to fulfil its obligation to inform its citizens about the laws, but, even worse, when it does do so it communicates the laws in a foreign language. A newly enacted law must be promulgated to be enforceable, meaning that it must be published and made available. In Côte d'Ivoire, a law is promulgated by its publication in the *Journal Officiel* (that is, the government gazette) or, in case of urgency, by posting it at the offices of the prefecture, under-prefectures and town halls.[52] But what is the effect when the vast majority of the population does not know what the *Journal Officiel* is and where it is published? Furthermore, large parts of the population, particularly women, cannot read or write. Even for the few who can, the *Journal Officiel* remains inaccessible because it is not available in indigenous languages and because the laws are written in very technical language.[53] Indeed, educated people and even some lawyers have difficulty understanding or keeping up with the law because of its abstruse language, its complexity, and the high volume of laws that are enacted. Therefore, judicial norms are inaccessible to the majority of the population. Women know neither their rights nor the laws that contain them, and therefore cannot seek redress in court. How can they claim what they do not know about?

5.3 Access to courts

Unfortunately, even when women know the law and attempt to claim their rights, the courts remain inaccessible.[54] The main factors that deter women from accessing courts are the high cost of judicial proceedings, the misconduct of court personnel, the reception of individuals by the courts, the nature of the proceedings, the appearance of the court personnel (for example, their apparel and austerity), and the language used at court (that is, old French and Latin expressions). Additional constraints are caused by the unresponsiveness of the justice system due to indifferent court personnel and law enforcement officers. As a report by Human

Rights Watch sets out, law enforcement officers, particularly, have been reported to refuse to assist women in laying charges or investigating crimes:

> *Numerous failures and obstacles on the part of state authorities leave victims of sexual violence, banditry, and other abuses in western Côte d'Ivoire with no access to justice, and either limited or no immediate protection. Efforts by victims to request protection from immediate danger and to report crimes to police, gendarmes, or other authorities are generally met with inaction from state officials, and even extortion. The rare case that is investigated and reaches prosecution is adjudicated in a system fraught with deficiencies, including inaccessible courts, corrupt and absent judicial officials, and nonexistent witness protection programs.*[55]

In addition, civil society generally, and women's organisations in particular, may also need to play a more active role in enforcing their rights. But members of civil society often lack training, particularly in law and human rights, which can be explained by a lack of access to information, adequate materials and financial resources. However, sometimes people are also unwilling to further their knowledge independently. For women, in particular, courts remain a distant mechanism even when they know their rights and the laws that contain them. This distance can be explained partially by the weight of tradition and customs. One would hope that where women had slowly occupied the domains traditionally reserved for men things would have changed; but that may be expecting too much. In Côte d'Ivoire, the principle of equality was acquired at Independence. Women take part in the life of political parties and constitute almost half of the electorate. However, they fail to take advantage of this. For example, they entreat the President of the Republic to sign a document obliging their different political parties to grant them a 30 per cent quota within public bodies. Considering their electoral force, it would have been more effective to create a debate within the political parties where women could have requested the space to which they are entitled.

Politics, which requires waiting to be served rather than claiming one's due, further explains why, despite the large number of women's rights associations, effective demands for the harmonisation of domestic legislation with international covenants pertaining to women's rights have yet to be made. This said, in the defence of the women of the Côte d'Ivoire, it is true that the principles of indivisibility and interdependence of human rights do influence access to courts considerably. As the General Assembly of the United Nations stated, 'the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible'![56] Can a woman who cannot read or write, the poorest of the poor, who neither knows her rights nor the limitations upon her obligations and who must assume all household chores, really be expected to

fight for the recognition of her rights and claim them in court, without awareness campaigns and adequate training? Unfortunately, that is the reality of the majority of Ivorian women.

5.4 Opportunities for improving access to judicial mechanisms

Women's access to court could be considerably improved by interventions such as training, awareness campaigns and advocacy.

5.4.1 Training and awareness-raising campaigns

Providing adequate training to and raising the awareness of certain actors, such as court personnel, members of civil society generally and women in particular, should be one strategy to address barriers to women accessing justice mechanisms.

Adequate training of magistrates and judges, for instance, will equip them with a better understanding of the international conventions and domestic human rights law and may help them to develop jurisprudence that will ensure better protection of individual rights. As noted earlier, the theory of direct applicability of international conventions gives the judge an opportunity to evaluate the applicability of international provisions and, where applicable, allows him or her to declare a right directly enforceable. Knowledge of this legal concept could be a powerful tool in the hands of progressive judges. Training and education campaigns on human rights would also assist civil society generally and women in particular to seek redress in court more often, thereby forcing the courts to develop jurisprudence on the relevant legal issues. Educating civil society, including women, about the law and about how to access legal mechanisms should, therefore, be a priority.

When developing strategies for the promotion of women's rights, it is often wrongly assumed that only women should watch over women's interests. Men are presented as rivals, or the opponents, who should not know about the other side's plans and strategies. This results in raising awareness of the existing rights without raising awareness for those upon whom the obligations rest. The fight for women's rights will be effective only if women and men work together. The delay of the emancipation of women is not caused by men, but rather by a society that leaves women in the background. However, this society is composed of both men *and* women and both men's and women's mindsets must change. Educational strategies should, therefore, include men and women.[57] When men and women are knowledgeable about human rights, claims-based judicial mechanisms will find their way back into the struggle strategy. In the meanwhile, human rights defenders and non-governmental organisations can seek redress before other institutions.

5.4.2 Alternate institutions or forums

When examining strategies to strengthen women's rights and women's access to justice, one should also examine the institutions that will allow challenges to the state and lobbying for women's rights, so that states and national public authorities fulfil their obligations and ensure that clear laws, that are directly enforceable before domestic jurisdictions, are adopted.

At national level, advocacy efforts should be directed at institutions such as the National Assembly and the Social and Economic Council. Furthermore, the Commission on Human Rights of Côte d'Ivoire (CDHCI) should become more active in promoting women's rights. The CDHCI is a relatively new independent commission with a mandate to, among others, hear and investigate complaints about human rights violations and to suggest measures to put an end to human rights violations. Most importantly, this commission makes suggestions to institutions such as the National Assembly and the Constitutional Council for the implementation of resolutions adopted by international institutions with a human rights mandate. Together with the Constitutional Council, the CDHCI could actively promote women's rights. The Constitutional Council could also become an institution ensuring effective protection of fundamental rights. For example, article 88 of the Constitution stipulates that the Constitutional Council is the adjudicator of the constitutionality of the laws *and* the regulatory body of the functioning of public authorities. Therefore, this council could *on its own initiative* decide to deal with a matter and remind the public authorities of their obligations in ensuring effective adherence to fundamental rights, liberties and democratic values. In addition to the CDHCI and the Constitutional Council, the Ombudsman of the Republic should be strengthened to address disputes about women's rights.[58] Even if the referral mechanism to the CDHCI is somewhat restrictive (that is, written applications only or proof of sufficient interest), the CDHCI and Ombudsman of the Republic could constitute springboards and mouthpieces that succeed in overcoming the inaccessibility of the courts and government's procrastination when it comes to enacting legislation. Using these bodies also gives more responsibility to civil society. The presence within civil society of human rights defenders and legal professionals, who are willing to provide *pro bono* services, is an important resource. Finally, as judicial procedures adjust to the Ivorian context, there should be more frequent referrals, allowing the state to provide for a harmonisation of the legislation. This would allow judicial authorities to be more effective in promoting the well-being of the women of Côte d'Ivoire.

6 Conclusion

To conclude this audit of the Ivorian justice system, we can see that Ivorian legislation offers some opportunities to make judicial claims efficient and to make it a privileged mode of protecting fundamental rights. This can only happen, however, if we also effectively reinforce the capacities of legal professionals, women, activists and NGOs active in defending and promoting human rights, and particularly the rights of women as rights of human beings.

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3 The report measures loss in achievement due to gender inequality in three areas of human development — reproductive health, empowerment, and the labour market. United Nations Development Programme. 'International Human Development Indicators' (n 1).

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5 UNICEF. 'Côte d'Ivoire statistics' (n 4).

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11 Amnesty International. 'Côte d'Ivoire, sexual violence and other human rights abuses must stop' (n 10).

12 Human Rights Watch. (2010). *Afraid and Forgotten: Lawlessness, Rape and Impunity in Western Côte d'Ivoire.* New York: Human Rights Watch, 32 and 35.

13 For instance, Côte d'Ivoire ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* in 1995 and signed, but not ratified, the *Protocol*

to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in 2004. See *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, entered into force 3 September 1981; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 13 September 2000, CAB/LEG/66.6, entered into force 25 November 2005.

14 The *Declaration of the Rights of Man and of the Citizen* of 26 August 1789 was a fundamental document of the French Revolution and was the first step towards the development of the French Constitution. *Universal Declaration of Human Rights* G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

15 Article 73 of the 1960 Constitution and article 133 of the 2000 Constitution read: 'The legislation currently in force in Côte d'Ivoire remains applicable inasmuch as it is not contrary to the present Constitution and save the adoption of new provisions.'

16 Regarding the Preamble to the August 1964 Bill on Civil Status, Marriage, Parentage, Name, Succession, Divorce, Judicial Separation, Adoption and Paternity (translated from French).

17 Article 1 of the Constitution.

18 The law of succession, for instance, ensures formal equality and the protection of the surviving partner. The surviving partner inherits in the absence of children, of privileged ascendants (father and mother) or of certain collaterals. If there are no parents or children, he or she takes the succession. The law on succession was enacted through Act No. 64–374 of 1964 (7 October 1964). The labour law was enacted through Act No. 64–290 of 1964 (1 August 1964). At the time of writing, it is under review.

19 Act No. 98–757 and Act 98–756 of 1998 (23 December 1998) which became sections 356 and following of the Penal Code.

20 AFROL News. 'AFROL gender profiles', available at http://www.afrol.com/Categories/Women/profiles/civ_women.htm (accessed 1 April 2011).

21 AFROL News. 'AFROL gender profiles' (n 20).

22 As many as 90 per cent of women who completed an interview process with the Ivorian Association for the Defence of Women reported that they had been beaten or struck by their domestic partner at least once; AFROL News. 'AFROL gender profiles' (n 20).

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34 Toungara, J.M. (1994). 'Inventing the African family', (n 24), 52.
35 Civil Code, Chapter 1, Marriage Law, Act 64-375 of 1964 (7 October 1964). (Civil Code, Marriage Law).
36 United Nations Department of Economic and Social Affairs. (2004). *World Fertility Report 2003.* New York: United Nations Department of Economic and Social Affairs, 84.
37 Organisation of Economic Cooperation and Development. (2009). 'Social institutions and gender index', available at http://genderindex.org/country/cote-d039ivoire (accessed 1 April 2011).
38 See article 58 of the Civil Code, Marriage Law (n 35), modified by Act 83-800 of 1983 (2 August 1983) as quoted above.
39 Some vicious husbands, thankfully very rarely, use the procedure for declaring a person incapacitated to ensure that their wives are placed under their legal guardianship (the reverse does not occur when he is the object of such proceedings) to curtail their independence.
40 See articles 18, 19 and 24 of the Civil Code, Marriage Law (n 35).
41 Articles 2, 3 and 20 of the Civil Code, Marriage Law (n 35).
42 It is worth mentioning that, in accordance with article 101 of the Constitution, the High Court of Justice has jurisdiction over criminal offences committed by members of government while in office and over allegations of high treason committed by the president.
43 The administrative chamber hears cassation appeals where a public official is party to a case, except in criminal matters. This chamber further sits both as a court of first and last instance for applications for annulment of administrative decisions on grounds of alleged abuse of power.
44 These include the codes of procedure (civil, commercial, administrative, fiscal, criminal), the laws on the organisation of the judiciary, and the statute of the magistracy.
45 Legal costs are to be expected. However, legal aid will be granted either automatically or on application.
46 Articles 88ff of the Constitution.
47 Furthermore, the ombudsman is mandated to assist in reinforcing social cohesion. This mission is important, considering that the denial of fundamental rights can cause social tension.
48 The ombudsman can neither rule on matters that are pending before the courts, nor used as an appeal mechanism for judicial decisions.
49 See *Convention on the Elimination of All Forms of Discrimination against Women* (n 13).
50 See, for example, *Affaire Cinar jugée par le Conseil d'État* le 22 septembre 1997; *Affaire épouse Soba jugée par le Conseil d'État* le 27 mars 1996; *Affaire Gesti jugée par le Conseil d'État* le 23 avril 1997; *Affaire Sorel jugée par la Cour de Cassation* 10 mars 1993; *Cour de Cassation* 18 mai 2005 arrêt n° 02–16336. Also see Kane, I.

(2000). 'Direct application of the *International Covenant on Economic, Social and Cultural Rights* in France and francophone African countries', *Interights Bulletin* 13(2): 53–54.

51 The same distinction has also been made by international bodies. For example, the Committee on Economic, Social and Cultural Rights recalled in their *General Comments* 3 and 9 that articles 3, 7*(a)*I , 8, 10(3), 13(2)*(a)*, (3), (4) and 15(3) were directly applicable, and that the other provisions required that public authorities intervene first; see UN Committee on Economic, Social and Cultural Rights, *General Comment 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003); UN Committee on Economic, Social and Cultural Rights, *General Comment 9, The Domestic Application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).

52 The law becomes enforceable three days after this publication.

53 Côte d'Ivoire adopted French as the official language at independence. While French has increasingly become the mother tongue of most Ivorians, many do not speak the language perfectly and cannot read it fluently.

54 In France, the Constitutional Council wisely recalled that accessibility and intelligibility of the law constitutes a constitutional objective. The Constitutional Council, in an application brought by parliamentarians to declare an enabling law unconstitutional, ruled on 16 December 1999 that equality before the law under article 6 of the *Declaration of Rights of Man and of the Citizen* can be realised only if people are sufficiently aware of the relevant norms. Furthermore, awareness is also necessary for exercising the rights contained in article 4 of the *Declaration*, which limits exercising rights only in terms of the law.

55 Human Rights Watch. (2010). *Afraid and Forgotten* (n 12), 44–45.

56 Article 1*(b)* of the United Nations, General Assembly Resolution. (1977). *Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms,* G.A. res. 32/130 of 16 December, U.N. Doc. A/RES/32/130.

57 Men should also be assured that the struggle for women's rights is not meant to take away men's rights or their place in society.

58 The Ombudsman of the Republic is perhaps best equipped to deal with complaints of this nature in a manner that is sensitive to Ivorian society. Côte d'Ivoire calls itself a country of dialogue, a country where what matters is consensus and conciliation.

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CHAPTER 6

Ending impunity for hate crimes against black lesbians in South Africa

Wendy Isaack

We need to understand what it means to be heterosexual as well as homosexual and that our sexualities affect whether we live or die … Bisi Adeleye-Fayemi

1 Introduction

In South Africa violence against women has reached epidemic proportions, with one of the highest rates in the world of countries collecting such data.[1] Despite the institutionalisation of protective legislative and policy frameworks over the last 15 years, violence against women continues unabated and perpetrators enjoy widespread impunity. Of particular concern are the routine rape, torture and murder of black lesbians — not because violence against any one group should trump another, but because the existing legal tools have not been harnessed to adequately address the particular form of discrimination from which such violence emerges.[2] The intersection of racial and gender bias, coupled with other forms of discrimination based on sexual orientation and socio-economic status, creates a very specific, powerful and sometimes brutal force of oppression. Women's rights advocacy and sexual orientation equality initiatives over several years, coupled with impact litigation as a specific legal advocacy tool, have reinforced the notion that sexuality and race *both* matter: *that the forces that subjugate lesbians are the same as those that oppress them as black women*.

Nearly two decades after the end of apartheid, institutionalised racism remains deeply embedded in South African society, operating alongside gross economic inequalities. Black people, in particular black women, are overrepresented among the poor, remain the most vulnerable to various forms of violence and too often do not have access to legal redress at the instance of rights violations. The intersection of race, class and gender disadvantages women in many ways, particularly in

respect of access to livelihoods and economic and other resources. According to the *2012–13 Commission for Employment Equity Annual Report*, white men continue to dominate the private sector in top and senior management positions and white females have benefited the most from affirmative action measures, while African and coloured women have benefited the least.[3] The Commission for Employment Equity (CEE) data suggest that while the government complies with the legal requirements for affirmative action in accordance with the transformation agenda of the country, private corporations still have a gender and racial bias in recruitment, employment and promotion processes. In 2012, 73 per cent of top management positions were held by whites, 60 per cent male and 13 per cent female, with 7 per cent black female of the 24 per cent total black representation.[4] South Africa has the highest rate of inequality — the largest gap between rich and poor people — in the world. Race, class and gender still determine access to resources and opportunities, leaving black African women with very limited options. Therefore there is a powerful connection between being a black woman and poverty, lack of access to opportunities, and exposure and vulnerability to violence in South Africa. Writing on behalf of the Supreme Court of Appeal in 2005, Cameron JA stated:

> *What was unique about apartheid was not that it involved racial humiliation and disadvantage — for European history has offered more obliterating realisations of racism — but the fact that its iniquities were enshrined in law. More than anywhere else, apartheid enacted racism through minute elaboration in systematised legal regulation. As a consequence, the dogma of race infected not only our national life but the practice of law and our courts' jurisprudence at every level.*[5]

In this case, the court articulated the role of law in South Africa as being paradoxical in two ways: apartheid used law to exclude and oppress the majority of people, whereas the new constitutional democracy would employ law to create inclusion and freedom from all forms of oppression. Because the majority of South Africans had experienced the humiliating effect of repressive colonial conceptions of race and gender, it was determined that, henceforth, the role of the law would be different for all South Africans.[6] The court recognised that, because the apartheid system integrated racial and patriarchal power relations to buttress its oppressive powers, the law, as embodied in the Constitution, would guarantee gender equality and non-discrimination on various grounds enumerated in the equality clause of the Constitution.[7]

Against this backdrop, this chapter contends that to date, available legal frameworks have not been utilised to their full potential to take into account multiple forms of oppression, and, as such, legal strategies have fallen short of achieving true equality for, in this particular context, economically disadvantaged,

black lesbians. An argument can be made that there is a tendency of human rights litigation strategies to marginalise and exclude black lesbian experiences with serious implications for building comprehensive feminist legal theory and exposing the full measure of women's rights violations. However, a unique opportunity is presented by the South African legal context to achieve a more comprehensive and robust equality jurisprudence. In particular, the promulgation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) and the establishment of dedicated Equality Courts create a dynamic context in which to apply an intersectional approach to discrimination cases.[8] In cases of hate crimes against black lesbians, using the Equality Act to argue intersectional oppression arising out of a combination of various oppressions that, together, produce something unique and distinct, will advance a more sound and relevant feminist jurisprudence.

This chapter suggests that, in framing and designing legal strategies to protect *all* women from violence and ensure their access to legal remedies, we must assess how the intersection of identities often results in the experience of severe vulnerability, compounded discrimination, exclusion and, ultimately, invisibility for certain groups of women. In pleading women's human rights violations, human rights lawyers can no longer afford to articulate women's experiences of violence by focusing on a single ground of discrimination. As commentators have noted: '… it is imperative that where the evidence is available, lawyers should plead intersectional discrimination and thereby assist courts in developing this particular jurisprudence'.[9] South Africa's legislative and policy framework on equality, in particular the enactment of the Equality Act, offers a unique vehicle through which to redress deficiencies by expanding the parameters of anti-discrimination law. In any event, as evidenced by the results of post-apartheid law reform processes undertaken in South Africa and the recent developments in the international arena, the human rights discourse remains the most effective tool for the liberation of sexual minorities.[10]

This chapter is structured in three parts. The first part establishes the theoretical framework by engaging in a critical race and feminist analysis of South Africa's jurisprudence and legal theory as developed thus far. In this section, human rights lawyers are urged to consider the significance of the intersection of various identities when pleading discrimination cases. The second part considers the prevalence of hate crimes against black lesbians and argues for the framing of homophobic violence as rights violations in the context of the Constitution. Finally, the chapter provides an overview of the Equality Act, highlighting both substantive and procedural advantages in utilising this legislation and the Equality Courts to respond to the incidence of hate crimes.

2 A critical race and feminist critique

Fifteen years after the end of apartheid, South Africa's feminist legal theory and jurisprudence still does not reflect the diversity of women's experiences. While the Constitutional Court and Supreme Court of Appeal have made progressive decisions giving meaning to women's rights to equality, freedom from violence and the attendant legal duties on the state and all its organs to protect women from all forms of violence, this jurisprudence is not necessarily reflective of the experience of intersectional oppression of the majority of black women.[11] On this note, two incidents, which were extensively reported on in mass media, come to mind:

In August 2007, in Section T, Umlazi, a township outside Durban, a 25-year-old black woman, Zandile Mpanza, was physically and verbally assaulted by a group of men for wearing trousers. Male community members of Section T had imposed a ban on women wearing trousers, and were supported by the local municipality in its acquiescence to this gender discriminatory policy. The young woman was forced to walk through the streets naked and was physically assaulted by members of the community. After assaulting her, a group of men proceeded to burn her house down. The Commission on Gender Equality instituted proceedings in the Equality Court on behalf of the complainant seeking a declaratory order based on the infringement of her right to inherent human dignity and unfair discrimination in terms of the Equality Act. At the conclusion of the case, one of the orders handed down by the Equality Court was that the four respondents had to issue an 'unequivocal apology' to the complainant for their actions.[12]

In February 2008, a racist video made by four white Afrikaans male students of the University of the Free State expressed their opinion on integration. The video showed three black women and one black man being made to eat dog food mixed with garlic and ostensibly the urine of one of the white male students. Most South Africans expressed shock, horror and disgust. University authorities refer to the video as something that might be perceived as racist but may have actually been about something else.[13] On the other hand, Siviwe Vamva of the South African Students Congress stated that '[a]ll these issues must be brought forward so that all the people of South Africa can see that racism is still a dominant feature in South African society'.[14] When the racist video surfaced, it became clear to many people that the intention of the white students had been to humiliate and demean the black workers on campus. The four accused pleaded guilty to a charge of *crimen injuria* and were sentenced as follows:

> *Each accused is fined R 20 000.00 (twenty thousand rands) or to undergo 12 months imprisonment in default of payment of fine. In addition, each will undergo six months imprisonment wholly suspended for five years on one of the following*

> *conditions: 1. That accused is and/or are not convicted of* crimen injuria *or criminal defamation committed during period of suspension, or 2. That the Equality Court does not, in terms of Section 21 of Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), determine that accused has, in terms of Section 7 of the said Act, unfairly discriminated against any other person/s on the grounds of race, which discrimination is committed during period of suspension.*[15]

In sentencing the accused, the presiding officer noted that the actions of the accused were racially motivated and referred to statements by prominent community leaders after the incident:

> *This incident is symptomatic of racial tension that has been simmering at the campus for some time over the issue of hostel integration. It is clear that there are still people who are bent on halting the process of reconciliation in South Africa …*[16]

Many sections of our society expressed horror and outrage on both accounts. Audre Lorde, feminist, essayist and social critic, asks:

> *What other creature in the world besides the black woman has had to build the knowledge of so much hatred into her survival and keep going? … What other human being absorbs so much virulent hostility and still functions?*[17]

Lorde goes on to say: 'We are black women born into a society of entrenched loathing and contempt for whatever is Black and female. We are strong and enduring.'[18] On a daily, basis black women in South Africa witness the betrayal of the constitutional promise to equality, respect for inherent human dignity and freedom from violence.[19] The gendered and racialised reality and persistence of economic deprivation renders black women's experiences of South Africa's constitutional democracy fundamentally different from that of black men and white women. An urgent and critical question is whether our current approach to equality litigation can guarantee this promise to all? Since 'prohibited grounds' of discrimination under section 1(1) of the Equality Act include, *inter alia*, race, sex, gender, sexual orientation or any other ground where discrimination on that ground causes or perpetuates discrimination, it seems imperative that attorneys litigating on behalf of black lesbians living in conditions of poverty in South African townships should argue multiple and intersecting grounds of discrimination. The Guiding Principles of the Equality Act mandate that:

> *… the existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination brought about by colonialism, the apartheid system and patriarchy must be taken into account in the application of the Act.*[20]

In the case of poor, black lesbians, litigation must take into account the historical, social and political context in which the violence (discrimination) takes place and the particular experience of the victim or survivor. Addressing these aspects in pleadings may provide the Equality Court adjudicating such proceedings with the opportunity, having the evidence of intersectional discrimination before it, to make an appropriate order in such circumstances. The reality is, in the absence of a method that accounts for the compounded effects of multiple oppressions, the same treatment will always fall short of being equitable. To achieve the constitutional promise of equality and human dignity for all, all black women's experiences of violence, irrespective of sexual orientation and/or gender identity, must be adjudicated as rights violations, so that all women's experiences contribute to the development of South Africa's legal theory and equality jurisprudence as we consolidate democracy after the brutality of apartheid.

Women are not a homogenous group and to lump their experiences together ignores the very stratifying effects of race, class, sexual orientation and other forms of difference that create hierarchies of power and privilege. In the South African context in particular, the violence that many women experience is shaped by these multiple identities, which not only increase vulnerability but also limit access to legal redress. As Kimberlé Crenshaw succinctly articulates:

> *… in the context of violence against women, the elision of difference is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities such as race and class which creates an additional dimension of disempowerment.*[21]

In her other work, Crenshaw takes this further and contends that when the multi-dimensionality of black women's experiences is considered against the single axis analysis (that is, the treatment of gender and race as mutually exclusive categories of analysis) *it reveals the theoretical erasure of black women in the conceptualisation, identification and remediation of race and sex discrimination*.[22] To date, legal challenges aimed at ending sex discrimination and advancing the right to equality have not necessarily adequately addressed the compounding effects of multiple forms of discrimination as they are inflicted upon single individuals: black women must, it seems, choose to configure their oppression as a reflection of sex *or* racial bias, but never both. Similarly, in addressing discrimination on the basis of sexual orientation, Patricia Cain expresses concern with how feminist legal theory has consistently marginalised lesbian experiences.[23] Cain argues that current feminist legal theory is deficient because it has not paid sufficient attention to the experiences of women who do not speak the dominant discourse. While the aim of this chapter is not to delve into the abundant literature on feminist legal theory and

jurisprudence,[24] contentions in the chapter are grounded in post-colonial feminist theory: the ongoing project of seeking to understand race, class and gender as specific processes of domination and subordination and using the law in a positive way to change all women's lives. Chandra Mohanty provides useful insight on the strategic location of the category of 'women' vis-à-vis the context of analysis and warns us against the social construction of women as a homogenous group prior to the process of analysis.[25] Mohanty suggests that post-colonial feminists can be identified in the way they think about and struggle against racism, sexism, colonialism, imperialism and monopoly capital.[26] An understanding of the law grounded in post-colonial feminist theory leads to an advancement of a feminist jurisprudence that engages with and seeks to understand and use the law as a vehicle for social change for *all* women. A feminist jurisprudence agenda must therefore, strive not to repeat the politics of exclusion by ensuring that legal institutions produce equitable outcomes for all women — each as she is differently configured on spectra of race, class, religion, and so forth. In alliance with Charlotte Bunch in *Unspoken Rules*:

> *… if the women's human rights agenda is going to be inclusive of all women and not repeat the exclusionary approaches it has challenged in male-dominated human rights practice, this and many other 'minority' women's rights issues must be vigorously pursued … both women's rights and human rights challenge how human rights distinctions between the private and public and reluctance to address female sexuality have perpetuated violations of women and kept them invisible.*[27]

3 Incidence of hate crimes

South Africa has one of the most progressive and inclusive constitutions in the world, with a Bill of Rights proclaimed to be the cornerstone of democracy, enshrining the rights of all people and affirming the democratic values of human dignity, equality and freedom. When the Constitution came into operation in 1996 with an equality clause expressly prohibiting unfair discrimination on the ground of sexual orientation, sexual minorities had much to celebrate.[28] Over a period of 10 years, organised lesbian and gay civil society successfully challenged discriminatory laws and practices in the Constitutional Court.[29] This finally culminated in the enactment of the Civil Union Act 17 of 2006, which provides for the legal right to marry for lesbian and gay couples. Therefore, just 15 years after the end of apartheid, not only has homosexuality been decriminalised, but lesbian and gay couples can now also adopt children, have access to social security and enjoy all the partnership benefits that are available to heterosexual couples.[30] South Africa is perhaps the most progressive state in the world in respect of sexual orientation and the law;

in the eyes of the law there is no fundamental difference between lesbian and gay people and their heterosexual counterparts. However, as is the case with many forms of oppression, there can be a wide expanse between *de jure* and *de facto* equality. Laws are easier to transform than deeply entrenched cultural norms.

Despite the progressive legislative framework and jurisprudence of the Constitutional Court in respect of sexual orientation, South Africa's post-apartheid setting has, nevertheless, been characterised by a reinforcement of patriarchal attitudes and by routine attacks on female sexuality. Our society remains deeply homophobic and sexist with constitutionally protected rights vehemently contested and resisted. Many black lesbians and transgender women continue to be caught in the spiral of poverty, powerlessness, routine victimisation and institutionalised violence, regardless of their constitutional rights to equality, human dignity and the right to be free from all forms of violence. Many black lesbians have been raped, tortured and murdered, simply because they refuse to conform to dominant heteronormative and patriarchal norms and values. In many parts of the country, homosexuality is still considered a sin, to be unAfrican and a betrayal of an essentialist African culture and tradition. The oppression is justified and defended in the name of culture and religion. So while the legal landscape has changed drastically and some lesbian and gay people enjoy the benefits of 14 years of successful sexual orientation impact litigation, there has been little change for some groups, as illustrated by the following true stories.

In or around February 2006, Zoliswa Nkonyana, a 19-year-old black lesbian was clubbed, beaten and stabbed to death in a township outside Cape Town. The accused were arrested shortly after the incident. There have been at least 20 postponements since their first court appearance in the Khayelitsha Magistrates' Court. At the time of writing, the case had again been postponed and the accused were out on bail.

On 7 July 2007, two black lesbians, Sizakele Sigasa and Salome Masooa from Soweto, a township in Johannesburg, were tortured, raped and brutally murdered. Sizakele was found with her hands tied together with her underwear and ankles tied with her shoelaces. She also had three bullet holes in her head and collarbone. No perpetrators were found and, at the time of writing, the docket had been closed.

In or around August 2007, Thokozane Qwabe, a 23-year-old black lesbian was found dead in a field in Ladysmith, a town in KwaZulu-Natal. Her clothes were lying about 70 metres from her body and she had multiple wounds on her head, suggesting that she had been stoned to death. At the time of writing, no suspects had been found.

On 27 April 2008, the body of Eudy Simelane, a former Banyana Banyana football player, was found in a field in Kwa-Thema outside Johannesburg. She had

been gang-raped and repeatedly stabbed to death by her assailants. Two assailants were convicted and two acquitted.

All the deceased in the above reports identified and openly lived as lesbian. All were black and all lived in a township, which may suggest a specific class background.

These reported cases and many others are a routine occurrence in South Africa, illustrating not only the reality of homophobic violence targeting specific groups, but also the flagrant impunity enjoyed by perpetrators of such crimes. Justice Albie Sachs, in a Constitutional Court case in 1999,[31] dealt with the injury to dignity imposed upon people as a consequence of belonging to a certain group. In stating that 'in the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility', he certainly was only referring to white middle-class gay men.[32] In the case of black lesbian and transgender women, the impact of the discrimination and violence is experienced on the grounds of race, sex, sexual orientation and various other grounds, including class. The scarring and injury to dignity certainly come from poverty and powerlessness, in addition to invisibility. Black lesbian and transgender women are specifically targeted for hate crimes, which they experience in manifold forms, ranging from 'curative/corrective rape' to torture and murder.[33] These hate crimes are about identity, differentiating between the victim and perpetrator and connecting violence and prejudice with the social fault lines through which identity is created and sustained.[34] Beyond hatred and prejudice of a specific group, another important quality of a hate crime is that it is a *message crime*: communicating to the social group of which the victim is a member that they are not wanted within society or a specific community.[35]

Hate crimes against black lesbians and transgender women violate numerous constitutionally protected rights. Section 9 of the Constitution provides for equality before the law, the right to equal benefit and protection of the law and the full enjoyment of all rights and freedoms. Subsections 9(3) and (4) in the equality clause prohibit unfair discrimination on numerous grounds, including sexual orientation, race, sex and gender**.** The violence targeting black lesbians and transgender women is a gross violation of the protected right to equality. Addressing these violations, whether through litigation or advocacy initiatives, requires a proper understanding of the consequences of being black, poor, female and challenging heteronormativity in an unequal society. It requires an acknowledgment of the unique oppression faced by this group, that this oppression, when compounded, becomes markedly different from the experiences of white lesbians. This violation is particularly acute when one recognises that gender, race and sexual orientation form the basis of discrimination that help maintain the subordinate positions of its victims in society.

Section 7(2) of the Constitution establishes the duty on the state to protect the rights in the Bill of Rights.[36] The Constitutional Court has discussed the obligations on the state as a result of the rights to life, human dignity and freedom and security of the person and has stated:

> *It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.*[37]

Section 11 of the Constitution provides that everyone has the right to life and in *S v Makwanyane* the court found that the positive duty imposed on the state by the right to life means, at the very least, that the state is under a constitutional obligation to protect its citizens from life-threatening attacks.[38] The reality and routine threat of violence also impinges on the group's right to inherent dignity and the right to have that dignity respected and protected. The violence and discrimination perpetrated against lesbians and transgender women is not experienced in a vacuum, but rather in a specific legal, social and economic context. The historical, social and political context, coupled with the particular contemporary experience of this group, is an important consideration when framing discrimination cases for litigation. Doing so ensures that we avoid the theoretical erasure of certain groups of women. An *intersectional approach to discrimination* ensures that pleadings take into account the combination of grounds of discrimination that intersect and together produce something unique and distinct from any one ground of discrimination standing alone.[39]

While arguments can be developed on the apparent violations of constitutional rights for the purposes of impact litigation, this chapter will not address constitutional litigation. The important issue to note at this point is that South African law does not recognise a separate category of hate crimes, which means that these attacks are investigated and prosecuted as ordinary criminal offences. The police do not investigate these incidents as hate crimes, since there is no such crime in South African criminal law and there are no guidelines or protocols to deal with the nature of these reports. At the level of reporting, a victim of a hate crime may be reluctant to disclose sexual orientation as a factor relevant to the crime due to fear of secondary victimisation in her engagement of the criminal justice system. The Centre for Violence and Reconciliation notes that it is surprising that the relevance of hate crime in reporting and sentencing has not been given sufficient attention, considering South Africa's recent history of legislated racism and the ongoing expression of violent prejudice.[40] Lesbian and gay activists are

currently formulating law reform strategies aimed at the promulgation of anti-hate crime legislation and considering impact litigation strategies. However, law reform is a slow process and impact litigation is expensive. In the interim, this chapter suggests that Equality Courts, in particular the High Courts, which are designated as Equality Courts, may for now be the most appropriate forum to respond to hate crimes against black lesbians and transgender women. Cases launched in the Equality Court can run concurrently with criminal cases.

4 The Equality Court as an appropriate forum

In providing that national legislation must be enacted to prevent or prohibit unfair discrimination, section 9(4) of the Constitution mandated the enactment of the Equality Act.[41] The Equality Act is aimed at nothing less than prohibiting and preventing unfair discrimination. As the Preamble to the Act states, the general purpose of this law is to eradicate social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought about pain and suffering to the majority of people.[42]

This ambitious mandate is to be achieved in at least three ways:

1. the prohibition and prevention of unfair discrimination
2. the promotion and achievement of equality and
3. provision of remedies to victims of unfair discrimination.[43]

The Equality Act is aimed at giving meaning to the constitutional right to equality, which includes the right to equal benefit and protection of the law. The Constitutional Court has already developed the factors that must be taken into account in determining whether discrimination has an unfair impact:

- The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well-off.
- The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.
- The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.[44]

Section 16 of the Equality Act establishes the Equality Courts, with access to justice as the basis of these specialised judicial forums.[45] A chamber in the High

Court is designated as an Equality Court and judicial officers have been especially trained to adjudicate equality matters. This integration and specialisation informs the architecture of the Equality Courts and this presents a unique opportunity for lawyers to litigate equality cases without having to rely directly on the Bill of Rights in the Constitution and the expenses of constitutional litigation. Equality Courts are courts of record and therefore there is jurisprudential benefit in litigating in these courts, in particular the precedent-setting potential that exists in the High Court when arguing intersectional discrimination cases. While South Africa has impressive jurisprudence on substantive equality, there is currently no jurisprudence on intersectional discrimination from our highest courts. The inquisitorial nature of proceedings, in the form of an inquiry that engages the litigant, the judicial officer's discretion to relax rules of procedure and the far-reaching remedies available to the litigant can ensure positive outcomes.[46] Of particular significance is that victims of unfair discrimination who cannot afford private attorneys' fees are offered an expedited process to ensure access to justice. Proceedings under the Equality Act can be instituted by:

- any person acting in their own interest
- any person acting on behalf of another person who cannot act in their own name
- any person acting as a member of, or in the interests of, a group or class of persons
- any person acting in the public interest
- any association acting in the interests of its members
- the South African Human Rights Commission, or the Commission for Gender Equality.[47]

The Equality Act offers a number of procedural advantages to a complainant of unfair discrimination. First, the Equality Act presumes discrimination on a prohibited ground and an analogous ground to be unfair. Second, the burden of proof shifts once the complainant makes out a *prima facie* case of discrimination.[48] In other words, once a complainant produces evidence of discrimination, which calls for an answer from the respondent, a *prima facie* case of discrimination will have been established and the respondent will be saddled with the full onus of proof that the discrimination did not take place. In respect of analogous grounds, as set out in section 1(xxiii)*(b)* of the Equality Act (definition of 'prohibited grounds'), before the discrimination is presumed to be unfair, the complainant would have to show that the discrimination causes or perpetuates systemic disadvantage, undermines human dignity and adversely affects the enjoyment of fundamental rights and freedoms. A systemic disadvantage can be understood as a disadvantage that operates along

standard and predictable lines in important spheres of life and emerges as an outset of one's education, freedom from private and public violence, or status as a political minority. Systemic disadvantages are deeply implicated in an individual's basic participation as a citizen in a democratic society.[49] In areas of race, sex and sexual orientation discrimination, the problem is precisely one of systemic disadvantage.

To reinforce the notion of substantive equality in proceedings before the Equality Court, section 4(2) provides that in the application of this Act the following should be recognised and taken into account:

> *… the existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and the need to take measures at all levels to eliminate such discrimination and inequalities.*[50]

While the concept of substantive equality is not expressly used in the Constitution, the purpose of this legislation is to achieve substantive equality, defined in the Equality Act as 'including the full and equal enjoyment of all rights and freedoms as contemplated in the Constitution'. Moreover, this notion of equality includes *de jure* and *de facto* equality and also intends to generate equality in terms of outcomes. In *Minister of Finance and Another v Van Heerden*, the Constitutional Court stated*:*

> *This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systemic under-privilege, which still persist … It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.*[51]

Considering the above-mentioned reports of hate crimes, potential causes of action in the context of hate crimes against black lesbians and transgender women, which can be litigated in the courts against the state and private persons, include: unfair discrimination on the grounds of race, sexual orientation, gender, socio-economic status, hate speech, harassment and publication of material that unfairly discriminates.[52]

Once an Equality Court, before which proceedings have been instituted, has concluded its inquiry and finds that unfair discrimination, hate speech or harassment has indeed taken place as alleged, the court may make any one or a combination of the following orders:

- an interim order
- a declaratory order
- an order for the payment of any damages in respect of proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question
- … the payment of damages in the form of an award to an appropriate body or organisation
- an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question …
- an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation …[53]

Section 28 of the Equality Act provides for special measures to promote equality with regard to race, gender and disability. In terms of section 28(1) of the Equality Act, if it is proved in the prosecution of any offence that unfair discrimination on the ground of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for the purpose of sentencing.[54] While sexual orientation is not a listed ground for the purposes of section 28(1), this chapter suggests that in sentencing for crimes against black lesbians and transgender women, a proper and contextual understanding of gender will reveal that these crimes are gendered: that in addition to their homophobic dimension, they are about masculine privilege, power, control, oppression and patriarchy.

5 Conclusion

This chapter has attempted to provide just one set of legal tools for human rights lawyers and human rights defenders in the South African context to respond to homophobic violence perpetrated against a specific group of women. The chapter does not suggest that other lesbian, gay, bisexual, transgender and intersex (LGBTI) people of other race groups do not experience homophobic violence, but rather that the crimes of hatred and prejudice against this specific group of women have a special immediacy because of the broader systematic discrimination. As set out in the Preamble to the Equality Act, the aim of this legislation is to facilitate the

transition to a democratic society and legal professionals have a responsibility to ensure that our courts and jurisprudence are in accordance with the country's broad transformation agenda.

Endnotes

1 One in four women in the general South African population has experienced physical violence at some point in her life and a national study of female homicide reveals that every six hours a woman is killed by her intimate partner; Lau, U. (2009). *Intimate Partner Violence Fact Sheet,* MRC-UNISA, available at http://www.mrc.ac.za/crime/intimatepartner.pdf (accessed 15 April 2012). For overall annual sexual offence statistics in South Africa, see Crime Information Management, South African Police Service. [n.d.]. *Total Sexual Offences in RSA for April to March 2003/2004 to 2009/2010*, available at http:/?www.saps.gov.za/statistics/reports/crimestats/total_sexual_offences.pdf (accessed 15 April 2012).

2 While there are no available statistics on the prevalence of hate crimes against black lesbians, in the last 10 years two national campaigns have been formed to respond to the reports — the 070707 Campaign to End Hate Crimes and the Rose Has Thorns Campaign. See also OUT LGBT Well-being & UNISA. (n.d.). *Hate Crimes Against Gay and Lesbian People in Gauteng: Prevalence, Consequences and Contributing Factors*, available at http:??www.out.org.za/images/library/pdf/Hate_Crimes_Research_Findings.pdf (accessed 15 April 2012).

3 South African Department of Labour. (2013). *2012–2013 Commission for Employment Equity Annual Report.* Pretoria: Government Printers.

4 South African Department of Labour. (2013) (n 3). The remainder of positions are filled by foreign nationals.

5 *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA) paragraph 7.

6 *Fourie v Minister of Home* Affairs (n 5).

7 Constitution of the Republic of South Africa, 1996 (Constitution) section 9(3).

8 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

9 Kitching, K. (ed). (2005). 'Intersections in international discrimination law', in *Non-Discrimination in International Law: A Handbook for Practitioners*. Interights, 2011 edition, available at http://www.interights.org/handbook/index.html (accessed 15 April 2012). Intersectional approaches to discrimination take into account the historical, social and political context in which the discrimination takes place, and in particular, the experience of the individual victim. This form of analysis addresses more subtle, institutionalised or systemic discrimination, hardened attitudes and rigid social stereotypes.

10 See, for example, Committee on the Elimination of Discrimination against Women. *CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, adopted at the 47th Session, 4–22 October 2010, CEDAW/C/2010/47/GC.2, paragraph 31.

11 See, for example, *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Van Eeden v Minister of Safety and Security* 2002 (10) BCLR 1100 (C); *S v Chapman* 1997 (3) SA 341 (SCA).

12 Mhlana, Z. (2008). 'Let them wear pants, Umlazi court orders', *Mail & Guardian Online*, 11 April, available at http://www.mg.co.za/article/2008-04-11-let-them-wear-pants-umlazi-court-orders (accessed 15 April 2012).

13 'South Africa: Free State University racist video', (2008). *Africa Files*, 27 February available at http://www.africafiles.org/article.asp?ID=17345 (accessed 15 April 2012); BBC. (2008). 'Outcry in SA over 'racist' video', 27 February, available at http://www.news.bbc.co.uk/2/hi/7267027.stm (accessed 15 April 2012).

14 BBC (n 13).

15 *S v IS Van der Merwe and Three Others* Bloemfontein District Court Case no: 21/7092008 (unreported), paragraph number unknown, but see quoted in *S v Van der Merwe and Others* 2011 (2) SACR 509 (FB) at paragraph 8.

16 *S v IS Van der Merwe and Three Others* (n 15) at paragraph 20.

17 Lorde, A. (1984). *Sister Outsider: Essays and Speeches.* Berkeley, CA: Crossing Press, 151.

18 Lorde (n 17) at 151.

19 The Constitution (n 7) protects the right to equality in section 9, inherent human dignity in section 10, and the right to be free from all forms of violence in section 12(1)*(c)*.

20 Equality Act (n 8), section 4(2)*(a)*.

21 Crenshaw, K. (1991). 'Mapping the margins: Intersectionality, identity politics and violence against women of colour', *Stanford Law Review* 43: 1242–1299 at 1242.

22 Crenshaw, K. (1989). 'Demarginalising the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics', *University of Chicago Legal Forum,* 139–168.

23 Cain, P.A. (1988–1990). 'Feminist jurisprudence: Grounding the theories', *Berkeley Women's Law Journal* 4: 191–214 at 191.

24 See, for example, Mohanty, C.T. (1991). 'Under western eyes: Feminist scholarship and colonial discourses', in C.T. Mohanty & A. Russo (eds). *Third World Women and the Politics of Feminism*. Indianapolis, IN: Indiana University Press; McClintock, A. (1995). *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest.* New York: Routledge; Albertyn, C. (2003). 'Feminism and the law', in C. Roeder & D. Moellendorf (eds). *Jurisprudence*. Cape Town: Juta, 291–326; Harris, J.W. (1997). *Legal Philosophies.* Durban: Butterworths.

25 Mohanty (n 24), 51.

26 Mohanty (n 24), 51.

27 Bunch, C. (1995). Foreword to R. Rosenbloom (ed.). *Unspoken Rules: Sexual Orientation and Women's Human Rights: International Gay and Lesbian Human Rights Commission Report.* New York: International Gay and Lesbian Human Rights Commission, vi.

28 Section 9(3) of the Constitution (n 7) states: '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.'

29 See, for example, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

30 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 29); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 29); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Department of Home Affairs* 2003 (5) SA 621 (CC).

31 *National Coalition for Gay and Lesbian Equality* (n 29).

32 *National Coalition for Gay and Lesbian Equality* (n 29) at paragraphs 126 and 127.

33 A hate crime is a crime committed because of the perpetrator's prejudice. It is a crime in which the perpetrator's conduct is motivated by hatred, bias or prejudice, based on the actual or perceived race, religion, gender, sexual orientation and gender identity of an individual or group of persons. This is the author's own understanding of the crime; see Isaack, W. (2007). 'South Africa: Hate crimes and state accountability', *Africa Files*, 8 August, available at http://www.africafiles.org/article.asp?ID=15869 (accessed 16 April 2012).

34 Harris, B. (2004). 'Arranging prejudice: Exploring hate crimes in post-apartheid South Africa' in *Centre for the Study of Violence and Reconciliation: Race and Citizenship Transition Series*, available at http://www.csvr.org.za/docs/racism/arrangingprejudice.pdf (accessed 16 April 2012).

35 Harris, B. (2004) (n 34).

36 Section 7(2) of the Constitution (n 7) stipulates that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

37 *Carmichele* (n 11) at paragraph 44.

38 *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 117.

39 Kitching (n 9).

40 Harris (n 34).

41 Section 9(4) of the Constitution (n 7) states: 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

42 The Preamble to the Equality Act (n 8) reads: 'This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by humans that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.'

43 Equality Act (n 8), section 2.

44 Currie, I. & De Waal, H. (1998). *Bill of Rights Handbook*, 5th ed. Cape Town: Juta, 244–245, summarising paragraph 52 of *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

45 Section 16(1)*(a)* of the Equality Act (n 8) states: 'For the purposes of this Act …

every Magistrate's Court and every High Court is an Equality Court for the area of its jurisdiction.'

46 Subsections 4(1)*(a)–(e)* of the Equality Act (n 8) outline the Guiding Principles in adjudicating equality matters.

47 Section 20(1) of the Equality Act (n 8). For further reading on *locus standi*, see Currie & De Waal, *Bill of Rights Handbook* (n 44), 35–43.

48 Sections 13(1)*(a)* and *(b)* of the Equality Act (n 8) stipulates: 'If the complainant makes out a *prima facie* case of discrimination … the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or … the respondent must prove that the conduct is not based on one or more of the prohibited grounds.'

49 For a discussion on systemic discrimination, see, for example, Pahad, E. (2005). 'Towards reconciliation and nation-building: A nation in dialogue'. Keynote address at the Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available at http://www.info.gov.za/speeches/2005/05122012151002.htm (accessed 16 April 2012).

50 Equality Act (n 8), section 4(2).

51 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at paragraph 27.

52 See Equality Act (n 8), section 7 (on the prevention and general prohibition of unfair discrimination on listed grounds), section 8 (on the prohibition of unfair discrimination on the grounds of gender), section 10 (on the prohibition of hate speech), section 11 (on the prohibition of harassment), and section 12 (on the prohibition of dissemination and publication of information that unfairly discriminates).

53 Subsection 21(2) of the Equality Act (n 8) gives the Equality Court extensive powers to grant far-reaching remedies at the conclusion of an enquiry into unfair discrimination, harassment and hate speech.

54 Here is an example of the intersection between Equality Courts (civil courts) and the criminal courts, demonstrating another benefit to litigation in Equality Courts: the legislation empowers the presiding officer to refer a matter to the Director of Public Prosecutions.

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CHAPTER 7

Strategic litigation of women's constitutional rights in Rwanda

Eugene Manzi

1 Introduction

During the 1994 Rwandan genocide, Rwanda's government and infrastructure were completely destroyed. Since then, the country has made remarkable progress towards restoring these systems and Rwanda is now seen as one of the fastest developing countries in Africa and a leader on the continent in promoting women's rights.

In the last 15 years in Rwanda, parliament has been a key forum to advocate and enhance women's rights. Laws like the Matrimonial Regimes, Liberalities, and Successions Law 22 of 1999,[1] the Gender-Based Violence Law 59 of 2008[2] and the new Penal Code of 2012, all reflect Rwanda's commitment to the protection of women's rights. Rwanda's 2003 Constitution also makes equality of men and women a fundamental right. However, some older laws and cultural practices still discriminate against women, and Rwanda's civil law system has been inadequate in providing effective mechanisms for enforcing women's rights. In March 2009, Rwanda's High Court President confirmed that Rwanda is becoming a dual civil law–common law system. This ongoing process may open new opportunities for enforcing women's constitutional rights in Rwandan courts more effectively.

This chapter will explore the discriminatory effects on women of the current Rwandan divorce law. First, it will provide a synopsis of the current legal reforms made in regard to women's rights in Rwanda, as well as their continued shortcomings. Within this context, the chapter will then focus on divorce proceedings as provided by the Rwandan civil law system and illuminate potential discriminatory effects through a case study. Finally, this chapter will forecast how women might be able to use the courts in Rwanda's new dual system to overcome the discriminatory effects of the existing system and thereby enforce their constitutional rights.

2 Women's rights in Rwanda

Rwanda has made important strides in gender equality, particularly by reducing poverty in female-headed households and increasing gender equality in primary education and politics.[3] Much of the progress might be attributed to the marked improvements at the formal level; for one, the Rwandan Constitution of 2003 recognises gender equality and requires that at least 30 per cent of positions in decision-making bodies are held by women.[4]

At the same time, Rwandan women still have a long way to go, as long as many remain poor, uneducated and unaware of their rights. Women continue to face gender-based challenges in terms of access to financial services (women run 41 per cent of businesses but account for only 16 per cent of borrowers) and low access to business development services, skills training and markets.[5] Women farmers face challenges as well; approximately 90 per cent of farmers are female, but 'it is more difficult for them to own land, and to get access to, and/or control of, certain inputs, such as fertilizer, seed, pesticides, loans, and agricultural extension services'.[6]

The legal guarantees of gender equality do not fully translate into reality, largely due to pre-existing social barriers. As Powley argues, 'persistent poverty and a low literacy rate, traditional cultural attitudes about the position of women', among other issues, prevent the implementation of legislation.[7]

For instance, women continue to fare poorly in the area of land rights, despite the Organic Land Law 8 of 2005 (which ensures equality of land ownership) and the equality of succession provisions in the Matrimonial Regimes Law 22 of 1999. This inequality is partly because of the persistence of patrilineal customs in inheritance practices.[8] In addition, the laws that permit women to inherit land can be 'vague, ambiguous, and contradictory'.[9] Women also may be unable or reluctant to pursue their rights, either because they are not aware of them or they fear reprisal from family members.[10] A similar gap between law and practice exists with respect to divorce, as this chapter will explore. Moreover, the economic and social gaps between men and women mean that women enter divorce proceedings at a disadvantage and the divorce laws fail to account for these systemic differences.

3 Rwandan statutory law

Several sets of laws are particularly important to women's rights in the context of divorce proceedings. The following section will therefore briefly review the Matrimonial Regimes Law, the Law on Prevention and Punishment of Gender-Based Violence and the Civil and Penal Code, before discussing Rwandan divorce law.

3.1 The Law on Matrimonial Regimes, Liberalities, and Succession

The Law on Matrimonial Regimes, Liberalities, and Succession 22 of 1999 (Matrimonial Regimes Law) is a key step towards gender equality in Rwanda. The law stipulates equality in property and inheritance rights between men and women.[11] This is important because:

> *… in traditional Rwanda, a woman had no right to succession as a daughter and as a wife ... The succession of family property was absolutely passed on to male children. This situation put women in a vulnerable state of dependence and often resulted in the underdevelopment of their capabilities.*[12]

Under the law, couples can choose one of three marital property regimes: (1) community of property (spouses jointly own property); (2) community of acquisition (some property jointly owned, some property separately owned); and (3) separate property (spouses retain separate ownership of property).[13] Under all the regimes, both spouses contribute to household support, and the consent of both spouses is needed for certain transactions.[14] In addition, 'the law replaced the power to devolve property to only male heirs with the possibility of property going to both sexes'.[15] Accordingly, the Matrimonial Regimes Law 'established, for the first time, women's right to inherit land'.[16]

However, the scope of the law remains limited, because it does not protect the rights of women married under customary law (rather than civil law).[17] Given that many marriages are informal, many women cannot access the legal rights under the Matrimonial Regimes Law.[18] In addition, the law has not changed the situation of women in practice because 'the existence of positive, codified law [does not] immediately preclude respecting some cultural norms, which are still [deeply] rooted in Rwandan social relations'.[19] A woman may be manipulated by her deceased husband's relatives into transferring property to them, because she risks being branded an 'unruly woman' if she disobeys.[20] Furthermore, 'although 75.9 per cent of the population knew about the existence of the law, research suggests that many people, possibly up to 87 per cent, do not understand the principles of the law'.[21] As a result, the implementation of the Matrimonial Regimes Law does not fulfil its legal role of creating gender equality in practice.

3.2 The Law on Prevention and Punishment of Gender-Based Violence

The Law on Prevention and Punishment of Gender-Based Violence (Gender-Based Violence Law), which was enacted in 2008 and came into effect in 2009, is the first Rwandan law that specifically addresses violence against women.[22] The drafting process of this law involved reflections on research and consultations with women

at grassroots level about the types of violence they experienced, and the law draws on legislation from other African countries.[23] The Gender-Based Violence Law is the first law that provides a definition for the rape of adult women (article 2(6)), that penalises marital rape (article 5) and that explicitly recognises a victim's right to claim damages for gender-based violence (article 38). Furthermore, it reforms gender-discriminatory criminal offences. For instance, adultery, which was previously considered a crime only if it was committed by a female, is now recognised as a gender-neutral crime (article 14).[24] The legislation not only introduces new offences and penalties, but also includes 'positive duties', such as maternity leave (article 8) and protection of children from gender-based violence (article 7). The legislation also has implications for divorce proceedings, because it explicitly recognises gender-based violence as a cause for divorce (article 6). Furthermore, the Gender-Based Violence Law takes cognisance of the fact that acts of gender-based violence are often difficult to prove in court and, therefore, makes an exception to the evidentiary rules of the Civil Code by allowing children, other people living in the household, and neighbours to give testimonial evidence during the court proceedings (article 13). The Gender-Based Violence Law clarifies that this kind of hearsay testimony is allowed, despite the fact that statements made by neighbours might be opinionated or biased. Notwithstanding these progressive provisions in the Gender-Based Violence Law, women continue to face numerous difficulties in divorce proceedings, as will be demonstrated in this chapter.

Despite some legal gaps,[25] the introduction of a specific law to combat gender-based violence is certainly a positive first step in Rwanda's legislative landscape. In addition to the Matrimonial Regimes Law and the Gender-Based Violence Law, another law worth mentioning is the 2001 Law on Rights and Protection of the Child Against Violence which 'criminalizes murder, rape, the use of children for "dehumanizing acts", exploitation, neglect and abandonment, and forced or premature (before the age of 21 years) marriage'.[26]

3.3 Civil and Penal Codes

Certain articles in Rwanda's Civil Code[27] also promote equality between men and women. The Civil Code gives women full legal rights to open bank accounts (article 212), appear in court in relation to the matrimonial property regime (article 212), be a witness to a legal act (article 184), and use their own name in any administrative act in which they are involved (article 63).[28]

While these have been important improvements, certain elements of the Civil Code continue to discriminate against women. One example of blatant discrimination against women can be found in article 206 of the Civil Code, which provides that the husband is the head of the household.[29] Furthermore, article 83

of the Civil Code confines a woman to the man's choice of residence without considering the woman's interests.[30] These provisions institutionalise the inferior status of women and legally subordinate women's decisions to those of men. While the former Penal Code of 1977 also included discriminatory provisions, such as article 354, which 'reinforce[d] the idea of the woman as a possession of her husband, rather than wife and husband as equal partners',[31] this discriminatory clause was repealed by the Supreme Court in 2008[32] and has now been replaced by a gender-neutral provision in the Gender-Based Violence Law. Since 2012, Rwanda has a new Penal Code which takes cognisance of women's reproductive rights by removing criminal liability for women inducing their own abortion and for medical doctors who assist women in terminating their pregnancy (article 165 of the new Penal Code) under limited conditions. However, the law did not legalise abortion per se.

Accordingly, while there have been some steps forward in legal reform, the statutory framework in many ways still reinforces the unequal economic and social status of women. As a result, women seeking to resolve a legal dispute, especially those entering a divorce proceeding, are often already at an initial disadvantage.

4 Divorce law in Rwanda[33]

Under Rwandan divorce law, there are three different options for separation from a spouse: (1) divorce; (2) separation *de corps*; and (3) voluntary separation. These will be outlined briefly before illustrating in a case study the effects of the divorce law on women.

4.1 Divorce

Under Rwandan law, divorce can be granted in only one of two circumstances: if there are legal grounds for a divorce (divorce for cause) or by mutual consent.[34] The legal grounds[35] for divorce include the commission of a serious crime (such that it would cause severe shame to the other spouse), adultery, domestic violence, refusal to contribute to household expenses, abandonment for at least 12 months, and mutual separation for a period of at least three years.[36] Either spouse can file for divorce for cause. When a suit for divorce is filed, the public prosecutor immediately becomes involved to evaluate the case for potential criminal charges, such as physical violence.[37] For the duration of the proceedings, the judge will permit the parties to live separately.[38] However, the law holds that the husband cannot be forced to leave the conjugal residence.[39] The wife will be required to find new housing unless she or her parents own the house.[40] Upon divorce, ex-spouses share community assets and liabilities, depending on the marital property regime applicable to them,[41] but the defendant in a suit of divorce for cause must

give back any property given to him/her by the other spouse during the marriage.[42] The successful applicant in a divorce for cause is usually granted child custody (although the respondent remains responsible for contributing to the expenses of the children)[43] and may be granted alimony of up to one third of their former spouse's income.[44]

4.2 Separation *de corps*

Spouses may also file for separation *de corps* (separation from bed and board) on the same basis that they can file for divorce: on legal grounds or by mutual consent.[45] The duty of cohabitation until the divorce is final is discharged, and the parties divide the property mutually and peacefully.[46] Also, they give themselves a chance at reconciliation, as they can legally get back together at any time within three years. After three years, a separation *de corps* for cause can be converted into a divorce upon the request of one of the spouses.[47]

4.3 Voluntary separation (*ukwahukana*)

Instead of filing for divorce or separation from bed and board, the wife is most likely to simply leave the conjugal home.[48] Although she may leave for a reason that gives her cause for divorce or separation, such as physical abuse, her husband would technically also have grounds to sue her for divorce in these circumstances because she left the conjugal home without his consent.[49] In addition, she also faces criminal sanctions for neglect of the family.[50]

5 Case study and analysis of divorce proceedings for women[51]

The implications of Rwandan divorce law can be illustrated by the case study of Rose Ingabire.[52]

5.1 Facts of the case

Rose Ingabire is legally married to her husband and the couple has six children. Their property is shared under the community of property regime.[53] After many years of marriage, her husband abandoned her and began living on another piece of property he claims to own with another woman. However, he often returned to the property to beat Rose and steal livestock and other items from her.

Rose went to the local authorities, known as cell leaders, who are charged with managing this type of domestic dispute. They assisted her in dividing the property between herself, her children and her husband, which is a common form of property distribution in Rwanda.[54] The authorities performed the division and set up boundaries on the land to clearly designate ownership. However, Rose's

husband returned, moved the newly-made boundaries, beat Rose, and stole more items from the property. At this point, Rose took the case to the *Abunzi*, a mediation committee entrusted with handling matters of this nature before claimants seek recourse in courts of law. However, the *Abunzi* ultimately ignored the issue of Rose's rights to the property and instead ruled that they found no evidence to prove theft of her property. In light of the circumstances, it is possible that her husband paid a bribe to some low-ranking officials for this favourable ruling.

After the *Abunzi* hearing, Rose's husband returned to the house, beat her severely, and then fled to another province. He occasionally returns to beat her and steal crops and other items from the land. Strangers regularly visit Rose's house to claim her crops, which they say her husband has sold to them. Rose has reported the matter to the police, but they have failed to intervene on her behalf, claiming the issue is a 'family matter'. Rose would like to file for divorce from her husband in order to protect herself and her minor children. Her husband refuses to agree to a divorce.

5.2 Rose's legal options

In cases like Rose's, divorce or legal separation is the best and most protective option for women. Obtaining a divorce or separation *de corps* creates definitive separation and protection for a woman who has been the subject of prolonged abuse, as the police will consider a husband's return as criminal trespass on another person's property. But as long as the parties remain legally married, local authorities as well as friends, family, and neighbours may be hesitant to interfere in domestic abuse. It is also practically difficult for a married woman to pursue criminal action against her husband, since the police will regard the situation as a domestic matter between husband and wife.

Like Rose, many Rwandan women lack the ability to generate significant income on their own either due to old age, illness, or a lack of skills, and therefore benefit greatly from a divorce for cause. The benefits of a successful divorce for cause (alimony, communal property acquired during the marriage, child custody) mean that actively pursuing divorce may be preferable to waiting to defend herself in a divorce filed by the husband, if he brings one at all. However, in the case study, Rose is reluctant to institute divorce proceedings against her husband because she would need evidence to prove his violence as grounds for divorce. Before the enactment of the Gender-Based Violence Law, proof of physical abuse generally required an official medical report, which is virtually unattainable for poor women who live in rural areas. Without evidence of physical abuse or adultery, Rose will thus not have grounds for divorce. With little to no police involvement, the outcome of Rose's case is likely to be unfavourable.

In other cases, separation *de corps* may be the best option for the woman because she remains legally married to her husband: he remains bound to support her and contribute to household expenses, but she is permitted to live separately from him. Unfortunately, a separated wife does not receive the same protections that would be accorded to a divorced woman. For instance, the police will treat violence towards a separated woman as a family matter. If they were divorced, however, the police would treat ex-spousal abuse like any other assault or criminal trespass. Additionally, given that only the spouse that successfully proves grounds for a separation for cause may receive alimony, the same financial reasons for initiating a suit for divorce apply to initiating the separation *de corps*. It must also be noted that an already abusive husband may be further agitated by a wife who files for separation *de corps*, and the woman may not have as much legal protection as if they were divorced: because they remain legally married, her husband may still closely monitor her actions and control and abuse her, and the local authorities may refuse to intervene.

If a wife does not file for divorce or separation, but instead flees her abusive home in an informal separation, her husband can sue her for divorce for cause under article 237 of the Civil Code, which stipulates the circumstances under which a person can institute divorce proceedings. A wife would only have a defence if her husband violated his marital duties, such as providing for the family, including school fees, shelter, intimacy with his wife, and protecting the family from any harm from within or outside the home. While the incidents of domestic violence and her husband's abandonment of the marital home would provide Rose with a defence, her potential inability to prove these incidents limits her chances of success. In addition, should her husband be successful in his application for divorce for cause, the consequences for Rose would be severe: she would lose any property her husband gave her during the marriage, would possibly lose custody of her children, and could be liable to pay her husband alimony of up to one third of her income.

6 Negative impact of legal culture on vulnerable Rwandan women like Rose

Rose has rights over her private property guaranteed under article 29 of the Rwandan Constitution. However, customary practices (for example, no woman was allowed to inherit property prior to 1999) and the Civil Code, which dictates that the wife must leave the conjugal home during divorce proceedings (article 250 of the Civil Code) interfere with this fundamental right. These laws force Rose to remain dependent upon her husband for property rights, implying that women's rights to own property are, in fact, inferior to men's. Moreover, the current Rwandan legal

framework poses a number of obstacles to Rose's potential effort to challenge the constitutionality and legality of the Civil Code.[55]

6.1 Role of precedent

Court decisions do not hold precedential value in Rwanda's civil law system. Rwandan courts currently do not provide any viable method for proving the unconstitutionality of statutes on points of law. Even if a litigant succeeded in urging the court to find a statute unconstitutional *as applied*, the court decision would not affect the rights of other litigants in a similar situation because one court decision does not effect a change in the law. Rose would, therefore, not benefit from previous court rulings that found the application of article 250 of the Civil Code unlawful. Similarly, the lack of precedential value means that other women like Rose, who might be in similar circumstances, will not be able to benefit from the decision in Rose's case and will have to relitigate the same issues (assuming they have the resources to hire a lawyer or that a lawyer with the appropriate expertise is available to intervene).

6.2 Difficulties of implementation

Even if Rose wins her case in court, there is no procedure to enforce the constitutional right to property when cultural practice still directly conflicts with a judgment in Rose's favour. Authorities will be reluctant to enforce such judgments because these judgments are contrary to what officials think they know and how they interpret the law. Also, the culturally entrenched belief in the superiority of men over women cannot be ignored, because authorities may simply ignore such judgments, forcing disadvantaged women to go back to court again in order to enforce the court judgment.

6.3 Political agreement

Without implementing legislation or political will, a court order or judgment holds little weight in a civil law system. For example, the Matrimonial Regimes Law gives women the right to choose one of three marital property regimes and to inherit property. However, parliament chose not to make this law retroactive because it determined that the courts would be flooded with claims and would lack the capacity to adjudicate all these cases. Therefore, women who owned or acquired property jointly with their husbands before 1999 under the marital property regime of community of property and community of acquisition, respectively, as well as women who inherited property before 1999, have a constitutional claim to the property, but they have no viable mechanism to enforce this claim under the current system.

6.4 Standing

In order to bring a claim in a court, a litigant must have standing. In Rwandan courts, a 'plaintiff has [to prove] the [status/quality], interest and capacity to bring the suit'.[56] However, the law does not define the notions of quality, interest, and capacity, and without legal precedent to interpret these standards, their application remains unclear.[57] *Amicus curiae* are not generally accepted in civil law jurisdictions, and a high threshold of expertise must be proved in order to qualify an individual (or lawyer) to present information to the court as an expert/*amicus curiae*. Moreover, in a post-conflict society like Rwanda, these types of experts are not readily available. Essentially, then, only the woman whose rights have been violated has standing.[58] Women like Rose and their legal representatives are, therefore, on their own when it comes to litigating cases of divorce in court.

Therefore, while Rose may have recourse under the Gender-Based Violence Law, it seems unlikely that she will succeed in challenging provisions like article 250 of the Civil Code. Even if the court waives the application of the Civil Code in *her* case, judges in Rwanda do not make law, so that decision has little to no impact on countless other women who are in the same situation as Rose.

7 The future of enforcing women's rights in Rwandan courts

Rwanda is now changing to a dual civil law–common law system. In Rwanda's new system, strategic litigation of women's constitutional rights could be used to correct imbalances and discrimination in the law and create a method to challenge the unconstitutionality of some of the provisions in legislation such as the Civil Code, because at least some cases will now create a legal precedent. Class action suits could also be a very effective means to remedy women's rights violations.

7.1 Strategic litigation

One of the advantages of strategic litigation is that '"[s]trategic" or impact litigation uses the court system to attempt to create broad social change … [and] lasting effects beyond the individual case'.[59] The objectives of strategic litigation are achieved 'through the establishment of effective and enforceable law'.[60] By creating a record of 'official practices' strategic litigation documents 'institutionalized injustice' thereby laying 'the foundation for future efforts'.[61] Since in strategic constitutional rights litigation, 'courts … [draw] frequently on comparative decisions of courts in other countries, particularly in those systems where common law prevails',[62] Rwandan courts are likely to follow this pattern. Strategic litigation also improves the judiciary's capacity to interpret and enforce laws in light of human rights mandates by allowing claimants to educate judges

on the applicability of international human rights law through expertise, such as *amicus curiae* briefs.[63] Finally, strategic litigation can also be a more cost-effective means of creating and enforcing rights, instead of forcing already vulnerable people to individually litigate their nearly identical claims.[64]

7.2 What Rose's case will look like in the new dual system

Litigating Rose's case in the new system would provide clarity regarding existing laws. So far, application of the Civil Code by judges has been arbitrary and inconsistent, as similar cases are adjudicated differently without reference to any decided case. Clear laws, however, allow victims to know and assert their rights, and encourage potential plaintiffs to come forward and challenge abuses. Violations of clear and accepted laws may ensure easy wins in court for plaintiffs like Rose. The Gender-Based Violence Law provides a hopeful example of an attempt to clarify the old Penal Code, and also to provide the necessary relief for a case like Rose's. In addition, the new Gender-Based Violence Law also makes proving domestic violence much easier than the old Civil Code: 'notwithstanding other legal provisions, evidences or testimonies related to gender based violence shall be produced in the courts by any person holding them, testimonies given by children and other people living in the household as well as those produced by neighbours shall be taken into account'.[65] Thoughtful constitutional claims brought alongside claims under these new laws will assure women's rights are upheld in accordance with the Constitution. Rose's case might also expose how police or other institutions that are supposed to enforce the law are failing to do so.

Even at the domestic litigation stage, it is also important to bear in mind the possibility of an appeal from national courts to the East African Court of Justice or other international forums. Rights assured to Rose under international instruments have also been violated. Although such laws are technically domesticated into Rwandan law, Rwandan courts need guidance on how to comply with international human rights standards, and the new dual system provides an avenue for creating this type of guidance through precedent setting and public interest litigation.

7.3 Class-action suits

For vulnerable women like Rose, class-action suits could be an effective means of changing laws and protecting other vulnerable people. Class-action suits are a 'device by which a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit'.[66] The court's ruling will then bind all members of the class. One of the advantages of class-action litigation is that people whose claims are too small to be pursued individually — or people

who cannot afford to pursue their claims, large or small — are given access to court. Another advantage is that the courts themselves are not inundated with numerous claims relating to a common subject matter. Associations may also be permitted to take court action whenever there is the violation of rights of its members.[67] This means that women's rights organisations may be given standing by the court and can potentially act on behalf of women like Rose in bringing these kinds of constitutional challenges to court. Cases like Rose's could be more effective and far-reaching if taken to court as class-action suits.

One example of a class-action suit in Rwanda is the case *Murorunkwere Speciose v State of Rwanda*, challenging article 354 of the Penal Code, which punished women for adultery but not men.[68] The Supreme Court found for the plaintiff and repealed that article. However, because court decisions are not currently published or binding for other courts, it is nearly impossible to determine the effects of this decision.

The *Speciose* case could serve as a procedural precedent for cases like Rose's and could set a standard in the new dual system of equal treatment of women and men under the law. However, because the decision is unpublished, it is nearly impossible for poor women or their advocates (if they can afford advocates) to utilise the procedures relied upon in prior cases, leaving them with no roadmap for constitutional litigation. In the dual system, common law judicial decisions that create a precedent are usually automatically published in law reports. According to recent reports from lawyers in Kigali, such reporting of judicial decisions has now started in Rwanda.

8 Conclusion

The legal landscape in Rwanda has historically been a system closed to public-interest advocacy and public-interest litigation. The system essentially prevented constitutional rights litigation affecting large groups of people. Instead, the system only allowed for the hearing of an individual's case and only in rare circumstances were constitutional challenges to laws, as applied, heard. Furthermore, judgments did not create legal precedent. Rose Ingabire's case is just one example of a woman trapped in an abusive marriage, unable to gather the necessary evidence to prove cause for divorce and without access to the resources needed to bring a successful suit for divorce or challenge the discriminatory law underlying her predicament. It is simply impossible for an unrepresented poor woman to manage to bring a constitutional claim in a Rwandan court under the Civil Law system.

However, with the shift toward common law jurisprudence in Rwanda, women like Rose can embrace what the common law system offers for the litigation of constitutional rights. Cases like Rose's can affect the rights of other women, thereby

setting a precedent for litigation of women's constitutional rights. The common law system provides a mechanism for challenging statutes that are unconstitutional on points of law, instead of relying on the haphazard application of the Constitution. However, this type of litigation has not yet been tested to see how courts will react to the power to make law in Rwanda, since traditionally it was unheard of for judges to make laws. Political influence is still a major barrier to justice, as judges are appointed by the executive and it cannot be ruled out that judges who are seen to be ruling against government policy might be demoted or dismissed. This lack of job security might compromise judges and render judgments ineffective.

Despite all of the challenges outlined in this chapter, women's fundamental human rights are at stake and these challenges must be faced for their sake.

Endnotes

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8 ARD Inc. & Rural Development Institute. (2008). 'Preliminary Women's Participation and Beneficiary Plan Part One: Recommendations from the field'. Report for USAID available at http://www.usaidlandtenure.net/library/country-level-reports/task-510-womens-participation-and-beneficiary-plan.pdf/view (accessed 15 July 2011).

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10 ARD Inc. & Rural Development Institute (n 8), 8.

11 Human Development Department (n 3).

12 USAID Institute for Legal Practice and Development (ILPD), 'Course: Gender and

domestic relations', 5, available at http://www.usaid.gov/pdf_docs/PNADH911.pdf (accessed 17 April 2012).

13 USAID Institute for Legal Practice and Development (ILPD) (n 12), 26.
14 USAID Institute for Legal Practice and Development (ILPD) (n 12), 26.
15 USAID Institute for Legal Practice and Development (ILPD) (n 12), 34.
16 Powley (n 7), 13.
17 Human Development Department (n 3).
18 Powley (n 7), 13.
19 USAID Institute for Legal Practice and Development (ILPD) (n 12), 26 and 36.
20 USAID Institute for Legal Practice and Development (ILPD) (n 12), 26 and 36.
21 Human Development Department (n 3).
22 Interestingly, the law reform process of this law was driven by the forum of Rwandan Women Parliamentarians, a legislative caucus open to women from all political parties. See Gomez, J. (n.d.) 'Policy brief: Combating gender-based violence: Legislative strategies', *Initiative for Inclusive Security*, available at http://www.huntalternatives.org/download/1342_combating_gbv.pdf (accessed 14 April 2011).
23 Powley (n 7), 11.
24 As discussed later, until the decision in *Murorunkwere Speciose v State of Rwanda*, RS/Inconst/Pén.001/08/CS, judgment rendered 26 September 2008 (unpublished), article 354 of the Penal Code, *Official Gazette* of 18 August 1977 (modified by Law 23 of 1981, confirmed by Law 1 of 1982 and Law 8 of 1983), punished adultery by women and men differently. See section 7.3 entitled 'Class action suits'.
25 For instance, the law does not create a general offence of 'gender-based violence' or 'domestic violence' and certain provisions of the Gender-Based Violence Law (n 2) only protect spouses of a civil law marriage, neglecting previous customary marriages (which are now illegal).
26 Powley (n 7), 12.
27 Civil Code Book I, 42 of 1988.
28 Human Development Department (n 3).
29 USAID Institute for Legal Practice and Development (ILPD) (n 12), 16.
30 Rwanda Development Gateway. (n.d.). 'Gender concepts', available at http://www.rwandagateway.org/spip.php?article112 (accessed 15 July 2011).
31 USAID Institute for Legal Practice and Development (ILPD) (n 12), 16.
32 See *Murorunkwere Speciose v State of Rwanda* (n 24).
33 This analysis of Rwandan divorce law relies on portions of an International Justice Mission internal document, used with permission.
34 Civil Code Book I (n 27) at articles 237 and 257.
35 This analysis will focus on divorce for cause, because divorce for mutual consent implies that the parties agree to separate and so the woman is in less compelling need of representation.
36 See Civil Code Book I (n 27) at article 237.
37 Civil Code Book I (n 27) at article 239.
38 Civil Code Book I (n 27) at article 250, paragraph 1.

39 Civil Code Book I (n 27) at article 250, paragraph 3.
40 Civil Code Book I (n 27) at article 250, paragraph 3.
41 See Matrimonial Regimes Law (n 1) at article 24. Presumably, the spouses share equally. Compare article 24 to article 4: 'In the event the regime of community of property is altered in accordance with article 19 of this law, the spouses shall equally share the assets and liabilities of the common property.'
42 Civil Code Book I (n 27) at article 280.
43 See Civil Code Book I (n 27) at article 283. The court can, of course, modify child custody as it sees fit when it is in the best interests of the children.
44 See Civil Code Book I (n 27) at article 282.
45 Civil Code Book I (n 27) at article 287.
46 Civil Code Book I (n 27) at article 289, paragraph 1 (community of property is probably divided equally under the same rationale).
47 Civil Code Book I (n 27) at article 290. If the separation *de corps* was by mutual consent then, after three years, the spouses must together request a divorce: Civil Code Book I (n 27) at article 291.
48 See Civil Code Book I (n 27) at article 237*(e)* and *(f)*; Ministry of Gender and Family Promotion, *Family Law and Matrimonial Property: Natural Persons, Family, Matrimonial Property Regimes, Liberalities, Successions* (September 2002) at 72.
49 Civil Code Book I (n 27) at article 237*(e)* and *(f)*.
50 Civil Code Book I (n 27) at article 237*(e)* and *(f)*.
51 This analysis assumes that the women contemplating divorce who are particularly disadvantaged by the law are those who are very poor with dependent children, and whose husbands physically abuse them.
52 Rose Ingabire's story is based on one woman's actual experience, but identifying details in the story have been changed to protect the client's identity.
53 Matrimonial Regimes Law (n 1) at article 3.
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55 See Rekosh, E. (2003). 'Public policy advocacy: Strategic litigation and international advocacy'. Unpublished presentation, Public Interest Law Initiative, Columbia University Budapest Law Center (on file with author).
56 Law on the Code of Civil, Commercial, Labour and Administrative Procedure 18 of 2004, article 2.
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63 European Roma Rights Centre/Interights/MPG (n 59), 33.
64 European Roma Rights Centre/Interights/MPG (n 59), 33.

65 Gender-Based Violence Law (n 2), article 13.
66 Hoexter, C. (2002). *The New Constitutional and Administrative Law.* Cape Town: Juta, 449, quoting the South African Law Reform Commission.
67 Hoexter (n 66).
68 *Murorunkwere Speciose v State of Rwanda* (n 24).

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CHAPTER 8

Associational life and women's constitutional rights in Africa

Ada Okoye Ordor

1 Introduction

Rights activism historically has drawn on the power of collective action in situations where individual effort alone is insufficient. This is particularly true of processes that seek to advance women's rights. Recognising the appeal of joint action in response to social and other issues in America, the French philosopher De Tocqueville, writing in the nineteenth century, observed that '[w]herever at the head of some new undertaking you see the government in France … in the United States you will be sure to find an association'.[1] In more recent times, this phenomenon has been described as a 'global associational revolution', which is illustrated by the overwhelming number and variety of associations that operate and network at international, national, local and community level.[2] It is in the context of associational networks initiating and driving movements that women's constitutional right to equality is discussed in this chapter.

Using the example of Nigeria, this chapter examines the use of the power of organisation and associational life by women to appropriate constitutional benefits and the challenges they are confronted with in the attempt to assert equal ownership of rights. It underlines the importance of identifying principal sites of contest in women's struggle for constitutional equality in Africa within the broader goal of gender equality. These contested areas include customary law and citizenship.[3] The chapter begins with a general discussion of the benefits of associational life, and proceeds to describe specific victories of associational activity around gender equality in Nigeria.[4] Legal advocacy by women's associations has resulted in new laws being passed that aim to protect women's rights, and strategic litigation has been successfully used to breathe life into protective laws. However, it is also clear that litigation on its own is insufficient as a long-term strategy. This chapter therefore proposes a range of strategies for addressing gender inequality in its diverse forms.

2 The dynamics of associational life

The public sphere, that space between government and the family or the individual, is characterised by civil society activity carried out by individuals and organisations that work for the advancement of its members or for the achievement of a public benefit. Among these are organisations devoted to the upliftment and advancement of women through rights-based approaches using political, legal, social, economic and other strategies.[5] A core element that commends associational activity is its intrinsic quality of giving expression to the freedom and inclination of people to interact and connect with other people with whom they share certain conditions, experiences and values. The convergence of people in associations is typically not an activity that flows from a command or an injunction. Rather it is an inherent right of people that is often formally recognised by the constitutions of democracies.[6] What makes associations all the more appealing as a means of pursuing, securing and protecting rights is their uncomplicated structural form and their 'minimum of regulatory control', which make them easily accessible to people experiencing various forms and levels of disempowerment.[7] Other features include self-governance, commitment that derives from voluntary participation and the distinct separation from government.[8] Associational life also lends itself to the flexibility needed to act as a single organisation, to partner or network with other organisations, and to reorganise as the need arises.[9] The non-profit character of civil society associations also makes them an attractive channel for communal development activities as the pressure to make and distribute financial profit to its members is absent. Moreover, the absence of a profit-making purpose induces confidence in the members, which is an essential element feeding into the effectiveness of associational activism.

The fact that organising and acting in concert may have widespread appeal does not mean that all associational activities possess a homogenous character or lead to uniform outcomes. Associations can always be disaggregated by size, purpose or focus area, nature of activities, geographical spread, membership criteria and other demographics. The most obvious discrepancy exists between international and community-based organisations. As scholars have observed, there is 'a sense of invidious comparison' between indigenous associations and international organisations that work with multi-billion dollar budgets.[10] Thus 'the fact that the Ford Foundation and the Progressive Young Farmers' Association are both non-profit does not imply that they necessarily reveal comparable organisational behaviour or face similar dilemmas'.[11] In light of the discrepancies in resources, Hassim rightly observes:

> *Perhaps ironically, the most vibrant and creative forms of collective solidarity are emerging at this* [community] *level, as women seek to address everyday crises*

> *with few resources. Yet community-level women's organisations seldom have the time, expertise or resources to address decision-makers, and women within other social movements do not as yet appear to have inserted a gender analysis into the conceptualisation of their struggles.*[12]

By drawing attention to the disempowering feature of lack of resources that often characterises life at the community level, this observation points to the need for associational networking between community organisations and other civil society formations that can supply what the former lack, and vice versa. According to Hassim, 'downward linkages between advocacy groups and other social movement allies' are 'equally important'.[13] As will be shown, networking between local and international organisations not only bridges resource gaps, but can lead to more effective engagement in specific cases of women's rights violations.[14]

Associations sometimes encounter challenges that can result in a 'fragmentation and stratification of [women's] organisations in civil society', with some adapting to new forms of association and others returning to community-based organising.[15] Thus seeds for new associational activity are taking root all the time, even if in seemingly undesirable situations such as fragmentation. In South Africa, for instance, the disaggregation in associational formations was uncovered after the 1994 elections, as the united bloc that characterised the women's movement in the previous decade experienced a loss of leadership with the appointment of many women leaders to positions in government. Describing this period, Hassim identifies three dimensions of the activities of women's movements:

> *… the arena of national policy advocacy; the arena of national and regional networks and coalitions; and the arena of women's everyday organising in community-based organisations.*[16]

The use of words such as 'networks', 'coalitions', 'community', and 'organising' indicates the centrality of associational life in the promotion and protection of women's rights at every level. Organisational effort therefore often precedes and even informs legal and policy interventions. Similarly, organisations subsequently make use of positive outcomes of these interventions of law and policy in advancing their organisational agenda.

Another benefit of associational life is that the involvement of more actors, in this case a critical mass of women, generates greater publicity for the cause.[17] Madunagu describes this as 'the strength of the critical mass, the richness in … diversity and the effectiveness and power in collectivity'.[18] In the past, mobilisation usually took the form of mass action carried out through associational networks, sometimes manifested in a ripple effect many years down the road. Nigerian history

provides an illustrative example. The unprecedented mass actions conducted by women in what is now known as the Aba Women's War of 1929 (south-east Nigeria) and the Egba Revolts of 1914 and 1947 (south-west Nigeria) were resoundingly effective as a result of the use of existing market channels and other associational networks by the organisers of the revolts.[19] The leaders of these protests eventually won seats on the local council.[20] Perhaps this repeated demonstration of active citizenship by women in the Nigerian south over the years was instrumental in securing them the right to vote in 1959—a right that was only extended to women in the northern region almost 20 years later in 1976.[21]

Although directed against increased taxation of all informal traders by the colonial native administration system, the Aba women's riots and the Egba revolts uncovered a capacity and readiness on the part of the women involved to react decisively to developments that they perceived as disproportionately disadvantageous to women. Given that most of the informal traders were women, the application of a new tax on traders immediately translated into an increased financial burden for women. It did not help matters that for the implementation of the new tax, the native administration system made use of often corrupt warrant chiefs in the Aba area and despotic traditional rulers in the Egba area.[22] By averting immediate imposition of the planned taxation, the protests served to check an arbitrary and non-inclusive administrative process.[23]

However, since this period in Nigeria's history, mass action by women has been described as 'sporadic, uncoordinated and unsustained'.[24] While community-based formations have continued to exist, women's organisations by way of urban-based, non-governmental organisations gradually took root and took over the spotlight. As a result, protests have been mostly replaced by awareness campaigns, which still include rallies and marches, legislative advocacy and strategic impact litigation around issues such as inheritance, domestic violence and child rights, as discussed in this chapter.[25] This shift is actually a reflection of a continental phenomenon of the 1980–90s, which saw the women's movement in Africa grow into a regional network of alliances clustered around cross-cutting concerns, such as violence against women, property rights, customary law and so on at national levels and beyond.[26]

In light of the benefits and potential of associational networks, the importance of developing a readily mobilised associational response or movement for the purpose of addressing inequalities against women is at the heart of this chapter. As Hassim observes, 'a women's movement should be built that is sufficiently mobilised to support a critical engagement with the state' and 'removing formal inequalities is also important, as this creates the normative and enabling environment in which women's claims to full citizenship can be pursued'.[27] In subsequent sections, this

chapter discusses issues of inequality in customary law and citizenship provisions drawing on contests where women either have engaged or could engage the power of association to appropriate constitutional entitlements.

3 Customary law and women's rights in Nigeria[28]

The focus of this section is not on specific customs, because these have already been substantially discussed in other works.[29] Rather, attention is directed at the implications of the intricate and highly nuanced legal environment that customary law constructs for women. The operation of customary law alongside other sources of law in postcolonial Nigeria creates a pluralistic legal environment that epitomises the legal structure of former British colonies in Africa. The body of laws is a combination of the received English law,[30] Nigerian legislation, Nigerian case law, and customary law that is defined to include Islamic law. Increasingly, laws passed by the Nigerian legislature and judgments of Nigerian courts have added significantly to the body of law, clarifying the application of the received English law and defining the scope of customary law.

For a customary practice to qualify as customary law, it must be acknowledged as an obligation by the community to such an extent that it is seen as 'a mirror of accepted usage'.[31] In other words, it must be recognised as law by members of the ethnic group to which it applies. For the courts to recognise a particular custom as law, the communal acceptance needs to have been proved in court frequently enough, in other words, on many occasions.[32] Proof of customary law in court may be by various means, including the calling of expert witnesses such as community elders and traditional rulers of that community, the use of authoritative textbooks, the advice of expert assessors or referees, the opinion of members of the court, who are required to possess expert knowledge of customary law and the use of judicial precedence.[33]

However, these methods of proving customary law are not always accurate because customary law is not fixed and may be contested. As Mamdani explains, it may be the case that dissenting voices are not heard and that 'in the absence of a recognition that conflicting views of the customary existed, even the question that they be represented could not arise'.[34] This critical observation reinforces and is reinforced by other writers who maintain that 'customary law … is a living and dynamic law—a law that must admit of development'[35] and that 'culture' and 'tradition' can be seen as unfinished projects that are continuously being transformed by cultural actors.[36]

The dynamic nature of customary law is recognised even in the judicial concept known as the validity test, a principle that operates on the rationale that a custom needs to be shown to be valid in order to continue to exist as law.[37] Under the validity test a rule of customary law must not be:

- repugnant to natural justice, equity and good conscience[38]
- incompatible either directly or by implication with existing law and
- contrary to public policy.

The first of these requirements is also described as the repugnancy doctrine, and while a custom does not necessarily offend the doctrine simply because it differs from the accepted norms of practice in other societies, it is usually not a simple matter to define what constitutes a violation of the repugnancy clause without the adjudicator applying an external standard. It must also be kept in mind that the courts may not modify a custom and recognise the modified form as customary law. In *Eshugbayi Eleko v Government of Nigeria*,[39] the court stated that its duty did not extend to transforming 'barbarous laws' and that once a custom failed the repugnancy test, the duty of the court was to abolish that custom. However, the court did observe that it was obliged to recognise and enforce changes in customary law brought about by social and political development, provided they were still recognised, in their milder forms, as binding custom within the community.[40] The absolute power of the courts to abolish customs that fail the validity test no doubt made affected members of communities wary and, perhaps, even more determined to protect those customs that remained unchallenged in court.[41]

The repugnancy test, it is believed, was intended to achieve a balance between the need to allow for local cultural expression, on the one hand, and the need to protect basic individual rights and liberties guaranteed under the common law, on the other hand.[42] However, the 'non-modification' stance of the colonial courts has also been perceived as detrimental to the positive development of custom. This view maintains that, rather than reject customs adjudged to be repugnant in their entirety, provision ought to have been made for the reform or modification of such customs.[43] By failing to make such provisions, the courts not only limited the space but slowed down the pace of communal reform of custom.[44] Ibhawoh therefore seems to be of the opinion that the courts could refer back customary law that does not pass the repugnancy test to its community of origin for modification to bring it within the framework of legal validity.[45]

It needs to be observed at this point that the common law doctrine of coverture must have affected the development of traditional colonial societies. Under the doctrine of coverture, a woman ceased to be a legal person once she got married. The personality of the wife became submerged in that of her husband: 'a husband and wife were regarded as one person and that person was the husband', a position that no doubt reinforced the subordination of women in colonial societies generally and in customary law jurisdictions specifically.[46] The coverture principle is still entrenched in different facets of the law, from customary to constitutional, in postcolonial

societies, including Nigeria, even though the laws of the former colonisers have been transformed. Unfortunately, in societies governed by customary law, it has not been as easy to dismantle this principle, which is at the core of the opposition to women's claim to equality. For a particular customary law to be abolished, it first has to be brought before the courts, because, as a judicial tool, the repugnancy clause can be invoked only by litigation challenging a particular custom.[47] Financial limitations and other constraints of litigation, such as social stigma, limit the use of litigation as a means to challenge gender discriminatory customs. Litigation is too expensive and many women would not want the notoriety that comes with openly taking on male-dominated cultural systems in court, where patriarchal attitudes could just as easily permeate the decision of the arbiters.[48] As a result, many gender discriminatory customs that have outlived their usefulness continue to exist in different communities. Nonetheless, significant inroads are being made in the advancement of women's rights through legislative advocacy and strategic litigation driven by associational networks, as is shown in the sections following.

4 Legislative progress in women's rights in Nigeria

Increasingly, civil society activism in Nigeria is putting pressure on legislative institutions to develop new legislation to abolish retrogressive cultural practices.[49] For example, in 2001, the Enugu State legislature passed the Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law 3 of 2001 as a result of years of synergised legislative advocacy by different women's rights organisations such as the Enugu-based Women's Aid Collective (WACOL) and other organisations under the network known as South-Eastern Women's Caucus. The successful campaign that led to the enactment of this law demonstrates how strategic use of associational networks can have a significant impact on promoting women's rights. It also influenced the passage of similar laws in other states.[50] For this campaign, as well as for other activities, WACOL has drawn support from its membership of a wide range of network organisations, such as the Gender and Constitutional Reform Network, the Widows' Rights Coalition, the South Eastern Women's Caucus, the Electoral Reform Network, the Legislative Advocacy Coalition on Violence against Women, the Enugu State Coalition of Civil Societies on HIV and AIDS, and the Transition Monitoring Group.[51] In addition to legislative advocacy campaigns, these networks have made an invaluable contribution to the constitutional reform debate, political transition processes and the documentation of human rights information.[52]

Both at national and state levels, these networks have also been instrumental in securing other legislative successes on women's and girls' rights, such as the Child Rights Act 2003[53] and the Protection against Domestic Violence Law of Lagos

State, which came into effect in 2007. A similar law on domestic violence was passed earlier in Cross River State in 2004 and in Ebonyi State in 2005.[54] Although not many states have passed a dedicated law on domestic violence, it is a good start that some states such as Lagos have finally taken the first step to address domestic violence by enacting a law that improves the grossly insufficient protection offered to women by the Criminal Code and the Penal Code.[55] In fact, the Penal Code does not offer any protection against domestic violence as it allows wife beating under a section entitled 'correction of child, pupil, servant or wife', as long as it does not result in grievous harm.[56] Many organisations collaborated under umbrella networks, such as the National Coalition on Violence against Women and the Legislative Advocacy Coalition on Violence against Women to secure the passage of the new domestic violence laws. By co-operating, the capacity of the networks was expanded to carry out intense lobbying, public hearings and widespread workshops, under significant media publicity. The Child Rights Act 2003 is particularly valuable for the girl child. In section 277, the Act defines a 'child' as a person under the age of 18 years and protects, among other rights, the child's right to development and survival, the right to a name, nationality and family life, the right to parental care, health, education and special protective measures.[57] The Child Rights Act criminalises child betrothal and child marriage and establishes a minimum age for marriage.[58] However, it is not clear how the minimum marriage age will affect the constitutional provision, which states that any woman who is married shall be deemed to be of full age.[59] This provision is often used to make child marriage seem less objectionable. With regard to the implementation of the Child Rights Act, it has also been pointed out that constitutional provisions on legislative competence require that corresponding legislation be passed by each State House of Assembly. Only then can the Child Rights Act and the Family Courts, designated to give effect to the Act, take off at state level.[60] Nonetheless, it should not go unnoticed that many states have passed a law on the rights of children, which is an indication of the success of the legislative campaigns by associational networks.[61]

Gains from legislative advocacy are further consolidated when civil society networks publicise and utilise them to further other campaigns. Legislative advocacy often results in the enactment of progressive laws in other jurisdictions, as illustrated by the laws on the protection of widows. Soon after Enugu State passed the first such law in 2001, Oyo and Ekiti states in the south-west quickly followed in 2002, while Edo in the south and Anambra in the south-east followed suit in 2004.[62] However, legislation in itself is often not enough—judicial interpretation of new statutory provisions is essential to establish a body of case law. Therefore, associational support for strategic litigation remains a relevant

tool for breathing life into new and older laws. By challenging the detrimental application of customary and religious laws, judicial interpretation contributes in no small way to the protection of women's rights in Africa.

5 Litigation challenging customary and religious law

5.1 Associational activism on religious law

Earlier in this chapter, reference was made to financial limitations and social stigma as constraints to individual litigation over women's rights. This section illustrates how these constraints can be addressed by associational strength through the provision of financial support, professional legal services, as well as much-needed solidarity. This was the situation in the *Safiyatu Hussaini Tungar Tudu* case[63] in which Safiyatu had received a death sentence by stoning for adultery under Sharia law. The Abuja-based non-governmental organisation, Women's Rights Advancement Protection Alternative (WRAPA), briefed lawyers who then successfully appealed to the Sharia Court of Appeal against Safiyatu's 2001 conviction and secured her discharge through its free legal-aid service.[64] Subsequently, in the *Amina Lawal* case, WRAPA succeeded in getting a conviction made in 2002 on similar facts overturned.[65] As with the *Safiyatu* case, the *Amina Lawal* case drew intense local and international attention because of the gravity of the human rights issues involved. In both cases, WRAPA's legal team collaborated with lawyers from other national and international non-governmental organisations.[66] The delicate process of handling each of these two appeals was carried out under international scrutiny and in the midst of a local environment charged with religious tension. WRAPA therefore coordinated periodic stakeholder meetings during which options and strategies for conducting the defence were discussed. Yawuri described the stakeholder meetings as follows:

> *The 'stakeholders' included a wide range of organisations and individuals (lawyers, academicians, scholars and activists) interested in two main things: first, saving the life of Safiyatu, and second, handling the appeal in such a way that the eventual judgment of the Sharia Court of Appeal would serve as a useful precedent in future* zina [adultery] *cases. The stakeholders group continued its work during the subsequent appeal of Amina Lawal.*[67]

As intended, the success of the appeals served to establish much-needed precedents in the application of Sharia jurisprudence to an aspect of women's rights in Nigeria. The stakeholders' cooperation described above further demonstrates the fact that whether interventions for the advancement of women's rights are made through legislative channels or by means of litigation, such gains have usually

been achieved through dedicated collaboration by networks of solidarity forged between organisations and people committed to upholding the rights of women. It is this associational force that propels the legislature to replace discriminatory laws with progressive ones and stirs the conscience of the judiciary to interpret the law in ways that promote constitutional equality and set positive judicial precedents, as evidenced by the cases of *Safiyatu* and *Amina*.

5.2 Associational activism around inheritance customs

Litigation has also been strategically utilised to challenge certain customary practices in other parts of Nigeria. In the cases of *Mojekwu v Mojekwu*[68] and *Mojekwu v Ejikeme*,[69] both of which received support and publicity from local branches of the International Federation of Women Lawyers,[70] the repugnancy clause was invoked by the Court of Appeal to overthrow a custom that prevented a woman from succeeding to the estate of a deceased father. According to this custom, in the absence of a son, a woman could not inherit from her father unless certain objectionable ceremonies were performed on her. However, in *Mojekwu v Mojekwu*, the Court of Appeal found that since the deceased had held the property under a *kola* tenancy, his widow and offspring, whether male or female, could inherit his property.[71] The *kola* tenancy is a customary land transaction that operates as a licence to use land. With the passage of time, and due to its undocumented nature, the land is often never reclaimed by the original owner.[72] The court went further by ruling against the validity of the long-standing *oli-ekpe* custom practised in some parts of south-east Nigeria. Under the *oli-ekpe* custom, inheritance of the property of a deceased man was by his son, or if he had no surviving son, by a brother, or on the latter's death, by his son. Women do not inherit under this custom. The judgment rejecting this custom was a unanimous decision by an all-male panel of judges who observed that 'a court of law being a court of equity as well, cannot invoke a customary law which is repugnant to natural justice, equity and good conscience. The *oli-ekpe* custom is one of such customs.'[73]

In 2000, the Court of Appeal restated this position in the case of *Mojekwu v Ejikeme*[74] by again declaring the *oli-ekpe* custom, as well as a related custom known as *nrachi*, invalid on the grounds, that, among others, its discriminatory effect against women was repugnant to natural justice, equity and good conscience. In this case, the two customs had been invoked to exclude the appellants — a woman, her son and her sister's son — from inheriting the property of the woman's grandfather, which had passed on to her through her mother in the absence of a son in the generations succeeding her grandfather. The respondents, distant male cousins, sought to dispossess the appellants of the landed property on the ground that since the ancestor had no surviving son, his property could not have

vested in his daughter, and subsequently in that daughter's child, unless the *nrachi* ceremony was performed on them. This ceremony entitled a man who had no son to keep one of his daughters from getting married until she succeeded in producing a male heir for her father's lineage. The daughter appointed for this purpose would be free to procreate but not necessarily with one particular man. The respondents in *Mojekwu v Ejikeme*[75] argued that since this ceremony was neither performed on the appellant's mother nor on the appellant, she was not eligible under customary law to produce *the* male heir who could inherit the property. As stated earlier, the Court invalidated the customs for having failed the repugnancy clause of the validity test.

On appeal, the Supreme Court maintained that the issues raised did not require the Court of Appeal to go into the merits of the particular custom in question and set aside the part of the judgment that abolished the custom in contention.[76] It, nonetheless, upheld the entitlement of the appellants to inherit the property in dispute on the ground that it was administered under a *kola* tenancy, which permitted inheritance by a successor of either gender.[77] Thus the outcome of the litigation was that the original property-owner's daughter and those who derived title through her, namely the appellants, were held to be legitimately entitled to the property — a victory all the same.

5.3 Risks of litigation

It is important to recognise that sometimes litigation runs the risk of negative outcomes for the litigants of the case and subsequent litigants through the effect of judicial precedents. This is illustrated by the Supreme Court decision in *Mojekwu v Iwuchukwu*[78] where, in the same victorious judgment, the court introduced a key element in the application of the repugnancy test that may, in subsequent judgments, have severe implications for women's rights. According to the Supreme Court justices, the views and position of members of the community, whose custom is challenged as repugnant, should be taken into account in deciding on the fate of the custom.[79] The message from the Supreme Court seems to be that failure to do so would attract the risk of the decision being overturned by an appellate court. This development introduces a significant qualification to the repugnancy clause of the validity test, namely that of communal acceptance of the abolition of the custom in question. A clear pronouncement from the apex court will be required in subsequent cases to clarify whether this is truly its position.

It needs to be highlighted that by introducing such a qualification, the Supreme Court seems to have overlooked, or else ignored, the very reason why the customary law validity test was made a judicial tool. The aim of the test is to take the assessment of a custom out of the subjective domain of those who practise that custom and

entrust it to the more objective consideration of the judiciary. By taking into account the opinion of those who benefit, in a negative sense, from a controversial custom, the purpose of a validity test may well be defeated. Considering that the validity test has additional criteria to the repugnancy clause, such as compatibility with existing law and coherence with public policy, it is submitted that sufficient parameters have been laid for an objective application of the validity test by courts to questionable customs.

This issue clearly has implications for Nigerian women as a whole and therefore calls for a strategic response from women's associations. In this context, associational synergy could be applied in a number of ways. First, women's rights organisations need to educate women's groups, particularly in communities most vulnerable to cultural oppression, on what the Supreme Court decision *did* establish: that there are circumstances under which women *can* inherit, *kola* tenancy clearly being one of them. Secondly, action research can be commissioned to study the *kola* tenancy as a gender-inclusive form of real property ownership, in comparison with forms of property ownership that exclude women, to determine how the boundaries of property ownership can be redefined and widened for women. Thirdly, applying the first and second points, the women's movement should prepare for concerted action to litigate this resistant subject in carefully selected, well-researched cases.

6 Women's citizenship rights under the Nigerian Constitution

In addition to discriminatory customary and religious laws, the Constitution itself, perhaps unwittingly, fuels inequality through its provisions on citizenship. Citizenship is a multi-dimensional construct, encompassing social, political, legal and other entitlements, deriving from the individual's relationship with the state.[80] Liberal constructions of citizenship presume equality of status, rights and duties for all members of the political entity and overlook principles of inequality deriving from gender, ethnicity, class, race or other categories.[81] In contrast to this view, a glaring example of gender inequality is found in the provision of the Nigerian Constitution on citizenship by registration.

6.1 Citizenship by registration under the Nigerian Constitution

Restating the position in the 1979 Constitution, the 1999 Nigerian Constitution (Constitution) provides for three categories of citizenship, namely, citizenship by birth, citizenship by registration, and citizenship by naturalisation.[82] While the sections on citizenship by birth and naturalisation apply equally to men and women, the contentious provision is section 26 of the Constitution, which deals with citizenship by registration:

(1) Subject to the provisions of section 28 of this Constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the President is satisfied that—

(a) he is a person of good character;

(b) he has shown a clear intention of his desire to be domiciled in Nigeria; and

(c) he has taken the Oath of Allegiance prescribed in the Seventh Schedule to this Constitution.

(2) The provisions of this section shall apply to—

(a) any woman who is or has been married to a citizen of Nigeria; or

(b) every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.

The gender-discriminatory element of this provision lies in the fact that it facilitates the acquisition of Nigerian citizenship by non-Nigerian women married to Nigerian men, but this does not apply the other way around.[83] Thus, Nigerian women are denied a privilege that the Constitution guarantees their male compatriots. To date, no one has challenged the provision in court.[84] It may be that many women affected by it either live outside the country, or else may be satisfied with the provision allowing 'full residential rights' to a foreign spouse.[85] Possibly the prospect of taking the Nigerian government to court is considered too daunting by those affected by the provision. It is doubtful whether women would be disposed to applying the time, resources, mental and emotional energy it would require to take on state machinery on this provision at present.[86]

An attempt to analyse why the provision on citizenship by registration is as it is may shed light on the underlying assumptions of this provision.[87] First, by implicitly recognising that some non-Nigerian spouses may not wish to acquire Nigerian citizenship, the provision automatically acknowledges the possibility that other non-Nigerian spouses, whether male or female, *do* want to acquire Nigerian citizenship. Nonetheless, the lawmakers failed to make a corresponding provision for citizenship by registration for foreigners married to Nigerian women. Secondly, the difference suggests either that foreigners married to Nigerian women are not expected to desire citizenship, or else they are encouraged not to want it. For those who do want it, the only option is the naturalisation route with its steep 15-year-residency requirement.[88] This fact points to a third assumption: that a longer period of time is required to prove a man's loyalty to a country than is needed to prove the loyalty of a woman. In the absence of an express or obvious justification for the discriminatory nature of this provision, a review of Nigeria's constitutional development in the next section may shed some light on the rationale behind the provision.

6.2 The influence of constitutional developments on citizenship rights

The period immediately preceding the end of colonial rule in Nigeria has been described as an era that was dominated 'by the struggle for self-determination by nationalist crusaders who were themselves soon overpowered by the military in a contest for the soul of an independent nation'.[89] In this context, the analysis has been offered that 'whereas the earlier constitutions sought to secure a means of maintaining order and the subordination of the inhabitants of the colonial territory, subsequent constitutional experiments were influenced by demands for independence by a growing number of nationalists'.[90]

> *Thus Nigeria's constitutional engineering process moved from the complete subordination of the protectorate by the colonial government under the 'Clifford' Constitution of 1922 through an insignificant representation of its people in the Legislative Council under the 'Richard' Constitution of 1946, followed by the emergence of a 'semi-responsible government' with the 'Macpherson' Constitution of 1951, internal self-government under the 1954 'Lyttleton' Constitution, to independence with the Independence Act of 1960, which also ushered in the 1960 Constitution.*[91]

With increased prospects for independence came heightened unease among minority ethnic groups fuelled by fear of domination by majority ethnic groups, following recurrent ethnic and regional conflicts. The representations made by ethnic minorities on this led to the setting up of the Minorities Commission in 1958 (also known as the Willinks Commission), which recommended the inclusion of a bill of rights in the Constitution as a means of protecting the interests of minority groups. Therefore, in 1958, a bill of rights was introduced into the 1954 Constitution and this was retained in the 1960 Constitution.[92] Subsequent constitutions, namely, the Republican Constitution of 1963, the Presidential Constitution of 1979 and the 1999 Constitution all incorporated a bill of rights, the contents of which were essentially consistent with international human rights standards. Nonetheless, it was a bill of rights[93] that was originally prompted by the concerns and demands of minority ethnic groups, rather than by considerations of gender equality and gender justice.[94] Besides, like its predecessor, the 1999 Constitution was passed by decree, not through a democratic process.[95]

While constitutional rights may be subject to qualifications,[96] there is no explicit intention for section 26(2)*(a)* of the Constitution to operate as a qualification to section 42 of the Constitution, which prohibits discrimination on a number of listed grounds, including sex. It is submitted that citizenship, and all the entitlements

that come with it, is a right that should not admit of any qualification that would translate to reduced constitutional standing for female citizens. The exclusionary citizenship provision is thus clearly a constitutional matter in which women's equality is undermined without justification. As such, it needs to be addressed as an undisguised challenge to the constitutional equality of *all* Nigerian women, as it confers on male citizens a privilege that female citizens do not have. This has the inevitable outcome of reinforcing negative notions of women's subordination, propagated and practised under both common law and customary law. Although section 26(2)*(a)* of the Constitution may be perceived as an insignificant provision that affects only a marginal proportion of women, every Nigerian woman is a potential victim of its gender-discriminatory effect and it should, therefore, be problematised as such.

It needs to be recalled that shortly after the 1999 Constitution took effect, a memorandum containing proposals for constitutional review, drawing attention to this provision, among others, was submitted to the Presidential Technical Committee on Constitutional Reform.[97] It is important for this initiative to be revived and placed squarely in the ongoing discourse on constitutional review. Equally important is the need to study and replicate the kind of synergy that led to the articulation of that memorandum, while learning from the shortcomings of the process.[98]

In addition to reviving the legislative advocacy campaign, constitutional litigation seems appropriate in this case. However, litigation must be approached in such a way as to avoid the common pitfall of lack of *locus standi*, often raised by the state when a court case is instituted by someone not directly affected by or connected with a matter. Associations of women will need to confer, cooperate and collaborate in this process to identify women with a clear *locus standi* (in the sense of being married to foreigners) who are keen to participate in this effort. It is important to have multiple plaintiffs to ensure that some remain to pursue the case to the end if anyone withdraws. Advocacy and litigation will have to be complemented by efforts to mobilise resources and support from selected women's groups willing to take a clear public stance on this discriminatory provision of the Constitution. It would also be useful to study successful challenges to discriminatory citizenship provisions elsewhere on the continent. A case in point is the Botswana case of *Attorney-General of Botswana v Unity Dow*, which is discussed next.[99]

6.3 An African precedent on constitutional citizenship

In the case of *Attorney-General of Botswana v Unity Dow*,[100] the applicant, Ms Unity Dow, petitioned the High Court to declare sections 4 and 13 of the

Botswana Citizenship Act of 1984, as well as certain other provisions, *ultra vires* section 3 of the Botswana Constitution of 1966. Section 3 of the Botswana Constitution guarantees every citizen of Botswana fundamental rights and freedoms without discrimination on several stated grounds, including sex. The applicant submitted that the Botswana Citizenship Act deprived women of the power to transmit citizenship to foreign husbands and to children born into a marriage to a foreign man. The relevant provision did not apply to a Botswana man married to a foreigner.

The arguments for the State were vigorously pursued on several grounds, including the need to maintain certainty of citizenship and avoid dual citizenship. Other grounds were the preservation of customary law and the maintenance of the body of law in general. According to the counsel for the State, '… huge chunks of our law would be liable to be struck down' if all the discriminatory provisions were removed.[101] Thus the discriminatory character of the law was not disputed. Rather, the point was made that 'the whole fabric of the customary law in Botswana … is based upon a patrilineal society which is gender-discriminatory in nature'.[102] Leaving room for dual citizenship, it was further asserted, would jeopardise the sole nationality of indigenous people. As observed elsewhere by this author:

> *It did not seem relevant to this argument that the same consequences flowed from the marriage of a Botswana man to a non-Botswana woman since the offspring of such a marriage would usually be eligible for citizenship of their mother's country as well as that of their father's, that customary law would not apply significantly, if at all, in such a marriage, and that whatever jeopardy was foreseen to the indigenous population by a male foreign spouse would not be removed by reason of the foreign partner in the marriage being the woman.*[103]

This analysis would seem to apply generally to the projection of the 'patrilineal' argument as a ground for having unequal provisions on citizenship, whether in the Constitution or in any other law. The Court of Appeal upheld the High Court judgment, which had been delivered in favour of Ms Dow. The judgment of the appellate court was anchored on a number of grounds, including canons of the Constitution, as well as provisions of international instruments. In the judgment, the Court of Appeal observed:

> *Fundamental rights are conferred on the basis that, irrespective of the government's nature or predilections, the individual should be able to assert his rights and freedoms without reliance on its goodwill or courtesy. It is protection against possible tyranny, oppression or deprivations of those self same rights.*[104]

Furthermore, the Court of Appeal stated:

> *It is plain and beyond any controversy, in my view, that the effect of Section 4 of the* [Citizenship] *Act is to accord an advantage or a privilege to a man which is denied to a woman. The language of the section is extremely clear and the effect is incontrovertible, namely that whilst the offspring of a Botswana man acquires his citizenship if the child is born in wedlock such an offspring of a Botswana woman similarly born does not acquire such citizenship. A more discriminatory provision can hardly be imagined.*[105]

Consequently, section 4 of the Citizenship Act was held to be *ultra vires* the Constitution and was, therefore, declared null and void.

It is quite possible that litigation in Nigeria and other African countries would lead to a similar outcome, given that most post-colonial legal traditions following the British legal system recognise the persuasive weight of judicial precedents across jurisdictions.[106] Furthermore, and perhaps more compelling, most African countries are signatories to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),[107] the *African Charter on Human and Peoples' Rights* (ACHPR)[108] as well as other international instruments that prohibit discrimination against women.[109] These are clear indicators that litigation can draw on the provisions of international conventions as a means of abolishing discriminatory laws and promoting equality, not only in Nigeria, but also in other African jurisdictions that share this anomalous situation.

7 Contemporary strategies of engagement with gender-discriminatory laws and practices

The case law discussed in this chapter demonstrates that litigation can be a very effective tool for fighting gender discrimination and making successful incursions into customary and religious laws that discriminate against women. Even if litigation does not quite achieve all its goals, as in the *Mojekwu v Mojekwu* case, the publicity around a particular case can create awareness in society and may be useful for the successful execution of a similar campaign at a later time.[110] However, as earlier stated, litigation cannot stand alone and may not be ideal in all cases or at all stages. It therefore needs to be determined which ground can be claimed or reclaimed by litigation and which turf must be secured by other means. Furthermore, litigation as a tool is effective only to the extent that women are willing to get the institutions concerned to enforce court judgments. In recognition of this fact and of the place of associational strategy post-litigation, Sara Longwe observes in the Foreword to the Lentswe La Lesedi publication of the *Unity Dow* case:

> *In the face of such patriarchal intransigence the test case clearly needs to be part of a larger liberation strategy. Political mobilization of the sisterhood in Africa is needed to push governments to meet their constitutional responsibilities to women. A test case can provide a necessary and powerful weapon in the women's struggle for equal treatment, but it is not sufficient in itself.*[111]

This means, therefore, that while women's groups with the capacity and mandate to do so should focus on which cases to take to court, alternative and complementary forms of engagement need to continue in order to challenge gender inequality in all its forms and from various angles.[112]

7.1 The potential of litigation

In the context of competing demands for limited resources that characterise developing societies in Africa, constitutional litigation is a particularly valuable investment of time and money where the issues sought to be addressed are those that affect large groups of women. For example, in relation to practices that are rooted in customary law, religious law and other legal sources that tend to apply to women in general, judicial precedents would be useful to give direction to subsequent cases of a similar nature. Judicial precedent offers more than symbolic value because of its potential to inform positive shifts in thinking, if sufficiently publicised, analysed and systematically disseminated, as was done with the Court of Appeal decision in the *Mojekwu v Mojekwu*[113] and *Mojekwu v Ejikeme*[114] cases. Even where an issue affects only a particular group of women and not the majority, litigation is worth considering when constitutional rights are at stake. For example, laws that persistently convey notions of women's inequality, such as the Nigerian citizenship provisions, call for litigation alongside legislative reform. This means that while litigation must necessarily focus on issues that affect mass blocs of women, issues that undermine the constitutional equality of women should also be prioritised for litigation.

Furthermore, positive outcomes of case law and campaigns should be distilled and communicated in positive terms. For example, the decisions by the Court of Appeal and the Supreme Court in *Mojekwu v Mojekwu*[115] upheld the standing of women in the family, specifically the daughter of the property owner, to inherit the property in question under the *kola* tenancy. However, this fact does not seem to have been celebrated as much as the Supreme Court criticism of the Court of Appeal for invalidating a custom was mourned. The Supreme Court judgment still recorded a victory for women's property rights and should, therefore, be widely disseminated.[116] Activities that promote or project women's rights tend to generate interest and awareness, which must be capitalised on.[117]

7.2 Collaboration with local stakeholders and indigenous systems

It is also important that litigation or legislative reform campaigns are accompanied and, in deserving cases, preceded by negotiations with the authorities or entities that wield the power sought to be challenged, be they customary, religious, parliamentary, executive or whatever. In the *Safiyatu*[118] and *Amina*[119] cases, for instance, numerous stakeholder meetings were held. In addition, the lead defence counsel in Safiyatu's case, in taking steps to represent her, first consulted with the village head who then accompanied him to meet with Safiyatu's family, thus garnering local support for the litigation that subsequently followed.[120] Furthermore, in Amina's case, the option of simply applying to the High Court to get the conviction of the Sharia court overturned was canvassed at the stakeholders' meeting, but was discarded as it was felt that such a step could easily be perceived as a slight on Sharia law, which would further delegitimise the women's rights process in the minds of Sharia adherents. It was maintained by the defence counsel, and subsequently demonstrated in the conduct and outcome of the cases, that the same system of law under which the offenders were convicted possessed the legal mechanisms to undo the harsh sentences.[121] It is instructive that the spate of convictions of women for adultery in Sharia jurisdictions in Nigeria quietened with the establishment of judicial precedents under Sharia jurisprudence in the two cases. Perhaps if a national or international sledgehammer had been brought down on the process, the trend of convictions and death sentences might have continued. Rather, by acting in association, the organisations and individuals involved in the appeals process soon identified the key issues and efforts quickly crystallised around the agreed plan of action. A press statement issued at the end of the case acknowledges the power of associational engagement.[122]

7.3 Associational activism at community level

Another strategy is to strongly engage associations that work at community level. By failing to uphold the part of the Court of Appeal judgment outlawing the objectionable customs in issue in *Mojekwu v Ejikeme*,[123] the Supreme Court sent a clear signal that any key effort to address situations such as those rooted in a people's culture must take highly nuanced contextual dynamics into consideration. It is here that the strengths of associational life must be deployed. Organisations committed to promoting the rights of women need to find ways to utilise, on a continuing basis, the spaces and structures created by other associational networks of men and women at various levels within and across communities. At the community level, interaction occurs through associational networks organised around communal, religious, vocational and commercial business interests. Through these

organisations, views favourable to the rights of women can be 'channelled' into the day-to-day issues addressed by these networks. Governance at the village level is more heavily influenced by community networks than anything else and these networks have access to established traditional authorities. As Enemo emphasises, the 'sensitisation of traditional rulers' is crucial because they 'are the custodians of our customs, and … can effect the necessary changes therein'.[124]

Furthermore, due to the dynamic nature of customary law, numerous negotiations are conducted on an ongoing basis within these networks at village, clan and extended family levels to adapt existing customary law to new realities and contemporary developments in local societies. For example, although customary law requires the physical presence of the couple and their families for traditional marriage ceremonies among the Igbos of south-east Nigeria, it is now acceptable for the families of the couple to stand proxy for the couple if the latter live outside the country and are unable to attend the ceremony.[125] The flexibility and fluidity of practices that constitute customary law also point to the potential for the growth and development of customary law when progressive minds engage with their communities in associational networks, rather than from a top-down or other paternalistic approach.

7.4 Developing differentiated strategies

Finally, in taking effective ownership of associational resources, it is essential to recognise the similarities and divergencies in women's lives and work within and across different groups. As Okech observes, '[g]roups of women who act together are often quite heterogeneous, and their ability to act comes from respecting difference while also forging a common argument through a shared set of questions'.[126] For women in disempowered positions in rural communities, for example, the immediate need may simply be for direction to the right associational path that will help them claim their constitutional rights, whereas the needs of educated urban women may be quite different. Networking between women's associations at different levels creates synergies while ensuring that efforts are applied accurately to real rather than merely perceived needs.

8 Conclusion

This chapter sought to highlight the place of associational life in the struggle for the emancipation of women's human rights from disempowering strongholds in an African context. In Nigeria, gender inequalities manifest very strongly in customary law and citizenship provisions. Legislative advocacy and judicial precedents are powerful tools for challenging these inequalities. However, these tools are usually

not effectively deployed by individual protagonists due to limited resources and the fear of a social stigma backlash. Furthermore, the institutions ultimately responsible for rights protection have traditionally been patriarchal—be they customary, legislative, judicial, religious or otherwise. These and other impediments make it both necessary and imperative for women to act in association with other women and men in seeking to secure or appropriate constitutional rights. Acting together increases access to resources and provides much needed solidarity. It also makes room for creative input to be channelled into the process in ways that secure the goals, while maintaining sensitivity to differing worldviews, as happened in the *Safiyatu* and *Amina* cases, for example.

Associational networks increase individual and organisational capacity to synergise and enhance the effectiveness of women's rights activism in a variety of ways. In particular, associational engagement contributes to the process of determining the legal strategy to apply in a given situation. Legislative advocacy holds the appeal of potentially producing law that addresses a given situation, but almost immediately, judicial interpretation is required to bring clarity into the application of the new law, thereby requiring strategic impact litigation. Ongoing associational leverage is, therefore, necessary to propel legislative advocacy, support the relevant party or parties through a judicial process and disseminate positive outcomes in empowering ways, particularly for women in dire situations of inequality.

Endnotes

1 De Tocqueville, A. [1835] (1983). 'Democracy in America', in B. O'Connell (ed.). *America's Voluntary Spirit: A Book of Readings*. New York: The Foundation Center, 54.

2 'Question & answer: Lester Salamon on the influence of nonprofits'. (2000). *The Gazette Online: Newspaper of the Johns Hopkins University* 29(16), available at http://.www.jhu.edu/~gazette/2000/jan0300/031estxt.html (accessed 2 July 2013).

3 See Okoye, A. (2003). *Gender, Citizenship and Customary Law from Colonial to Commonwealth Africa*, available at http://web.uct.ac.za/org/gwsafrica/knowledge/ada.htm (accessed 1 July 2013).

4 The terms 'associational life' (and its derivatives), 'movement', 'collective action', 'civil society formations' and other similar expressions are used interchangeably in this work.

5 It is also important to note that many of the inequalities that women face emanate from those forms of associational engagement that establish hegemonic systems. Often these include, for example, cultural groups that practise or recognise patriarchal rites of passage and traditional paternalistic trade unions that do not cater for gender differences. However, as Bakare-Yusuf observes, 'rather than

viewing these systems as revolving around a master plan or closed hierarchical system that is imposed from above, it is more productive to look at how groups and individuals shape autonomous patterns of being, producing sites of struggle, contestation, complicity and transformation in the process'. This observation implies that the existential dynamics of these hegemonic systems need to be studied if the stranglehold they have on women's equality is to be broken. In this regard, other, more progressive, forms of associational engagement can work to negotiate this 'liberation' process. See Bakare-Yusuf, B. (2003). 'Determinism: The phenomenology of African female existence', *Feminist Africa: Changing Cultures* 2: 8–24 at 19.

6 In Nigeria, for instance, the right to join an association is protected under section 40 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree 24 of 1999 (the Constitution).

7 Salamon, L. (1999). *America's Nonprofit Sector: A Primer*, 2nd ed. New York: The Foundation Center, 10–11. This implies that there are less stringent registration and operational requirements and procedures for voluntary forms of association than would apply, for instance, to commercial entities.

8 Salamon, L. (n 7).

9 Harding, D. (1994). *From Global to Local: Issues and Challenges Facing NGOs.* AVOCADO Series, 22. Durban: Olive Information Service.

10 Welch, C. (2004). 'Human rights and development in Africa: NGOs', in P.T. Zeleza & P.J. McConnaughay (eds). *Human Rights, the Rule of Law, and Development in Africa*. Philadelphia, PA: University of Pennsylvania Press, 198–208 at 204.

11 Anheier, H. (1990). 'Private voluntary organizations and the third world: The case of Africa', in H.K. Anheier & W. Seibel (eds). *The Third Sector: Comparative Studies of Nonprofit Organizations*. Berlin: Walter de Gruyter, 361–376 at 368.

12 Hassim, S. (2005). 'Terms of engagement: South African challenges', *Feminist Africa* 4: 10–28 at 19–20.

13 Hassim,'Terms of engagement' (n 12), 16.

14 See section 5.1,'Associational activism on religious law' later in this chapter.

15 Hassim, 'Terms of engagement' (n 12), 14.

16 Hassim, 'Terms of engagement' (n 12), 15.

17 This was a key outcome of the Nigerian case of *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt. 512), discussed later in this Chapter in the section on 'Associational activism around inheritance customs'.

18 African Women's Development Fund. (2006). *Report of the First African Feminist Forum.* Accra: African Women's Development Fund, 7, available at http://www.africanfeministforum.com/wp-content/uploads/2010/10/AFF-2006-Report.pdf (accessed 2 July 2013).

19 Olumese, I. (1998). 'Women in non-governmental organisations', in A. Sesay & A. Odebiyi (eds). *Nigerian Women in Society and Development*. Ibadan: Dokun Publishing House, 155–163 at 156.

20 Tamale, S. (1996). 'Taking the beast by its horns: Formal resistance to women's oppression in Africa', *Africa Development* 21(4): 5–21.

21 Okoye, A. (2000). 'Sharing the citizenship of women: A comparative gendered analysis of the concept of "legal personhood" in Africa', in E. Salo & H. Moffett (eds). *Associates' Publications.* Cape Town: University of Cape Town, available at http://web.uct.ac.za/org/gwsafrica/knowledge/ap3.htm (accessed 1 July 2013).

22 See Sesay, A. & Obadare, E. (1998). 'UN agencies and women in Nigeria', in A. Sesay & A. Odebiyi (eds). *Nigerian Women in Society and Development*. Ibadan: Dokun Publishing House, 181–198 at 185. See also Olaitan, W. (1998). 'Women in politics in Nigeria', in A. Sesay & A. Odebiyi (eds). *Nigerian Women in Society and Development*. Ibadan: Dokun Publishing House, 73–82 at 77.

23 Although market tax was introduced in the long term, the protests were still successful when it is considered that other kinds of taxes might have been imposed in quicker succession if the mass protests had not taken place.

24 Olumese, 'Women in non-governmental organisations' (n 19), 156.

25 The dynamics of women's gains and losses over different epochs in Nigeria's history are comprehensively discussed in Salman, R.K. & Abdulraheem, N.M. (2012). 'Non-realization of women's rights in Nigeria: The way forward', *University of Ibadan Law Journal* 2(1): 225–245.

26 Tripp, A.M. (2005). 'Regional networking as transnational feminism: African experiences', *Feminist Africa* 4: 46–49.

27 Hassim, 'Terms of engagement' (n 12), 24–25.

28 An extensive bibliography on customary law and women's rights is available at http://www.africabib.org/women.htm (accessed 1 July 2013).

29 See, for instance, Aina, O. (1998). 'Women, culture and society', in A. Sesay & A. Odebiyi (eds). *Nigerian Women in Society and Development*. Ibadan: Dokun Publishing House, 3–32 at 3; Okoye, P. (1995). *Widowhood: A Natural or Cultural Tragedy.* Enugu: Nucik Publishers; Enemo, I. (2009). 'Customary law of succession in Nigeria and the rights of women: Need for reform', *CALS Review of Nigerian Law and Practice* 3(1): 17–32 at 20–26.

30 The received English law includes the common law, rules of equity and statutes of general application in England as at 1 January 1900.

31 This key parameter for the determination of what constitutes customary law was laid down in the case *Owonyin v Omotosho* 1961 (1) All NLR 304 at 309.

32 Woodman, G.R. (1969). 'Some realism about customary law: The West African experience', *Wisconsin Law Review* 1: 128–152 at 130.

33 Woodman, 'Some realism about customary law' (n 32), 131–133.

34 Mamdani, M. (1996). *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism.* Princeton, NJ: Princeton University Press, 118.

35 Uwaka, O. (1997). *Due Process in Nigeria's Administrative Law System: History, Current Status and Future.* Lanham, MD: University Press of America, 88.

36 Bakare-Yusuf. 'Determinism' (n 5), 8.

37 This test was developed and applied by colonial courts in former British colonies. See *Eshugbayi Eleko v Government of Nigeria* (1931) AC 662 and *Re Effiong Okon Ata* (1930) 10 NLR 65.

38 This clause has been invoked to overthrow a custom sentencing a deposed chief to

death in *Eshugbayi Eleko v Government of Nigeria* (n 37) and to abolish another custom based on slavery in *Re Effiong Okon Ata* (n 37).

39 *Eshugbayi Eleko v Government of Nigeria* (n 37).

40 *Eshugbayi Eleko v Government of Nigeria* (n 37).

41 Okoye. 'Sharing the citizenship of women' (n 21).

42 Eze, O. (1998). *Human Rights and Social Justice: An African Perspective*. Monograph of the 4th Annual Lecture Series of the Empowerment and Action Research Centre, Lagos, Nigeria; Ibhawoh, B. (1999). *Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria.* Copenhagen: The Danish Centre for Human Rights.

43 Ibhawoh. *Between Culture and Constitution* (n 42).

44 Ibhawoh. *Between Culture and Constitution* (n 42).

45 It seems that in the northern part of Nigeria, native authorities were conferred with power to declare customary law invalid, as well as propose modifications to it, and such a declaration or modification would become binding on local courts, whether or not it was in accordance with customary practice. Woodman. 'Some realism about customary law' (n 32), 139.

46 Oputa, C. (1990). 'Women and children as disempowered groups', in A. Kalu & Y. Osinbajo (eds). *Women and Children under Nigerian Law*. Lagos: Federal Ministry of Justice Law Review Series 6: 1–4 at 1. See also Salman & Abdulraheem, 'Non-realization of women's rights in Nigeria' (n 25), 228.

47 Woodman. 'Some realism about customary law' (n 32), 139.

48 Uwais identifies the financial and patriarchal constraints. See Uwais, M. (2005). 'Women, the Constitution and applicable laws'. Paper presented at the 1st Murtala Muhammed Memorial Conference, Breaking Barriers and Limitations: Role of Women in Development, ECOWAS Centre, Abuja, Nigeria, available at http://www.greatbrakriver.com/mmf2009/downloads/Women,%20The%20Constitution%20and%20Applicable%20Laws.pdf (accessed 1 July 2013).

49 A summary of such laws that have been passed in the past decade can be found in Federal Ministry of Women Affairs and Social Development. (2008). *Nigeria's 3rd and 4th Country Periodic Report on the Convention of the Child.* Abuja: Federal Ministry of Women Affairs and Social Development, 9–10, available at http://www.ecoi.net/file_upload/1228_1216038674_nigeria.pdf (accessed 8 February 2011).

50 These include the Inhuman Treatment of Widows (Prohibition) Law 2004 of Edo State, and the Malpractices against Widows and Widowers (Prohibition) Law 2005 of Anambra State.

51 See the networks of Women's Aid Collective, available at http://www.wacolnigeria.org/ (accessed 1 July 2013). See also Women's Aid Collective. (2005). 'A Memorandum to the Senate Committee on Information in respect of the Bill on Freedom of Information Act'. Paper presented at the public hearing held in Abuja, available at http://www.foicoalition.org/archives/2005/senate_pubhear_submissions/wacolabuja.HTM (accessed 1 July 2013).

52 See, for example, Nigeria CEDAW NGO Coalition. (2008). *Nigeria CEDAW NGO Coalition Shadow Report*, report submitted to the 41st session of the UN Committee

on the Elimination of All Forms of Discrimination against Women, June–July, available at http://www.fidh.org/IMG/pdf/BAOBABNigeria41.pdf (accessed 15 February 2011).

53 The Child Rights Act 2003 domesticates the UN *Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of the Child*; see *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990; and *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/ 49 (1990), *entered into force* 29 November 1999.

54 See the Prohibition of Domestic Violence and Maltreatment against Women Law 10 of 2004, Cross River State, and the Protection against Domestic Violence and Related Matters Law 3 of 2005, Ebonyi State.

55 The Criminal Code 1916, Cap 38 Laws of the Federation of Nigeria 2004 came into effect in 1916 while the Penal Code 1959, Cap 89 Laws of Northern Nigeria 1964, which was drafted on the model of the Sudanese Penal Code, came into effect in 1960.

56 Section 55 of the Penal Code, 1959 (n 55). The Penal Code is the prime statute that criminalises offences committed in the northern states of Nigeria, while the Criminal Code applies in the southern states of Nigeria.

57 See sections 4, 5, 14, 13, 15 and 16 of the Child Rights Act 2003.

58 Sections 21 and 23 of the Child Rights Act 2003.

59 Section 29(4)*(b)* of the Constitution (n 6). This provision is discussed in more detail in: Okoye, A. (2002) 'Riding on the backseat: Thoughts on the new constructions of womanhood in Nigeria', *Newsletter of the African Gender Institute of the University of Cape Town* 10: 7, available at http://www.iiav.nl/ezines/email/AGInewsletter/2002/July.pdf (accessed 15 February 2011).

60 These challenges are discussed in Nwazuoke, A.N. (2007). 'Status of the girl-child in Nigeria and the Child Rights Act 2003', *Nigerian Bar Journal* 5(1): 107–122 at 116.

61 At least 16 of the 36 Nigerian states are reported to have passed a law on children's rights. See Federal Ministry of Women Affairs and Social Development. *Nigeria's 3rd and 4th Country Periodic Report on the Convention on the Rights of the Child* (n 49), 9.

62 See the gains made and hurdles still to overcome in Nigeria in the campaign 'Africa for Women's Rights', available at http://www.africa4womensrights.org/post/2010/03/05/Dossier-of-Claims%3A-Nigeria (accessed 1 July 2013).

63 *Safiyatu Hussaini v Attorney-General Sokoto State*, Appeal No. SCA/GW/28/2001 Sharia Court of Appeal Sokoto State, 25 March 2002. This was an appeal from the Upper Sharia Court Gwadabawa, Sokoto State, U.S.C/GW/CR/F1/10/2001, 3 July 2001. All the court proceedings and judgments in the case are reported in 'Proceedings and judgments in the *Safiyatu Hussaini* case', in P. Ostien (ed.). (2007). *Sharia Implementation in Northern Nigeria 1999–2006: A Sourcebook,* Vol. 5, Trans. A.M. Yawuri. Ibadan: Spectrum Books, 17–51, available at http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-

northern-nigeria/vol_5_3_chapter_6_part_II.pdf (accessed 12 April 2011).

64 See Yawuri, A.M. (2007). 'On defending Safiyatu Hussaini and Amina Lawal', in P. Ostien (ed.). *Sharia Implementation in Northern Nigeria 1999–2006: A Sourcebook*, Vol. 5. Ibadan: Spectrum Books, 129–139, available at http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_5_8_chapter_6_part_VII.pdf (accessed 1 July 2013).

65 *Amina Lawal of Kurami Village v Katsina State*, Sharia Court of Appeal Katsina State, 25 September 2003. Amina Lawal had been sentenced to death by a Sharia court in Bakori, Katsina State, Nigeria, for adultery, while the man involved was let off for want of evidence. In both cases, the evidence of the adultery was the birth of a child. See Women's Rights Advancement Protection Alternative (WRAPA). (2002). *WRAPA Newsletter* 3(3): 12.

66 Women's Rights Advancement Protection Alternative. *WRAPA Newsletter* (n 65), 12.

67 Yawuri, 'On defending Safiyatu Hussaini' (n 64), 131.

68 *Mojekwu v Mojekwu* 1997 (7) NWLR (Pt. 512), 283.

69 *Mojekwu v Ejikeme* 2000 (5) NWLR 402.

70 The International Federation of Women Lawyers (FIDA) is an international association with a presence in different countries and local branches across Nigeria.

71 *Mojekwu v Mojekwu* (n 68).

72 See Obioha, E. (2008). 'Change in tenure pattern and customary land practices among Igbo community in south-eastern Nigeria', *Anthropologist* 10(1): 45–53 at 51–52.

73 *Mojekwu v Mojekwu* (n 68) at 305.

74 *Mojekwu v Ejikeme* (n 69).

75 *Mojekwu v Ejikeme* (n 69).

76 *Mojekwu v Iwuchukwu* 2004 (4) SC (Pt. II) 1. A new respondent was substituted in place of a deceased party, and this accounts for the difference in the respondent's name.

77 *Mojekwu v Iwuchukwu* 2004 (4) SC (Pt. II) 1

78 *Mojekwu v Iwuchukwu* 2004 (4) SC (Pt. II) 1

79 *Mojekwu v Iwuchukwu* 2004 (4) SC (Pt. II) 1

80 Citizenship has also been defined as a multi-tiered construct that applies simultaneously to people's membership in sub-, cross- and supra-national collectivities as well as in states. See Yuval-Davis, N. (1997). 'Women, citizenship and difference', *Feminist Review* 57: 4–27. This suggests that citizenship needs to be examined, not just in terms of states, but also in relation to the dynamics of the interplay of various phenomena, including gender, ethnicity, religion, class, location and so on.

81 Statement attributed to Roche, M. 'Citizenship, social theory and social change', as cited in Yuval-Davis, 'Women, citizenship and difference' (n 80), 6.

82 Citizenship by birth, which is effectively tied to citizenship by descent, passes on to a child equally through either parent or through a grandparent; section 25 of the Constitution (n 6). Citizenship by naturalisation is done by application to the president for a certificate of naturalisation, when the specified requirements are met; section 27 of the Constitution.

83 This subject was extensively discussed in Okoye, 'Sharing the citizenship of women' (n 21).
84 To the knowledge of the author.
85 Section 32(1) of the Constitution (n 6).
86 As American women's rights attorney Galles, K. (2010) observes: 'It's very lonely being a plaintiff.' See American Association of University Women. (2010). *American Association of University Women Annual Report 2010.* Washington, DC: American Association of University Women, 10, available at http://www.aauw.org/files/2013/02/AAUW-annual-report-2010.pdf (accessed 1 July 2013).
87 Also see Okoye, 'Sharing the citizenship of women' (n 21), 72.
88 Section 27(2)*(g)* of the Constitution (n 6). The only exception to this is if the foreign spouse has a Nigerian grandparent, in which case he may apply for citizenship by registration under section 26(2)*(b)* of the Constitution.
89 Okoye, 'Sharing the citizenship of women' (n 21), 72.
90 Nwabueze, B.O. (1982). *A Constitutional History of Nigeria.* Essex: Longman, as summarised in Okoye, 'Sharing the citizenship of women' (n 21), 72.
91 Nwabueze, *A Constitutional History of Nigeria* (n 90) as summarised in Okoye, 'Sharing the citizenship of women' (n 21), 72. References omitted, but note that Nigeria's colonial constitutions are each identified by the name of the Governor-General of the period.
92 Ibhawoh. *Between Culture and Constitution* (n 42); Nwabueze. *A Constitutional History of Nigeria* (n 90).
93 In Nigeria, 'bill of rights' is not used as a proper noun, but in an adjectival sense to describe Chapter IV of the Constitution, which sets out a list of fundamental rights.
94 Ezeilo, J. (2000). 'Engendering the language and content of the 1999 Constitution'. Paper presented at a Colloquium on Gender and the 1999 Constitution convened by the Citizen's Forum for Constitutional Reform, Lagos, 17–20 May.
95 The absence of a gender equality agenda is further demonstrated by the fact that the 1999 Constitution was ultimately the product of an all-male military Provisional Ruling Council. Again, the concern in 1999 was not about gender equality and equity as much as it was about affecting a hand-over to a civilian government as quickly as possible, lest the military again renege on its promise to relinquish power.
96 For example, Nwabueze identifies 'the demands of the security of the state itself, of public morality, public health and the provision of social and economic services' as possible grounds for qualification of certain rights. Nwabueze. *A Constitutional History of Nigeria* (n 90) as quoted in Okoye, 'Sharing the citizenship of women' (n 21).
97 See National Centre for Women Development. (1999). 'Memorandum conveying proposals by Nigerian women for amendments to the 1999 Constitution'. Unpublished submission to the Presidential Technical Committee on Constitutional Reform.
98 Pereira describes the process as follows: 'Following the formation of the Presidential Technical Committee on the review of the 1999 Constitution, women's organizations worked separately and collectively on the amendments and new provisions that

they wanted to incorporate into a review of the Constitution … [T]wo things are notable about this development. The first is that the diverse women's organizations were able to come together in the first place and reach a common position regarding proposed changes. The second point worth noting is that many of the women involved were also organizationally linked to mainstream human rights groupings that were striving for greater representation of women within their ranks and greater gender sensitivity in the content of their work. One such coalition was the Citizens' Forum for Constitutional Review (CFCR). Although the women's Memorandum suffered from a lack of follow-up at the level of the Presidential Committee, women were still able to draw on the proposals made in that Memorandum in their membership of the Citizens' Forum and their engagement with its work.' Pereira, C. (2002). 'Understanding women's experiences of citizenship in Nigeria: From advocacy to research'. Revised version of the paper presented at the 10th General Assembly of the Council for the Development of Social Science Research in Africa (CODESRIA), Kampala, Uganda, at 4, available at http://www.codesria.org/IMG/pdf/PEREIRA-1.pdf (accessed 1 July 2013).

99 *Attorney-General of Botswana v Unity Dow* 1992 BLR 119; 1992 (103) ILR 128 (Court of Appeal). See also Dow, U. (1995). *The Citizenship Case: The Attorney-General of the Republic of Botswana v Unity Dow,* Gaborone: Lentswe La Lesedi, in which both the High Court and the Court of Appeal judgments are reported. The book is also available online at http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm (accessed 1 July 2013).

100 Dow, U. (n 99).

101 *The Citizenship Case* (n 99) at 20, see item B.11.5.

102 *The Citizenship Case* (n 99) at 20, see item B.11.5.1.1. See also at 24 and 28.

103 Okoye, 'Gender, citizenship and customary law' (n 3).

104 *The Citizenship Case* (n 99) at 145.

105 *The Citizenship Case* (n 99) at 162.

106 Interestingly, Judge Aguda, one of the judges of the Botswana Court of Appeal who heard the appeal in the *Dow* case, was a Nigerian jurist serving in the Botswana judiciary at the time.

107 *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, entered into force 3 September 1981. See the list of African States that have signed CEDAW, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 15 March 2011).

108 *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

109 *The Convention on the Elimination of All Forms of Discrimination against Women* was referred to in the judgment. For a list of African countries that have signed CEDAW, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 15 March 2011). The ACHPR entered into force after the majority of the countries of the Organisation of African Unity had

signed it in 1986; see Viljoen, F. (1999). 'Application of the *African Charter on Human and Peoples' Rights* by domestic courts in Africa', *Journal of African Law* 41(1): 1–17.

110 The Court of Appeal judgment in the *Mojekwu v Mojekwu* case (n 68) was widely publicised by the Nigerian branches of the International Federation of Women Lawyers (FIDA) and other women's rights groups.

111 Longwe, S. Foreword, in *The Citizenship Case* (n 99) at viii.

112 Although the discussion in this paper is somewhat circumscribed to customary law and citizenship provisions, there are many other structures of gender inequality that require ongoing attention if they are to be dismantled. The strategies presented at this point are therefore not restricted to the specific issues discussed in this paper, but are intended to apply to a wider spectrum of women's rights. Additional gender equality issues are discussed comprehensively in Pereira, 'Understanding women's experiences of citizenship' (n 98) and Enemo, 'Customary law of succession' (n 29).

113 *Mojekwu v Mojekwu* (n 68).

114 *Mojekwu v Ejikeme* (n 69).

115 *Mojekwu v Mojekwu* (n 68).

116 Enemo captures it in the following positive spirit: 'Even though they found no justification for the Court of Appeal to declare the '*oli-ekpe*' custom repugnant to natural justice, equity and good conscience in the case, since it was not in issue, the court still went ahead to uphold the judgment of the lower court on the basis of the Mgbelekeke custom, which gave inheritance rights to the children of the deceased, regardless of sex. The good news is that justice finally prevailed. The fact that it was the surviving daughters of the deceased original property owner that were held to be entitled to succeed to their father's estate even in the absence of any surviving male is a victory to every woman'. Enemo, 'Customary law of succession' (n 29), 28.

117 Ahikire describes how the mandatory inclusion of women candidates in the Ugandan parliamentary elections generated general societal awareness and 'changed the general picture of public politics in Uganda'; Ahikire, J. (2004). 'Towards women's effective participation in electoral processes: A review of the Ugandan experience', *Feminist Africa* 3: 8–26 at 14.

118 *Safiyatu Hussaini v Attorney-General Sokoto State* (n 63).

119 *Amina Lawal of Kurami Village v Katsina State* (n 65).

120 Yawuri, 'On defending Safiyatu Hussaini' (n 64) at 130–131.

121 Yawuri, 'On defending Safiyatu Hussaini' (n 64) at 133.

122 In its press statement issued on the success of Amina's appeal, the organisation that coordinated her defence (WRAPA) thanked those who contributed to the success of the case, among them, government institutions, as well as 'national women groups and community-based organisations that through sensitisation were able to assist the understanding of Nigerians on the rationale for the appeal of Amina'. Also acknowledged were 'the learned *ulamas* [Islamic scholars] who individually and sometimes collectively supported the appeal and in many instances researched to support the arguments of the grounds of appeal'. It was also observed in the statement that 'these organisations and individuals brought in resources and logistic

support to the process'. See Yawuri, 'On defending Safiyatu Hussaini' (n 64), 131.

123 *Mojekwu v Ejikeme* (n 69).

124 Enemo, 'Customary law of succession' (n 29), 31.

125 This author has witnessed several such ceremonies. Usually, the traditional ceremony is followed by a church wedding or a civil marriage in a marriage registry in which the couple physically participate. Similarly, many communities in south-east Nigeria impose an obligation on their young men to perform the work of grave-digging when a member of the community dies. This custom has, over time, mutated to allow for a fee to be paid in lieu of digging for those young men who do not live in the community or who, for some other reason, are unable to participate.

126 Okech, A. (n.d.) 'GROOTS Kenya', in S. Batliwala (ed.). *Changing their World: Concepts and Practices of Women's Movements*. Toronto: Association for Women's Rights in Development (AWID) at 2, available at http://www.awid.org/Media/Files/ENG-Case-Study-GROOTS_Kenya (accessed 21 November 2013).

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