5. Domestication of CEDAW: points to consider for customary laws and practices

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Prefatory survey

Global concern for the improvement of the welfare of women dates back to the 1940s, when the United Nations set up the Commission on the Status of Women (CSW). To its eternal credit, the Commission has been able to highlight the particular disadvantages of women, while its activities have generated many Declarations and Conventions. The CSW meets annually, its recent activities including, among others, the input it made to the 1992 International Human Rights Conference; the 1993 International Year of the World's Indigenous Peoples; the 1994 Population and Development Conference (The Cairo Summit); the 1994 International Year of the Family; and planning the 1995 UN Women's Conference in Beijing.[1]

In fulfilment of its standard-setting function, the United Nations has posited norms or standards of human rights that member states should observe. Hence, there exists a considerable corpus of international legislation on human rights, which is essentially promotional in nature.[2] Only a highlight is presented in this chapter.[3]

Quite apart from the Universal Declaration of Human Rights (UDHR), 1948, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the following are international instruments on the rights of women, namely:

- the Convention on the Political Rights of Women, 1952,
- the Convention on the Nationality of Married Women, 1957,
- the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, and
- the Declaration on the Elimination of Discrimination Against Women, 1967.[4]

Specialised agencies of the UN have also made considerable progress. Thus, there are:

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1. See R Cook (1993) *Human Rights in Relation to Women's Health.* Geneva: WHO, 193, p.54.
2. A H Robertson (1997) *Human Rights in the World.* Manchester: Manchester University Press.
3. See Osita Eze (1984) *Human Rights in Africa: Some Selected Problems.* Lagos: Macmillan in Association with NIIA, p.154
4. See Osita Eze, loc. cit.

- the Equal Remuneration Convention, 1951, of the International Labour Organization (ILO),
- the Discrimination (Occupation and Employment) Convention 1958 of the ILO,
- the Convention Against Discrimination in Education and Recommendations thereon, 1960, of the UN Educational, Scientific and Cultural Organization (UNESCO),
- the Recommendation Concerning the Employment of Women with Family Responsibilities, 1965, of the ILO, and
- the Recommendation Concerning the Status of Teachers, 1966, of UNESCO etc.[5]

However, the central and most comprehensive document is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Adopted on 18 December 1979, it is the leading modern instrument on women's equal rights.[6] It has thus been described as the definitive international legal instrument requiring respect for and observance of the human rights of women.[7] It entered into force as an international treaty on 3 September 1981, after the twentieth country had ratified it in accordance with the Convention's article 27. CEDAW, it has been asserted, is intended to be effective to liberate women, to maximise their individual and collective potentialities and not merely to allow women to be brought to the same level of protection of rights that men enjoy.[8]

The challenge for this chapter is to demonstrate how customary law norms and practices have militated against the attainment of these potentialities engrained in CEDAW. It, therefore, examines the praxis in selected domestic jurisdictions. As will be seen, tremendous success has been recorded in some countries in the domestication (i.e. bringing into domestic use) of the Convention's provisions. The chapter also identifies normative customs and practices in Nigeria and other jurisdictions which, if modified or even completely abrogated, would lead to the maximisation of the potential of the individual and collective potentialities of women as enunciated in the Convention.

Structure of the Convention

The Convention consists of a preamble and 30 substantive articles. In broad terms, the provisions can be grouped into three different parts in accordance with the matters on which they deal. The first part, covering articles 2–16, contains the Convention's Agenda for equality. This part can be further subdivided into three limbs. The first limb deals with the civil rights and legal status of women. This we find in articles 7, 8, 9, 10, 11, 13, 14, 15 and 16.

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5. See Osita Eze, loc. cit.
6. See Cook, op. cit., p.2.
7. See Cook, loc. cit.
8. See Cook, ibid. p.26.

The second limb adds a novel dimension to international human rights norms. The Convention takes credit as the first international human rights treaty to positivise women's reproductive rights. We find provisions relevant to reproductive rights in articles 4(2), 5, 11(f), 11(2)(a), 11(2)(b), 11(2)(c), 11(2)(d), 12(1) and 12(2). In article 10(h) the Convention mentions family planning. Thus far, it is the only human rights treaty that has incorporated family planning in the education process. In article 16(e) the concept of planned and responsible parenthood is also upheld.

The third limb challenges the classical conception of human rights, a conception that views the state as the only violator of human rights. The conception of human rights as claims against the state pervades the UDHR, ICCPR and the European Convention on Human Rights (ECHR). By recognising culture and tradition as potential violators of women's rights, the Convention espouses the modern trend or approach that clamours for the re-conceptualisation of human rights. Articles 5, 10(c) and the 14th preambular paragraph recognise the influence of culture and tradition as impediments to women's enjoyment of their rights. In particular, article 10(c) enjoins the state parties to eliminate any stereotyped concepts of the roles of men and women at all levels and in all forms of education by encouraging co-education and by the revision of text books and school programmes and the adaptation of teaching methods.

The convention acknowledges the anthropocentric emphasis on women's rights. Thus, the eighth preambular paragraph is concerned that in situations of poverty, women have the least assess to food, health, education, training and opportunities for employment and other needs. Indeed, health problems have been identified as part of violence against women. For example, Nigeria has a high maternal mortality rate (MMR). Major causes of maternal mortality include anaemia, haemorrhaging and obstructed labour. It has been suggested that that inadequate healthcare facilities are a major cause of maternal deaths, with associated problems including inefficient handling of complications, lack of essential equipment and trained personnel, limited access to maternity facilities and lack of pre-natal care.

The second part of the Convention deals with its implementation. In article 17, the Committee on the Elimination of Discrimination against Women (CEDAW) is established. The other provisions include: the election of members of the Committee, articles 17(2), 17(3) and (4); tenure of members, articles 17(5) and (6); casual vacancies, article 17(7); emolument of members, article 17(8); monitoring of administrative and legislative measures adopted by parties, article 18; and rules of procedure, article 19 and meeting, article 20.

The third part of the Convention contains general provisions, for example: signature of state parties, article 25; depository of the Convention, article 25; ratification, article 25(3); accession, article 25(4); entry into force, articles 27(1) and (2); reservations, articles 28(1)(2) and (3); disputes resolution through negotiation and arbitration, article 29; and deposit of authentic texts, article 30.

Distinctive features of the Convention

What may be characterised as the distinctive features of the Convention are highlighted below.

The Convention takes pride of place as the only human rights treaty that has catapulted the concerns of women into the main stream of human rights discourse. As Rebecca Cook has noted, it goes beyond the goal of sexual non-discrimination – as required by articles 13(1), 55(c) and 56 of the UN Charter; article 2 of the UDHR; articles 2(1), (3), (4), (23) and (24) of the ICCPR; articles 2(2) and (3) of the ICESCR; article 14 of the ECHR; article 1 of the Inter-American Commission on Human Rights (IACHR); and article 12 of the African Charter on Human and Peoples' Rights (AfCHPR) – to address the disadvantaged positions of women in all areas of their lives.[9] As opposed to other human rights treaties, CEDAW frames the legal norm as the prohibition of all forms of discrimination against women, as distinct from the narrower sex-neutral norm that requires equal treatment of men and women.[10] The Convention is, thus, the international treaty in which member countries undertake to eliminate all forms of discrimination against women in all spheres of life.

The Convention affirms women's rights to reproductive choice. It is also the only human rights treaty to recognise family planning and responsible parenthood. In this regard, it transcends the narrow definitions provided for in earlier human rights Conventions by confronting the pervasive discrimination against women's reproductive health.

Women's empowerment also receives a boost in the Convention. In article 3, state parties agree to take appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights. Other far-reaching provisions aimed at empowering women are found in article 13(1)(b) – the right to micro-credit in the form of bank loans, mortgages and other forms of financial credit.

Article 14 is also innovative, if not revolutionary. The state parties undertake 'to take into account the particular problems faced by rural women and significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy'. The Convention advocates alternative dispute resolution through negotiation and arbitration.

Nature of the rights in the Convention

Although the liberty-oriented or first generation rights embrace the five broad categories of personal, moral/political, proprietary, procedural and equality rights, respectively, the Convention emphasises only four, the legal status of women receiving the broadest attention.

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9. See R Cook, loc. cit.

10. Prof. Cook's account of the new frontiers opened by CEDAW is indeed insightful, see ibid.

The agenda for equality is proclaimed in article 2, where state parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means a policy of eliminating discrimination against women. They undertake:

> To embody the principle of equality of men and women in their national constitutions or other appropriate legislation.
>
> To adopt appropriate legislative and other measures prohibiting all discrimination against women.

The other subsections amplify the measures. Temporary special measures aimed at facilitating *de facto* equality between men and women shall be embarked upon. These measures shall not constitute discrimination, article 4(1). Article 7 restates the provisions of the Convention on the Political Rights of Women adopted in 1952. Hence, in article 7 women are guaranteed the right to vote, to hold public office and to exercise public functions. This includes the right of representation at international fora, article 8. The 1952 Convention on the Political Rights of Women was based on the desire of the parties to implement the principle of equality of the rights for men and women contained in the Charter of the UN. Article 9 integrates the Convention on the Nationality of Married Women, which was adopted in 1957. Thus, article 9 provides for the statehood of women irrespective of their marital status. The Convention draws attention to the fact that often women's legal status has been linked to marriage, making them dependent on their husband's nationality rather than individuals in their own rights. The 1957 Convention on the Nationality of Married Women had sought to eliminate the consequences of the practice prevalent in many countries by which the nationality of a married woman is to a great extent conditioned by that of the husband. The Convention followed the Hague Convention on certain questions relating to conflict of nationality laws. It thus represents an attempt to evolve a status of the independence of the nationality of the wife from that of the husband, as opposed to the pristine concept of the 'traditional principle of the unity of the family'.[11]

Article 16 makes elaborate provisions relating to marriage and family relations. In particular, article 16(2) integrates the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962. The basic theme of the Convention is to ensure that no marriage shall be legally entered into without the free and full consent of both parties. In line with the 1962 Convention, CEDAW, in article 16(2), provides that the betrothal and the marriage of a child shall have no legal effect, and all necessary action shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

The agenda for equality is also carried into the fields of education, employment, economic and social activities. Accordingly, article 10 affirms: women's rights to non-discrimination in education, appropriate measures for equality in the same conditions for career and vocational guidance, article 10(a); access to the same curricular, article

11. See, generally, O Eze, loc. cit.

10(b); opportunities for scholarship and study grants, article 10(d); and continuing education, reducing female students' drop-out rates and organisation of programmes for girls and women who have left school prematurely, article 10(e) and (f). Article 11 also affirms the right to non-discrimination against women in the field of employment in order to ensure: the right to work, article 11(a); the same employment opportunities, including application of the same criteria for selection in matters of employment, article 11(b); the right to free choice of profession and employment, the right to promotion, job security etc., article 11(c); the right to equal remuneration, article 11(d); and social security, article 11(e). Articles 10 and 11 incorporate UNESCO'S Convention Against Discrimination in Education 1960, the ILO Convention on Equal Remuneration of 1961, Discrimination (Employment and Occupation) Convention 1958 and the ILO's Recommendations on Employment (Women with Family Responsibilities) 1965.

Article 13 prohibits discrimination in economic and social activities. Instructively, the situation of rural woman is accorded admirable impetus. Thus, CEDAW, in article 14, enjoins the state parties to take into account the particular problems faced by rural women and the significant roles that they play in the economic survival of their families. Other provisions to enhance the development of rural women are provided for in article 14(2)(a)–(h).

As noted earlier, a distinctive feature of CEDAW is its inclusion of reproductive rights. The 13th preambular paragraph recognises the role of women in procreation and insists that this should not be the basis of discrimination. In article 5, CEDAW advocates a proper understanding of maternity as a social function, demanding fully shared responsibility for child rearing by both sexes, article 5(b).[12] It is thus not surprising that provisions for maternity protection and childcare are shoe-horned into provisions relating to employment in articles 11(2)(a), 11(2)(b), 11(2)(d); 12(1), 12(2), 14(2)(b) and education in article 10(h). Article 16(e) mandates the state parties to evolve family codes, which will in turn safeguard women's rights to take the requisite decisions in reproductive self-determination.

Approaches to the domestication of CEDAW in selected domestic jurisdictions

The provisions of CEDAW have found expression in several municipal enactments. State practice, however, reveals divergences in the legislative techniques employed for the Convention's domestication. In some jurisdictions, the method of transformation by reception has been applied. This involves certain CEDAW provisions being re-enacted as constitutional provisions protecting human rights. Thus re-enacted, those provisions enjoy the immutability which attaches to other fundamental rights provisions of the constitution. Questions of conflict between the CEDAW provisions and the other entrenched provisions of the constitution are thereby eliminated.

12. See, generally, R Cook, loc. cit.

The techniques employed in two jurisdictions may be cited here to illustrate this point. The Constitution of the Republic of Uganda, 1995, guarantees human rights in chapter four. There is clear evidence of the influence of CEDAW in some of these fundamental rights provisions. Articles 21(2) and (3) ordain the non-discrimination norm in very liberal terms. CEDAW's concerns for affirmative action find constitutional expression in article 32(1) and (2). Article 32(1), for instance, of the Ugandan constitution, 1995, provides:

> Notwithstanding anything in this constitution, the state shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition, or custom for the purpose of redressing imbalances which exist against them.

In order to operationalise the above affirmative action provision, the constitution obligates parliament to establish an equal opportunities commission. Hence, article 32(2) provides:

> Parliament shall make relevant laws, including laws for the establishment of an Equal Opportunities Commission, for the purpose of giving full effect to clause (1) of this article.

Akin to CEDAW, the Ugandan constitution recognises maternity as a social function that should attract special protection. Article 33(3) affords this protection in these terms:

> The state shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

Employers of labour are thus under obligation to provide special protection for women during pregnancy and after childbirth. Article 40(4) of the constitution dictates this obligation.

Other provisions that transform CEDAW provisions include article 31(1) (Rights of the Family). Article 31(2) is a revolutionary provision. It mandates parliament to make laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children. Other rights of women are specially consecrated in article 33(1), (2), (3), (4), (5) and (6). In particular, articles 33(5) and (6) almost reproduce CEDAW provisions verbatim. For example:

> 33(5) without prejudice to article 32 of this constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

This provision is a clear affirmation of the cogency of the call for the re-characterisation of human rights discourse. For instance, it acknowledges that other non-state actors equally violate human rights. The constitution comes down heavily on customary or traditional practices that derogate from the dignity of womanhood. The provisions are indeed trenchant. They can be found in article 33(6), which provides:

> Laws, cultures, customs or traditions which are against the dignity, welfare or interest of woman or which undermine their status, are prohibited by this constitution.

Socio-economic rights are enacted in gender-neutral terms in article 40.

The Constitution of the Republic of Ghana, 1992, is similar to the Ugandan constitution in domesticating substantial provisions of CEDAW by reception. Instructively, the non-discrimination norm in article 12(2) of the constitution is patterned after article 1 of CEDAW. Hence, it inaugurates the non-discrimination norm in terms of 'gender' as opposed to section 42 of the Nigerian Constitution, which restrictively defines non-discrimination in terms of sex etc. Article 27(1) incorporates both the intendment and letters of the CEDAW provisions on the special right to be accorded to women before and after childbirth. The Ghanaian constitution also recognises customary practices as potential violators of women's rights. However, instead of prohibiting customary practices that dehumanise women, the constitution generously accommodates all persons who are likely to be affected by such practices. Accordingly, article 26(2) provides that all customary practices that dehumanise or are injurious to the physical and/or mental well-being of a person are prohibited. In furtherance of the obligation undertaken by government's ratification of CEDAW, the constitution makes other special provisions for the protection of women's rights in article 27(2) and (3). The provisions in respect of property rights of spouses are indeed interesting. Article 22 deals with this as follows:

> 22 (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
>
> (2) Parliaments shall, as soon as practicable after the coming into force of this constitution, enact legislation regulating the property rights of spouses.
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> (3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article –
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> a. spouses shall have equal access to property jointly acquired during marriage;
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> b. assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

Even those CEDAW provisions that have not been specifically re-enacted under the Ghanaian constitution are still justiciable thereunder. In what ranks as the most international law-friendly provision, article 33(5) gives the Ghanaian courts amplitude of authority to enforce all human rights provisions in so far as they are compatible with democratic norms. Article 33(5) provides:

> The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

The constitutions of Kenya and Zimbabwe adopt a rather curious approach. Both constitutions approbate and reprobate on the question of gender equality. In Kenya, for instance, Sections 82(1) and (3) of the constitution prohibit sex discrimination. Yet discriminatory practices that are inimical to women's integrity and status cannot be

challenged. Thus Section 82(4) exempts certain areas from the prohibition against discrimination. The subsection provides:

> (4) Subsection (1) shall not apply to any law so far as that law makes provision –
> (b) with respect to adoption, marriage, divorce and burial, devolution of property on death or other matters of personal law.

Section 23 of the Constitution of Zimbabwe makes similar a provision. There can be no denying the fact that such provisions heighten the tension between women's right to equality and the rights of traditional communities to live according to their traditions.[13]

In the South American jurisdiction, the Constitution of Colombia adopted the Ugandan constitutional technique. The 1991 Colombian constitution, in Article 42, incorporates Article 12 of CEDAW on delivery of healthcare. In the Eritrean constitution of 1997, the preamble and Articles 5 and 7 bear the imprint of the vision of CEDAW. The South African constitution, in Article 187(1), (2) and (3), entrenches an independent commission for gender equality to promote and protect gender-related issues. The principles of CEDAW have also been domesticated in regional conventions. For instance, the State of Sao Paulo and other municipalities evolved a regional equivalent of CEDAW, which goes by the name the Paulista Convention on the Elimination of All Forms of Discrimination against Women.

Elsewhere, CEDAW provisions have been domesticated by reception into various acts of parliaments. In the Australian jurisdiction there is the Sex Discrimination Act, which is patterned on CEDAW. It prohibits discrimination on the grounds of a person's sex, marital status or pregnancy.[14] In 1986, the Human Rights and Equal Opportunities Commission Act, 1986, was enacted in fulfilment of Australia's obligations under the Discrimination (Employment and Occupation) Convention 1958 (ILO III) and the International Covenant on Civil and Political Rights of the Child.[15] The Act established the Human Rights and Equal Opportunities Commission. This Commission is vested with the function of inquiring into alleged infringements of the following enactments: the Sex Discrimination Act, the Racial Discrimination Act and the Disability Discrimination Act. These Acts, respectively, prohibit discrimination on the grounds of sex, race or disability in employment, education etc.[16]

The above examples represent constitutional and legislative efforts geared towards the actualisation of CEDAW provisions in domestic law. Unfortunately, not all countries

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13. See C G Bowman and A Kuenyehia (2003) *Women and Law in Sub-Saharan Africa.* Accra: Sedco Publishing Ltd., pp.39–40.
14. This writer acknowledges his debt of gratitude to the leading authority on the Women's Convention, Prof. Rebecca Cook for these illuminating examples.
15. See M Kirby (1993) 'Discrimination – the Australian Response' in 19 *Commonwealth Law Bulletin,* No.4, p.1692.
16. Ibid. p.1693.

have benefited from this kind of legislative proactivity. Our survey in another context[17] reveals that the dependency upon the authority of the competent legislature for the performance of treaty obligations has not yielded expected dividends. It cannot be denied that legislative lethargy on this matter is a betrayal of the 'legitimate expectation' that there would be a compliance with treaty obligations.[18] In the face of this lethargy, the judicial evolution of a new trend, a new attitude, towards the application of treaty standards in domestic law must be viewed as a welcome development. Professor Rosalyn Higgins has captured the chequered sequences culminating in this new trend even in the very hotbed of judicial conservatism – the United Kingdom. According to the distinguished publicist:

> First, in the 1970s and early 1980s, most judges regarded the European Convention provisions as out of bounds, while a few judges vigorously sought way to make them relevant to their judicial tasks. Then, there was a second period during which it became more generally accepted that unincorporated human rights provisions had a definable, albeit, fairly circumscribed, place in judicial decision-making. And today, we are witnessing a remarkably new trend whereby the issue of non-incorporation is being rendered less and less important.[19]

In Commonwealth Australia, the Bangalore judicial colloquium, convened by Bhagwati CJ in collaboration with the Commonwealth Secretariat, was a further impulsion to the evolution of this trend. It has caught on like wild fire, with the trend being noticed in such other jurisdictions as the Caribbean, Zimbabwe and New Zealand.[20]

Domesticating CEDAW in Nigeria[21] and other jurisdictions: the challenge of customary law and practices

In the Preface to *Nigeria's Treaties in Force,* 1970–1990,[22] it was asserted that:

> We have tried in these volumes to provide as comprehensive an index (sic) of all existing treaties **in force**.

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17. C C Nweze (2003) 'Recent Trends in the Judicialisation of Treaty Human Rights: Comparative Perspectives', in C C Nweze and Oby Nwankwo (eds.) *Current Themes in the Domestication of Human Rights Norms.* Enugu: FDP, 143, 160.
18. *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1994–1995) 183 Commonwealth Law Reports (CLR) 229. *Abacha v. Fawehinmi* (2000). 6 Nigeria Weekly Law Reports (NWLR) (pt 660) 228.
19. R Higgins (1994–1997) 'The Role of Domestic Courts in the Enforcement of Human Rights in The UK', cited in J Ezeilo, 'Influence of International Human Rights Law on African Municipal Legal Systems', 6 *NIG. JR* 50, 67.
20. See C C Nweze, loc. cit.
21. Culled from C C Nweze, ibid.
22. Vol. 2 (1990) Lagos: Federal Ministry of Justice (FMJ), p.v (emphasis supplied).

CEDAW is published as a treaty in force in the said volume. The inclusion of CEDAW as such a treaty provokes the question: how are treaties domesticated in Nigeria? Do they come into force by the fact of their publication in a volume entitled *Nigeria's Treaties in Force?*

Under the constitutions of Chile, Tunisia, Madagascar etc., the legislative arm of government is actively involved in the process of treaty making. In other words, treaty-making power is shared by the executive and legislature. When the legislature intervenes, the treaty becomes due for implementation following its publication in the *Official Gazette*. The requirement of publication, therefore, is an express constitutional prerequisite for the implementation of a treaty. Unlike the above models, Nigerian practice follows closely that in the United Kingdom. According to Wali JSC in *Ibidapo v. Lufthansa Airlines*:[23]

> Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.

The Privy Council in the case of *Higgs and Anor v. Minister of National Security*[24] reiterated the English position in these words:

> ...Treaties formed no part of domestic law unless enacted by the legislature.

At the time of writing, the Nigerian National Assembly was yet to enact CEDAW into domestic law. The net effect is that on a strict legalistic interpretation of section 12 of the 1999 constitution, CEDAW provisions must abide legislative intervention before they can become **direct** sources of rights in Nigeria. But as developments elsewhere, even in the United Kingdom, have shown, the judicial evolution of a new trend, a new attitude, towards the application of treaty standards in domestic law, has made unincorporated treaties, and even universally accepted canons, relevant to judicial tasks.

Happily, in Nigeria, the appellate courts have demonstrated their preparedness to advance the frontiers of the administration of justice in this manner. The decisions in *Oguebie v. Odunwoke*[25] and *Aliu Bello v. AG of Oyo State*[26] epitomise this attitude. The *Aliu Bello* case dramatises the fecundity of the Latin maxim *ubi jus ibi remedium* ('for every wrong the law provides a remedy'). In that case, the Supreme Court held the maxim to be so fundamental to the administration of justice that where there is no remedy, provided either by the common or by statute, the courts are urged to create one. What is more, the Supreme Court has even shown that the desire to furnish domestic law with meaning and to add content where lacunae exist, has always been a priority. This can be seen in the case of *Oguebie v. Odunwoke* (supra), where the court applied the customary international law doctrine of implied mandate or doctrine

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23. (1997) 4 Kenya Law Reports (KLR) (pt. 500) 734, 751.
24. *The Times* of December 1999, cited in *Abacha v. Fawehinmi* (supra) at p.288.
25. (1979) 3-4 Supreme Court (SC) 58.
26. (1986) 12 SC 1.

of necessity even in the absence of any domestic legislation on the matter. It is thus in employing CEDAW provisions to add content to domestic law that the norms can be indirectly incorporated (although these norms are not directly enforceable, as indicated earlier). Through this device, rights in domestic statutes can be more broadly defined. The same approach prompted the judicial reinvention of the meaning of the provisions of sections 32 and 38 of the 1979 constitution, dealing with the rights to the dignity of the person and movement, respectively. The rewarding gains of this approach were consecrated in *Nemi and Ors v. The State*[27] and *Agbakoba v. Director, SSS*[28]

The domestication option

Article 2(f) of CEDAW adopts an abolitionist language. It enjoins state parties:

> To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

This provision, like other revolutionary provisions of CEDAW, has been acknowledged as catapulting the issue of gender to centre stage in the debate about the future of customary laws and of plural systems of law.[29] The dividends of such provisions are truly enormous. For instance, they have prompted the emphasis of women's human rights activists to the idea:

> of personal autonomy, precisely as a means of addressing the oppression of individual women within the family unit where women's human rights are frequently violated through domestic violence, restrictions on access to resources and in matters of marriage, divorce and property rights. In other words, the human rights of women epitomise questions about the relationship of the individual to the group.[30]

It is in this context that CEDAW provisions are deployed as 'hangers' in this article to assess normative customs and practices that must either be abolished or, at least, modified to enhance gender equality. This will be done under five broad headings: (1) Gender hierarchy, (2) Access to land/inheritance, (3) Reproductive rights, (4) Domestic violence and (5) Sundry customs.

(1) Gender hierarchy

As noted above, CEDAW employs an abolitionist language in articles 2(f) and 5(a) in mandating governments to abolish or modify customs that discriminate against women.

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27. (1994) *Journal of Human Rights Law and Practice* (JHRLP) Vol. 10 Nos. 1–3, 99.
28. (1994) 9 NACR 134.
29. See N Pillay (2002) 'The Advancement of Women's Rights'. Occasional Papers, Paper 16, Centre for Human Rights, University of Pretoria, 3.
30. Diana J Fox (undated) 'Women's Human Rights in Africa: Beyond the Debate over the Universality or Relativity of Human Rights', available at http://web.africa.ufl.edu/asq/v2/v2i3a2.htm [accessed 23 April 2010]

These provisions are particularly germane in Africa, where most customary norms erect a gender hierarchy. Thus in most systems, wives, widows or daughters exercise minimal control over land. Indeed, the prescriptive language of customary jurisprudence in Nigeria is that only men are the rightful persons to determine valid alienation of land.[31] The decision in the Zimbabwean case of *Magaya v. Magaya*[32] equally points to this cultural phenomenon.

In that case, S L Magaya, a Zimbabwean of African descent, died, leaving behind two wives and four children, a house in Harare and some cattle at a communal home outside the city. He died intestate. Venia Magaya was his eldest child and his only daughter. She was born of his first wife. His three sons, Frank, Nakayi and Amidio, were all children of his second wife. Shortly following the death of S L Magaya, Venia Magaya sought heirship of the estate in the local community court. The eldest brother, Frank, declined to seek the inheritance, claiming he would not be able to look after the family, as is required under traditional law. Ms Magaya had been living in the house with her parents until her father's death. With the support of her mother and three other relatives, she received the appointment and title to the house and cattle. Soon thereafter the second son, Nakayi Magaya, applied to cancel this designation. He was proclaimed the rightful heir under customary law. He proceeded to evict his sister from the Harare property.

The African custom defined by the community court was not articulated within the decision, yet its intent is clear: 'Venia is a lady (and) therefore cannot be appointed to (her) father's estate when there is a man'. Ms Magaya appealed to the Supreme Court. Writing for the court, Justice Muchechetere held that '[w]hat is common and clear from the [texts] is that under the customary law of succession of the above tribes males are preferred to females as heirs'.

The decision was greeted with widespread disapprobation. For example:

> *Magaya* violated both the spirit and letter of a host of international human rights treaties to which Zimbabwe is a party. Most significant among those are [CEDAW, ICESCR, ICCPR]. CEDAW was ratified in 1981 with the explicit purpose of condemning 'discrimination against women in all its forms', thereby extending the basic condemnation of gender discrimination put forth in the Universal Declaration of Human Rights (UDHR). It symbolised the states parties' commitment to eliminating discrimination against women in all its forms, from legal to social and cultural 'prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes'. It called for the modification or abolition of

31. *Usiobaifo v. Usiobaifo* (2005) 3 NWLR (pt.913), 665.

32. See David M Bigge and Amélie von Briesen (2000) 'Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in *Magaya v. Magaya'. Harvard Human Rights Journal*, Vol. 13.

> discriminatory 'laws, regulations, customs and practices'. In *Magaya*, however, CEDAW's aims were not met … [33]

The Kenyan Court of Appeal also handed down a decision that perpetuated discrimination against women. In *Otieno v. Ougo*[34] what was in issue was the plaintiff's right to bury her late husband. Her contention was that denying her the body of her late husband amounted to discrimination against her as a woman, which was a violation of her human rights. For the defendants, it was contended that under the Luo custom, she had no right to bury her husband and she could not be the head of the family upon her husband's death. The High Court dismissed the case. On appeal, Nyarangi JA held, *inter alia:*

> There is nothing repugnant or immoral about … the above customary [law]…[T]he practices are innocent and are meant to underscore the deep loss to the clan…. The appellant as the deceased's wife has to be considered in the context of all wives married to Luo men irrespective of their lifestyles who become subject to the customary laws.

There is no denying the fact that such customs militate against women's participation in cultural life and economic development. Interestingly, there have been judicial attempts to prune such customs of their debilitating influences. For example, the decision in *Uke & Anor v. Iro*[35] represents a gallant judicial attempt to check the erosion of women's rights by customary practices, when the Court of Appeal struck down a Nnewi custom. By Nneato Nnewi custom, a woman cannot give evidence in relation to title to law. Pats-Acholonu JCA (as he then was) held that:

> It is an apostasy to say that a woman cannot be sued or cannot be called to give evidence in relation to land subject to customary right of occupancy.
>
> A custom, which strives to deprive a woman of constitutionally guaranteed right, is otiose and offends the provisions that guarantee equal protection under the law.[36]

His lordship's stance is very commendable. If that custom had any utility in ancient times, it cannot be accommodated in our contemporary society.

(2) Access to land/inheritance

Most systems of customary law manifest an inexplicable irony. On the one hand, there is ample empirical evidence that women are the lifeblood of unpaid agricultural labour, a situation that CEDAW, in articles 14(2) and (h), seeks to remedy. Indeed, article 13(1)(b) pragmatically maps out a wide canvass for empowering women in this regard. On the other hand, notwithstanding the pivotal role of women as the major source of

33. David M Bigge and Amélie von Briesen, loc. cit.
34. Kenya Appeal Reports (1982–88).
35. (2001) 17 WRN 172.
36. Ibid. pp.176–177.

cheap agricultural labour, most customary law systems seldom concede allodial (inalienable) ownership of land to women. Divorce or the death of their husband effectively erodes their control over land.

Two decisions from Nigeria illustrate this trend. In *Mojekwu v. Mojekwu*[37] one of the issues that came before the Enugu Division of the Court of Appeal was the incidence of the 'Oli-Ekpe' custom of Nnewi, by which a surviving brother of a deceased man is, by custom, allowed to inherit the property of his late brother because the surviving wife has no male issue. Niki Tobi JCA, had this to say:

> For a custom or customary law to discriminate against a particular sex is to say the least an affront to the Almighty God himself.... I have no difficulty in holding that the 'Oli-Ekpe' custom of Nnewi is repugnant to natural justice, equity and good conscience.

In *Nzekwu & Ors v. Nzekwu & Ors*[38] the Supreme Court held that any Onitsha custom that postulates that an Okpala has the right to alienate the property of a deceased man in the lifetime of his widow is a barbarous and uncivilised custom, which should be regarded as repugnant to equity and good conscience and therefore unacceptable.

Instructively, there would appear to be no uniformity in customary practices in Nigeria on women's rights. Thus, it has been asserted that the customary laws of the Yoruba people would appear by means of judicial decisions to have developed beyond the restrictions imposed in other native laws and customs in the country.[39] Viewed superficially, this conclusion would appear hasty. Yet, a perusal of judicial responses to customs relating to women's rights would bear out the cogency of the assertion. Instances will illustrate the point being made.

For instance, *Akande v. Oyewole*[40] is a groundbreaking decision. In extending the rights of female children to property under native law and custom, which was their father's matrilineal inheritance, the decision exposed the exiguity in the socio-anthropological distinctions between matrilineal and patrilineal systems.

In that case, the plaintiff (respondent on appeal) contended that the property in question belonged to his family. The defendant's father was not a member of the plaintiff's family. He was merely allowed to occupy a room in the said family house as a licencee on compassionate grounds. He fled his own family compound after seducing a woman. Upon the death of the defendant's father, he (the defendant) appealed to the plaintiff's family to be allowed the occupation of the room used by his father in his lifetime. This request was not favoured.

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37. (1997) 7 NWLR (pt.512), 283.
38. (1989) 2 NWLR (pt.104) 373, 395.
39. A G Karibi-Whyte (1994) 'Succession' in *Law and Family.* Enugu: FDP.
40. (2000) 6 WRN 36.

The defendant's case was that he was a member of the plaintiff's family because his father's mother was from that family. The land on which his father built the house in dispute was the share of his father's mother out of the plaintiff's family land.

The trial court entered judgment for the plaintiff, hence the appeal. Akintan JCA first restated the long-settled legal position that:

> Family property is property which devolves from father to children and grandchildren under native law and custom, and which no individual child or member of the family can dispose of in his or her will, until such property is partitioned and each child or member of family has his or her separate share of the family land, irrespective of allotment. On allotment, the allotee has right to occupy and use the land, but he or she cannot alienate it without the consent of the family. The right of occupancy acquired is however transferable to the allottee's successors. Similarly, although the land does not belong to him, the allottee has ownership of whatever development he superimposes on the land by his personal efforts. But no matter how long an allottee of family land may have stayed on the land or whatever improvement he has carried out on it, the occupancy right granted him cannot ripen into full ownership.[41]

Turning to the findings of the trial court, Akintan JCA explained that:

> It is clear from the findings of fact made by the learned trial judge that the main reason why he rejected the case put up by the defendant is that the appellant's father could not claim to be a member of [the plaintiff's family]. The learned trial judge's conclusion in that respect was not based on any evidence led to show that inheritance through female issue was not permissible under the relevant customary law. The law is long settled that rights of daughters in property held under nature law and custom are well recognised and protected and that the court has jurisdiction to make orders to protect a female's rights, even to the extent of ordering partition.[42]

His lordship concluded that since the defendant's paternal grandmother was from the plaintiff's family, the defendant's father was also from that family.[43] If this latter reasoning is finally endorsed by the Supreme Court as the correct legal position, then it would represent an advancement of the law on the right of female children from the earlier formulation in *Lopez v. Lopez,*[44] *Lewis v. Bankole*[45] and *Folami v. Cole*.[46] It would ultimately prompt a reconfiguration of the anthropological bases of matrilineage and patrilineage! Hence, we anxiously await the reaction of the Supreme Court to this far-reaching decision.

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41. See ibid p.45, citing *Olanguna v. Ogunsanyo* (1970) 1 ALLNLR 227; *Shelle* v. *Asajon* (1957) Supreme Court of Nigeria Law Report (SCNLR) 286.
42. Ibid. p.47, citing *Lopez v. Lopez* (1924) 5 NLR 56.
43. Loc. cit.
44. 5 NLR.
45. (1909) 1 NLR 81.
46. (1990) ANLR 310.

Be that as it may, the perpetuation of the current of legal reasoning that endorses the recognition by natives 'that daughters have the same rights as sons in the lands of their fathers' is indeed noteworthy. Combe CJ must truly be stirring in his grave.

In *Lopez v. Lopez* (supra), the plaintiffs who were seeking partition of family property were females or children of female children of the original owner. Although the incapacity of females to hold land was not an issue at the trial, the evidence of the chiefs was that although females cannot inherit land, they have the right to stay in the house. Commenting on the opinion of the chiefs, Pennington J said:

> The opinion commends itself to me…. And I do not propose to depart from it. A decision that women are entitled to share in the landed property under native law and custom would strike at the very root of native ideas on the subject of family property.[47]

Combe CJ was quick to vacate that reasoning for, on appeal, he first acknowledged that:

> In early times, the rights of daughters were not the same as those of the sons …[48]

But that ancient sentiment must yield its place to a more urbane, if civilised, sociology! Combe CJ thus declared magisterially:

> However that may be, females undoubtedly have rights and the court must have jurisdiction to make such order as may be necessary to protect a female enjoyment of her rights.[49]

The above case and that of *Lewis v. Bankole* truly demonstrate the role judicial responses have played in stripping Yoruba customary law of restrictions imposed by other native laws and customs. Yet one sociological factor must not be underrated in this evolutionary process – it is the fact that judicial behaviouralism was at play in those cases. For instance, in *Lewis v. Bankole* (supra), it was evident that the judge, Osborne CJ was considerably influenced by his imperial sociological background. After all, in England, a succession of Queens had admirably held sway over British Colonial suzerainty. Now, listen to His Lordship, Osborne CJ:

> Lagos is not the only part of this Majesty's Dominions where the female sex are seeking for greater recognition of her capabilities; and seeing that a wise and great Queen holds sway for long years over the British Empire, there seems no reason why, on the mere ground of sex, a Lagos woman should not be capable of managing the domestic concerns of a family compound … There is nothing inequitable in this recognition of women's rights.[50]

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47. Ibid. p.53 cited in A G Karibi-Whyte, p.50.
48. *Lopez v. Lopez* (supra) at p.54, cited in Karibi-Whyte, p.48.
49. See Combe CJ, in *Lopez* (supra) of p.55, cited in Karibi-Whyte, loc. cit.
50. See *Lewis v. Bankole* (supra) pp.101–102.

In effect, Osborne CJ held that in Lagos a woman could be head of the family if she is the eldest and the others who are junior to her are females. Here again, we are compelled to set out the judicial reasoning that yielded the above decision, a reasoning dripping with precious insight into sociological jurisprudence:

> … and the town of Lagos bears striking testimony to the honour here accorded to women in the names of the square wherein this court house stands, some and one of the principal markets, both called after women of wealth and importance in by gone days…[51]

It is a great credit to the judicial sagacity of Osborne CJ that almost 81 years after his redoubtable espousal of women's rights in the above case, the Nigerian Supreme Court has felt itself bound by his compelling logic! In *Folami v. Cole* (supra), the appellants contended that since all the children of their deceased mother were females, the first respondent had to be elected by the other sisters before she could assume the leadership. The first respondent, on her part, contended that by virtue of her being the eldest child of their deceased mother, the headship of the family automatically devolved on her. The High Court and the Court of Appeal found for the respondent, whereupon the appellants further appealed to the Supreme Court, which approvingly adopted the views of Osborne CJ.[52] The court upheld the judgment of the Court of Appeal, which relied on Osborne CJ's judgment in *Lewis v. Bankole* (supra) alone in upholding the custom that in Lagos a surviving female child could become head of the family if she was the eldest and all the surviving children were females.

In the northern part of Nigeria, it is estimated that adherents of the Islamic faith are predominant. Islam, it is said, is a complete way of life. Our action research reveals that contrary to certain unfounded assumptions, Islam takes a progressive view of women's rights. Judicial decisions have endorsed this trend. Thus, for instance, the pre-Islamic tradition that treated women as objects of inheritance has been completely supplanted as being rooted in ignorance and oppression.[53] In *Muhammad v. Mohammed*,[54] two sisters instituted an action against their brothers at the trial court for their own shares in respect of the estate of their deceased father. The estate as a whole was subject to distribution to all legitimate heirs in accordance with the dictates of Islamic law. Their brothers (defendants) got their own legal shares. They, however, excluded their female sisters (plaintiffs) on the ground that female daughters are not entitled to inheritance. The plaintiffs approached the trial court for assistance to recover the estate and give them their own shares.

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51. See ibid. p.102.
52. See, particularly, Belgore JSC at pp.315–316.
53. See, per Muntaka-Coomasie JCA in *Muhammad v. Mohammed* (2001) 6 NWLR (pt. 708) 104, 112.
54. *Loc. cit.*

The trial court found that the parties are half-brothers and sisters. Their late father's estate had not been distributed as required by Islamic law. The court, accordingly, ordered that the estate be distributed among the heirs under Islamic law. This was done. Dissatisfied, the plaintiffs appealed to the Sharia Court of Appeal, which upheld the judgment of the trial court. On further appeal to the Kaduna division of the Court of Appeal, the court dismissed the appeal.

Muntaka-Coomasie JCA who read the judgment of the court, first offered a useful insight into the pre-Islamic status of female children:

> Before the advent of Islam, daughters and young sons of deceased person (sic) were not entitled to inheritance. There reasons (sic) were that since infant sons and daughters cannot go to war and secure booty or loot … they should not be allowed to inherit as heirs. In fact females were themselves object of inheritance.[55]

According to His Lordship, Islam destroyed that arrangement which was based on, and rooted in, ignorance and oppression. On the crucial question of whether female children can partake in the inheritable estate of their deceased father, the learned justice of the Court of Appeal stated the Islamic position, which he held to be the law, thus:

> Now daughter (sic) or female heirs are allowed to partake like their male counterparts in a modified manner, namely, a daughter can have as her share, half of what the son will get as his share …[56] this is what is popularly known as ILILZAKARI formula. That is to say a male person would get twice of the female share.[57]

His Lordship traced the religious pedigree of this patently discriminatory practice in these words:

> The issue of inheritance under Islamic law is sacrosanct. It could be clearly seen that Allah the most High did not leave it in the hands of human beings. He the Almighty undertook to explain its rule, conditions and classification of the heirs and stated same in the Holy Qur'an.[58] So female heirs constitute Qur'anic heirs, i.e. their shares were specifically entrenched in the Holy Qur'an; therefore nobody or institution can deny them shares which God gave them.[59]

Now, His Lordship endorsed this scriptural formulation without evaluating the rationale for the preferential treatment, which the ILILZAKARI formula accords to male children.

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55. See ibid. p.112.
56. *Loc. cit.* citing chapter 4 verses 11–14 of the Holy Qur'an.
57. *Loc. cit.*, affirming the concurrent findings of the two lower courts allowing the daughters to inherit the land in dispute.
58. Citing *Suratui Nisa* chapter 4. The Qu'ran.
59. *Loc. cit.*

The question is whether the sacrosanctity, which the said formula is invested with under the Holy Qur'an, can stand the test of the non-discrimination norm ordained in the Nigerian constitution and other laws. Section 42 of the 1999 constitution provides:

> 42(1) A citizen of Nigeria of a particular community, ethnic group, and place of origin, sex, religion or political opinion shall not by reason only that he is such a person:
>
> a. be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religion or political opinion are not made subject or
>
> b. be accorded either expressly by or in practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religious or political opinions.

It is interesting to note that the derogation provisions in section 45 of the constitution do not extend to the provision of section 42.[60] The entrenchment of the ILILZAKARI formula in the Holy Qur'an, therefore, cannot justify its discriminatory tendencies.

Above all, Islamic law is part of the received customary law. It is, therefore, a law in force in parts of the country. It comes within the meaning of 'any law in force' in section 42. Thus, any rule of Islamic law that imposes special disabilities or restrictions or accords special privileges or advantages based on sex, is unconstitutional.[61] With due respect to Muntaka-Coomasie JCA, section 42, must per force, vacate the sacrosanctity with which the Holy Qur'an invests the ILILZAKARI formula. In effect, His Lordship ought to have pruned the formula of such interpretations that tended to confer advantages on the male children, namely, the formula which allowed a male person to get twice the female share. That practice cannot find justification either under CEDAW, the African Charter on Human and Peoples' Rights (AfCHPR),[62] ICESCR[63] or ICCPR.[64]

It is true, indeed, that elsewhere in Africa CEDAW provisions have been invoked in cutting down such discriminatory customary practices. Mwalusanya J of the High Court of Tanzania was, perhaps, one of the first judges to uphold women's rights enshrined

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60. We are therefore in agreement with the submission that the only derogation from the bar on discrimination that is allowed under the section concerns those in section 42(3), see, O C Okafor (2000) 'The non-discrimination norm as a basis for the legal protection of economic, social and cultural Rights', in E Onyekpere, *Manual on the Judicial Protection of Economic, Social and Cultural Rights.* Lagos: SRI, 145, 147.
61. See B O Nwabueze (1982) *The Presidential Constitution of Nigeria.* London: C Hurst and Co. p.452.
62. Cap 10 LFN, Article 2.
63. Article 2(2).
64. Article 26.

in CEDAW. In *Ephrahim v. Pastory,*[65] a woman inherited clan land, which she sold for her sustenance in her old age. The sale was challenged on the ground that under the Haya customary law females have no right to sell clan land. Mwalusanya J voided that rule of customary law as being contrary not only to CEDAW, but also to the UDHR, ICCPR and AfCHPR.

(3) Reproductive rights

The concept of reproductive rights is anchored on people's entitlement to the control of their reproductive choices. This control is only exercisable where they enjoy reproductive autonomy. The implication of this is that reproductive autonomy is an indispensable prerequisite for the effective enjoyment of reproductive rights. Mahmoud F Fathalla, one of the leading authorities on reproductive health rights, captures the import of the nexus between both concepts in admirable and lucid prose:

> Reproductive health, therefore, implies that people have the ability to reproduce, to regulate their fertility, and to practice and enjoy their sexual relationships. It further implies that reproduction is carried to a successful outcome through infant and child survival, growth and healthy development. It finally implies that women can go safely through pregnancy and childbirth, that fertility regulation can be achieved without hazards and that people are safe in having sex.[66]

The question is: what is the relevance of this to customary law? The answer is not difficult to find. Many customs effectively denude women of their reproductive autonomy, that is, the ability to control their choices. These customs include child marriages, female genital mutilation (FGM), puberty rites etc.[67]

In Zambia, cultural practices that impede reproductive autonomy have been identified in a study of the links between human rights abuses and HIV transmission to girls.[68] These include deep-rooted cultural taboos that inhibit parents from discussing sex with their children and so militate against effective sex education. So pervasive are these practices that the government has openly acknowledged that the key underlying cultural factor that makes girls vulnerable to HIV is the subordinate status of women and girls, which deepens their social and economic dependency on men. Indeed, a UN Special Envoy came up with the finding that Zambian girls are raised to be obedient and submissive to males and not to assert themselves. In his view, these factors conspire to rob them of autonomy 'to negotiate safe sex and to control their sexual lives and therefore place them at high risk of HIV transmission'.[69]

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65. Civil Appeal No. 70 (1989) cited in C G Bowman and A Kuenyehia, op.cit.186.
66. Mahmood Fthalla (1991) 'Reproductive Health: Global Overview', 626 Annals of the New York Academy of Sciences *1,1.*
67. See C G Bowman and A Kueyehia, op. cit.
68. Human Rights Watch (2003) *Suffering in Silence: The link between human rights abuses and HIV transmission to girls in Zambia*, pp.14 *et seq.*
69. Ibid.

There is also another cultural practice in certain parts of southern Africa, including Zambia, known as 'dry sex'. In this practice, girls and women attempt to dry out their vaginas in an effort to provide more pleasurable sex to men. They achieve dryness by using certain herbs and ingredients that reportedly reduce vaginal fluids and increase friction during intercourse. The practice and its health implications were captured in a 1999 report by the Zambian Ministry of Health and the Central Board of Health, which stated thus: 'to enhance male pleasure, a number of women continue to practice dry sex, which can increase vulnerability to infection through exposing genital organs to bruising and laceration'.[70]

This is another cultural practice in Zambia that violates the reproductive rights of women. According to this cultural practice, a widow is under obligation to have sex with another man following the death of her husband. The underlying belief is rooted in the assumption that:

> To be purged of the 'evil forces' assumed to have caused the death of a spouse, the widow or widower is 'cleansed' through the act of sexual intercourse with a relative of the deceased.

There can be no denying the health implications of this practice, both for the widow and the cultural agent of the 'cleansing'. Thus, Human Rights Watch discovered that one man who always volunteered in his community to cleanse widows after funerals, is now dead, apparently due to HIV/AIDS.[71]

In other jurisdictions, all sorts of customs undermine reproductive autonomy in various ways. In Nigeria, for example, the Supreme Court had occasion, even if unwittingly, of advancing the concept of reproductive self-determination. In *Okonkwo v. Okagbue*[72] the court held that marriage, in its popular meaning, is a union of a man and a woman: above all, between two living persons. It took the view that, for a marriage to be meaningful, it is necessary for the husband to physically exist so that the marriage can be consummated. In that case, therefore, the court nullified the custom that allowed a woman to be married to a deceased man.

The decision in *Yusufu v. Okhia*[73] also concerned a custom that militated against the exercise of reproductive autonomy. Here, the allegation was that a customary marriage between a deceased man and his widow subsisted until the wife performed the funeral rites for her late husband. Where she did not discharge that duty, any relation of the husband could inherit her. Since the widow had not performed the rites, the relations of the deceased wanted to 'inherit' her. However, she refused and instead opted out

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70. Ibid. p.19.

71. See ibid p.15.

72. (1994) 9 NWLR (pt.368) 301.

73. (1976) 6 East Central State Law Report (ECSLR).

of the matrimonial home and had a relationship with the appellant. The respondent, a brother of the deceased, originated an action in the lower court against the appellant for adultery and enticement. The court ruled in his favour, hence, the appeal. The appellate court derided the rule of customary law that permitted an action for adultery and enticement after the death of a man as being repugnant to natural justice.

(4) Domestic violence

As observed earlier, the constitution of Uganda acknowledges that other non-state actors equally violate human rights. The constitution of Ghana is even more explicit. Article 26(2) provides that all customary practices that dehumanise or are injurious to the physical and mental well-being of a person are prohibited. These constitutional provisions made in furtherance of the obligations imposed by CEDAW typify legislative responses to the peculiar kind of social problems engendered by the operation of certain cultural practices. One such practice is domestic violence, which has been identified as a major threat to women's health. International surveys carried out in parts of Africa indicate the following percentages of women who reported one form of violence or another by their male partners:

> Tanzania: 60 per cent; Uganda: 46 per cent; Kenya: 42 per cent and Zambia: 40 per cent.... [A] nation wide survey covering 11 major ethnic groups in Ethiopia reported that on average every man beat his wife seven times in six months….A comprehensive survey of a large random sample was carried out throughout Ghana in 1998 which indicated that a large proportion of women had experienced physical abused by a current or recent partner.[74]

The sociological factors that sustain these practices vary from jurisdiction to jurisdiction. It has been reported, for instance, that '[i]n Botswana, Swaziland and Zimbabwe, the right of a man to chastise his wife as a correctional measure is enshrined in both common and customary law'.[75]

There can be no doubt that the constitutional techniques adopted in Ghana and Uganda, as shown above, are worthy of emulation in other jurisdictions, where CEDAW provisions are to be employed as hanger for assessing the impact of customary practices on women's rights.

(5) Sundry customs

There are a host of other customary practices that must be attended to in the process of domesticating CEDAW. It is our fervent hope that religion will not be employed a shield for perpetuating anachronistic attitudes. Two examples may be cited from Nigeria to illustrate this possibility.

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74. N Neft and A D Levine (eds.) *Where Women Stand: An International Report on the Status of Women in 140 Countries,* cited in C G Bowman and A Kuenyehia, op. cit. p.455.

75. C G Bowman and A Kuenyehia, loc. cit.

First, there is an aspect of Islamic law which, notwithstanding its endorsement by a long line of cases, is not free from doubt. The question of who is a competent witness under Islamic law has long been settled by superior authorities.[76] The general principle of Islamic law relating to claims in civil matters involving both movable and immovable property is that proof is complete by:

- evidence of two unimpeachable male witnesses, or
- evidence of one male witness and two or more unimpeachable female witnesses, or
- evidence of one male or two female witnesses with the claimant's oath in either case.[77]

In effect, whereas under Islamic law a claim is regarded as proved if two unimpeachable male witnesses testified in proof and the court is entitled to enter judgment accordingly,[78] this is not the case if two unimpeachable female witnesses testify without the evidence of a male witness.[79] Thus, the unimpeachability of the testimonies of two female witnesses is incapable of inducing credibility in the mind of a judge. Only the additional testimony of a male witness, whether impeachable or not, can render such testimonies cogent and credible. This Islamic procedure has been endorsed by a succession of Supreme Court justices learned in Islamic jurisprudence,[80] and other eminent and erudite justices of that court, who had the opportunity of deciding matters touching on Islamic jurisprudence.[81]

Surprisingly, this crucial procedural matter has never been subjected to the fair hearing standards enunciated in the Nigerian constitution.[82] The rationale of all binding authorities on this matter is that fair hearing imposes an ambidextrous standard of justice in which the court must be fair to both sides of the conflict.[83] It, therefore, does not anticipate a standard of justice that is biased in favour of one party, but prejudices the other. Above all, the right to fair hearing is not a technical doctrine. It is one of substance.[84] In the exercise of that right, a party to a suit is at liberty to call witnesses if he or she likes.[85]

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76. *Jatau v. Mailafuya* (1988) 1 NWLR (pt.535) 682, 690–691; *Jidun v. Abuna* (2000) 14 NWLR (pt.686) 209, 218.
77. *Hada v. Malumfashi* (1993) 3 NWLR (pt. 303) 1.
78. *Nasi v. Haruna* (2002) 2 NWLR (pt.750) 240.
79. *Jidun v. Abuna* (supra).
80. Uthman Mohammed, Belgore, Wali, Kutigi, Onu JJSC.
81. Both Achike and Ayoola JJSC sat on the panel in *Jidun v. Abuna* (supra).
82. Section 36.
83. *Ndu v. State* (1990) 7 NWLR (pt.164) 550, 578; *Ogundoyin v. Adeyemi* (2001) 33 WRN 1.
84. *Ogundoyin* (supra).
85. *Nwanegbo v. Oluwole* (2001) 37 WRN 101.

In our humble view, therefore, the determination of cases, on such criteria, as not only the quantity of witnesses, but also on the prejudicial criterion of classification of such witnesses into sexes, is not only an affront on the inveterate principles of fair hearing, it offends the inviolable non-discrimination norm of the constitution and CEDAW.

It is hoped that when the opportunity presents itself again, the appellate courts would subject this vital procedural issue to the constitutional touchstone of fair hearing. Such ugly aspects of Islamic law must be redefined to bring them in line with the overall portrait of Islamic jurisprudence as feminist-oriented.[86]

Other aspects of customary laws that have been challenged in the courts are those relating to burial ceremonies and their impact on women's religious freedom. In *Onwo v. Oko*,[87] the appellant claimed that the respondent forcefully, and against her wishes, shaved her hair, assaulted her grievously and locked her up in a room and removed all her property in order to conform to the tradition of the community of mourning the dead. The appellant, a born again Christian and member of the Assemblies of God Church, claimed that according to her own religion and her faith, she does not mourn the dead. Consequent upon the shaving of her hair forcefully, she originated an application for the enforcement of her fundamental rights. After the leave sought had been granted, and after hearing both sides on the main motion, the trial court dismissed the application on the ground that fundamental rights are not enforceable against a private individual. In allowing the appeal, the Court of Appeal held that where fundamental rights are invaded by ordinary individuals, the victims have rights against the individual perpetrators.[88]

Post scriptum

Notwithstanding that CEDAW has long been ratified in most of the jurisdictions considered above, domestic legislative action for the actualisation of the rights in the convention is yet to be consummated. This is the unfortunate fallout of the noticeable lethargy on the part of the competent legislature. That is why it is heart-warming that through judicial proactivity, CEDAW provisions are gaining incremental endorsement. This poses a challenge to non-governmental organisations (NGOs) and women's rights advocates: to maximise this beneficent judicial attitude by increasingly hybridising their litigation strategies by reference to domestic law, CEDAW and other international human rights instruments.

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86. A B Mohammed (undated) 'Protection of Women and Children under Islamic Law', in A U Kalu and Y Osinbaja (eds.) *Women and Children under Nigerian Law.* Lagos: FMJ, nd., 50, 53.

87. (1996) 6 NWLR (pt.456) 584.

88. In *Ojonye v. Adegbudu* (1983) NCLR 429 it was held that a wife was not bound to provide a goat for the traditional burial rites of her husband, because it was inconsistent with her religious belief.