

The Status of Women under International Legal Instruments and African Customary Law: Two Normative Systems in Perpetual Conflict?

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Abstract

Rights of women form part of fundamental human rights. Initially, this set of rights was not recognised by the international community. This situation changed when the international community acknowledged that women cannot fully enjoy fundamental human rights without specific reference to their rights. However, African women are confronted with the challenges surrounding the clash between their status under international legal instruments and African customary law. This paper argues that while some African countries have signed and ratified various international instruments on the protection of the rights of women, and incorporated them in their national laws, there is a gap between policy and implementation. Ratification has not translated into improved rights for women due to persistent adherence to some African customary law which does not recognise such rights. The paper adopts the doctrinal method of research to review the various international legal instruments on women's right, customary law and women's rights in Africa, and the influence of the African customary law on the implementation of these instruments in Africa. It concludes that even though the issue of women's rights is in conflict with African customary law, international human rights norms could be domesticated in Africa without the total abolition of African cultural practices.

1. Introduction

The protection of fundamental human rights and subsequently the rights of women was alien to ancient African culture. Most ancient traditional Africa societies did not regard all human beings as persons in law; the status of some categories of individuals was elevated above that of an ordinary human being to that of "gods".¹ Slaves and members of certain castes were not recognised as human beings and the status of kings and their lineage were elevated: they were viewed as superior to ordinary human beings.² Women did not enjoy full legal status; their status lay between that of a serf and an infant, with a restricted legal personality.³ They were regarded as subservient and inferior in traditional African society. In patriarchal ancient African societies, this status is ascribed to a girl child at birth. When a woman gives birth to a female child, the father has little or no regard for the child due to the belief that she is a temporary member of the family who ceases to be part of it when she marries. Among other things, this negatively impacts women's access to education, right of inheritance, and also choice of career. In contrast, a male child is the father's heir who will maintain the dynasty even after the demise of the father concerned. Even upon marriage, a woman is still dependent in all areas of her life and it is believed that she cannot make any decision with regard to her reproductive life without the consent of her husband.⁴ A woman is regarded as a second-class human being whose role in the home is restricted and subject to the approval of the husband concerned. In the past, the role of women in traditional African society was limited to bearing and rearing children, and also home keeping. The health consequences of these activities were not considered.⁵

¹ A. Emiola *The principles of African customary law*. 2nd Ed. (2005) 33-38.

² *Ibid.*

³ Emiola, note 1(above)

⁴ E. Fokala "The relevance of a multidisciplinary interpretation of selected aspects related to women's sexual and reproductive health rights in Africa" (2013) 17 *Law, Democracy & Development* 177, 180.

⁵ R.J. Cook "International protection of women's reproductive rights" (1991-1992) 24 *N.Y.U.J. Int'l & Pol.* 645, 646.

However, as the world progressed, the international community realized that women cannot fully enjoy their fundamental human rights without specific instruments that accommodate women's rights. As a result of this, some international instruments that accentuate the rights of women were enacted. African countries acceded to the various instruments on the protection of women's rights even though the issue of women's rights such as equality, non-discrimination, freedom, integrity and dignity is unfamiliar to most of the African customary law. While African countries have signed and ratified these instruments and incorporated them in their national laws, there is a gap between policy and implementation. Major explanations for this are the various cultural practices that subjugate women's rights which are entrenched in the various African communities. This is the legacy of patriarchy in most of the African societies. This has made the adoption of the laws that protect women's rights a difficult task. It is against this background that this paper examines the status of women under the international human rights instruments and the African customary law. To achieve the foregoing; the paper will consider the various international and regional treaties, and customary law and women's right in Africa. The paper will conclude by discussing the influence of the African customary law on the implementation of these instruments in Africa.

2. Development of the Legal Framework on Women's Rights in Africa.

The special and unique nature of women (physiologically and anatomically) requires the international community to adopt fundamental human rights instruments that accommodate women's rights. The first stage of the development of women's rights witnessed the promotion of specific legal rights such as employment rights, and also measures against violence against women and trafficking in persons.⁶ These rights were considered because women were facing discrimination at the workplace due to pregnancy and child-birth, among others issues. In the public and private spheres, women were also vulnerable to violence and were subordinate to men. Most victims of trafficking in persons were women. In addition to general human rights provisions, there was a need for specific laws to tackle the infractions that were exclusive to women.

Negotiations were therefore held for special conventions to address various forms of discrimination against women based on sex.⁷ Thus, the second stage in the development of the law focused on how to enforce the various laws already in place relating to women. Despite legislation that prohibited discrimination against women on the grounds of sex, women were still experiencing persistent infringement of their rights.⁸ This prompted a Women's Convention (The Convention for the Elimination of All Forms of Discrimination against Women), which heralded the third stage of the development of laws on women's rights.⁹ In order to eradicate all forms of infractions on women's rights, which usually were borne out of discrimination, the Convention dealt with all forms of discrimination that could be envisaged at the time.¹⁰

The fourth stage in the development of the law on women's rights, was the inclusion of women's concerns in generalised treaties such as international trade norms.¹¹ An example is the Protocol to the African Charter on Human and Peoples' Rights, which considered the vulnerable and unique nature of women. Article 19 of the Protocol provides that: Women shall have the right to fully enjoy their right to sustainable development. In this connection, the State Parties shall take all appropriate measures to ... (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.¹²

The next section will discuss the various international human rights instruments on the protection of women's rights as this will assist in identifying the various instruments that has been ratified and signed by some African Countries.

2.1 The Universal Declaration of Human Rights (UDHR) 1948

⁶ R.J. Cook "Effectiveness of the Beijing Conference advancing international law regarding women" (1997) 91 *ASIL Proceedings* 310-317.

⁷ *Ibid*

⁸ *Ibid*.

⁹ Adopted by the UN General Assembly Resolution 34/180 of 18 December 1979.

¹⁰ Cook, note 6 (above).

¹¹ Cook, note 6 (above).

¹² Adopted on 25 November 2005.

The UDHR - which came into force in 1948 marked a turnaround in the generalisation of the international protection of human rights. No previous document on the development of human rights was as universal and comprehensive as the UDHR. It was adopted by the UN General Assembly on 10 December 1948. The provisions of the UDHR were intended to meet the immediate need of the international community to put an end to the gross human rights abuses experienced during the Second World War.

The UDHR comprises 39 articles, framed with the aim of giving more value to human life. Considering the antecedents and the provisions of the declaration, it goes without saying that at the time of its drafting, rights of women were not directly contemplated. There are some provisions that support the right of autonomy in relation to an individual's body. For instance, Article 1 states that all human beings are born free and that they are equal in dignity and rights. It follows that all human beings are the same; no one is inferior or superior to another. Hence, no individual is allowed to impose his/her will on another person in a bid to subjugate such an individual. In the same vein, Article 2 affirms that no one is superior to another in exercising the various rights and freedoms contained in the declaration. Article 3 provides for the universal right to life, liberty and security of persons. This particular article accommodates the reproductive health rights of women, because the right to life, security and liberty are indispensable in guaranteeing reproductive autonomy. Article 7 is on equal protection before the law. According to the Article, all are equal before the law and are entitled without any discrimination to equal protection before the law. It states further that all are entitled to equal protection against discrimination.

The process of child-bearing and rearing could have an impact on an individual's right to life. Consequently, an individual must be able to make independent decisions in this regard without fear. Articles 12 and 16 of the UDHR support the reproductive health rights of women. Article 12 deals with the right to privacy, which is vital to reproductive health rights.¹³ Reproductive autonomy cannot be achieved when there is interference of any kind in relation to an individual's body. The provisions of Article 16 are extremely important to reproductive health rights. It states that:

Article 16 does not specify what 'full age' is; this may offer space for those who debate this issue. The other provisions of the article are crammed with requirements for autonomy. They forbid discrimination on any grounds. Men and women have equal rights in marriage. It follows, therefore, that just as a man is free to make decisions in relation to his body, so is a woman at liberty to do whatever she likes; no one has a superior right over the other. The UDHR also forbids any form of coercion into marriage, and, according to the article, society is expected to help to make the union a success. Society can only perform this function through the various laws and norms that are in place in relation to marriage.

Article 25 is important to the social well being of women. According to the article, everyone has the right to a standard of living adequate for the health and well being of himself and family. And this includes food, clothing, housing, medical care, and necessary social services and right to security in the event of unemployment, sickness, disability, widowhood, old age and lack of livelihood in circumstances beyond his control. The Article states further that motherhood and childhood are entitled to special care and assistance. It prohibits discrimination by stating that both children born in and out of wedlock shall enjoy the same social protection. Article 27 gives an individual the right to freely enjoy scientific advancement and to participate in the cultural life of the community. This provision is not directly linked to the reproductive health rights of women, but in a way gives a woman the liberty to benefit from scientific advancements such as family planning and sterilisation services, among others, without any form of coercion. The article supports the fact that, even if a particular society does not believe in autonomy in relation to one's body an individual who is a member of such a society, is at liberty not to align themselves with the beliefs of their society.

The UDHR has been criticised for several reasons. Although the chairperson of the committee that drafted it, Eleanor Roosevelt, was a woman, the provisions of the articles were gender indifferent. They do not address the various issues that affect women. This is due to the circumstances that surrounded the drafting of the UDHR. The UDHR was drafted to give more value to human life in order to avert a reoccurrence of the various killings that took place during World War 1 and 11. As a result of this, the rights of women were not envisaged at this time. Considering its origins, developing countries regard the UDHR as a Western idea and therefore some of its provisions were regarded as impracticable due to cultural differences.

¹³ Article 12 of the Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 217 A(111) of 10 December 1948.

Furthermore, wealthier countries connect human rights aid to economic relations with developing countries.¹⁴ Although the UDHR did not categorise rights, and although its provisions are mere declarations that are not legally binding, the declaration marks the genesis of the generalisation of the protection of human rights on a truly universal scale.¹⁵

2.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

Prior to the adoption of the UDHR, the UN agreed that its provisions would be transformed into a legally binding instrument, using one or more treaties.¹⁶ However, this was not achieved for almost two decades. In 1966, the various human rights recognised in the UDHR were divided into the International Covenant on Political and Civil Rights, and the International Covenant on Economic, Social and Cultural Rights.¹⁷ While different, these two categories of rights are interdependent and indivisible because they are applicable to all human beings on an equal basis without any form of discrimination.¹⁸

For instance, Article 1 states that all human beings are born free and they are equal in dignity and rights. It follows that all human being are the same; no one is inferior or superior to another. Hence, no individual is allowed to impose his/her will on another person in a bid to subjugate such an individual. In the same vein, Article 2 affirms that no one is superior to another in exercising the various rights and freedoms contained in the declaration. Article 3 provides for the universal right to life, liberty, and security of persons, and accommodates the reproductive health rights of women because the right to life, security and liberty are indispensable in guaranteeing reproductive autonomy. Article 7 is profound on the right of everyone to the enjoyment of the just and favourable conditions of work particularly, remuneration, safe and healthy working conditions, equal opportunities to everyone among others.

Article 10 and 11 are of utmost importance to women as it addresses the issue of the protection of the family including their social welfare, the issue of consent to marriage, protection of mothers during pregnancy and after child birth, protection of children among others.

2.3 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979

This is often referred to as the Women's Convention or the International Bill of Women's Rights. It is an instrument that marks a turnaround in the history of international human rights where more value was attached to women's health and rights by recognising the various rights that are directly or indirectly connected to such rights. Prior to this Convention, the focus was on general human rights. As the world progressed and developed, there was a need to recognise the fundamental physiological differences between men and women. By virtue of their unique nature, women have special needs which were not met by the various international treaties adopted before the CEDAW.

Due to its patriarchal nature, much of traditional African culture reflects discrimination against women. The various international conventions and treaties preceding this Convention did not consider practices that devalue women. While human rights treaties aim to attach more value to human life, women still suffered many kinds of discrimination in both the private and public spheres hence the need for a treaty to address this shortcoming and to enable women to enjoy their fundamental human rights.

As the first human rights treaty that addresses discrimination against women, the CEDAW comprises 30 articles.¹⁹ Article 1 defines the term "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

¹⁴ P. Sane "Human rights and the clash of cultures" (1993) 10(3) *New Perspectives Quarterly* 27.

¹⁵ Antonio Augusto Cancado Trindade.

¹⁶ International Covenant on Economic, Social and Cultural Rights. Available at: United Nations High Commissioner for Human Rights www.ohchr.org

¹⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976. As at 13 October 2014, the ICESCR had 70 signatories and 162 parties.

¹⁸ P. Alston & B. Simma "First session of the UN Committee on Economic, Social and Cultural Rights" (1987) 81(3) *American Journal of International Law* 747.

¹⁹ Adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981. As at 17 October 2014, it had 88 signatories and 188 parties.

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.

This definition is comprehensive and covers a wide range of ways in which a woman can be discriminated against. According to the article, to achieve non-discrimination, men and women must be seen as equal. Their biological differences should not be used to prevent women from enjoying the various human rights that men ordinarily enjoy. The Article further disapproves of discrimination even if it was not purposeful.²⁰ In addition, it recognises that discrimination can occur in different spheres: private or public. The Article does not consider marital status as a precondition for the enjoyment of the rights enshrined in the Convention. It affirms that equality does not have any correlation with a woman's personal relationships with men.²¹

Article 2 of the Convention enjoins state parties to condemn discrimination against women in all its forms and to make every effort to promulgate policies that eliminate such discrimination. This wide-ranging provision outlines the various steps that state parties must take to eliminate discrimination against women. They should include the principle of equality in their constitutions and ensure that it is achieved by passing appropriate laws to sanction any act of discrimination against women. States are also enjoined to make an effort to achieve practical realisation of the principle of equality.²² The state must adopt legislative and other measures, including sanctions, to prohibit discrimination against women.²³ To further ensure the total eradication of discrimination against women, states must also make an effort to ensure the legal protection of women's rights, and that these rights are effectively protected through the establishment of national tribunals and other public institutions.²⁴

The Article further enjoins state parties to abstain from any act that could amount to discrimination against women, and to ensure that all public authorities and institutions comply with this obligation.²⁵ Acknowledging that the issue of discrimination goes beyond government action or inaction, the Article obliges states to ensure that private individuals, institutions or enterprises, do not discriminate against women.²⁶ In order to adapt the new Convention into various national laws, the Article requires that states pass legislation to either modify or abolish existing state laws, regulations, customs and practices that discriminate against women.²⁷ Furthermore, states are enjoined to repeal any penal law that is already in place, and which discriminates against women.²⁸

Article 3 is relevant to the issue of the reproductive health rights of women, because reproductive autonomy requires the ability and capacity to make reproductive decisions. This Article requires state parties to take steps, including the promulgation of legislation, to ensure the full development and advancement of women. According to the Article, this will enable women to enjoy their fundamental rights including reproductive autonomy on an equal basis with men.

Article 5 focuses mainly on relationships within family. It advocates the modification of social and cultural expectations of how men and women should conduct themselves. This opens the door to abolish customary and other practices that assign inferiority or superiority according to gender or which promote stereotyped roles for men and women.²⁹ The Article also supports family education. It notes that maternity should be regarded as a social function and that rearing children should not be stereotyped as solely a woman's duty.³⁰

If women are to fully enjoy their fundamental rights, they must participate in decision-making. This will enable women to agitate for their special needs, which men may not consider necessary. Article 7 of the Convention enjoins state parties to enable women to vote and be voted for in all elections to all publicly elected bodies, to participate in the formulation and implementation of policies, to hold public office, and to perform public functions at all levels of government.

²⁰ Carmel Shavel "Rights to sexual and reproductive health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women" (2000) 4(2) *Health and Human Rights* 46-47.

²¹ *Idem* 47.

²² Article 2(a) CEDAW.

²³ Article 2(b).

²⁴ Article 2(c).

²⁵ Article 2(d).

²⁶ Article 2(e) CEDAW.

²⁷ Article 2(f).

²⁸ Article 2 (g).

²⁹ Article 5(a).

³⁰ Article 5(b).

Women should also participate in NGOs and associations concerned with the public and political life of the country,³¹ represent their government at international level, and participate in the work of international organisations.³² This is a form of empowerment that will, in turn, enhance women's autonomy as they will be exposed to international trends in this regard, that could be incorporated into their country's national laws.

Turning to the promotion of equality between men and women, Article 10 of the Convention focuses on equal rights in education with the objective of reducing the drop-out rate among female students. The Article also obliges states to organise programmes for girls who drop out prematurely.³³ Furthermore, it enjoins state parties to ensure that women have access to specific education, such as information and advice on family planning. According to the Article, this will promote family health and well-being.³⁴ Education is vital in promoting women's rights. An individual's level of knowledge determines their capability and ability to exercise reproductive autonomy.

Article 11 (1) (f) emphasises a woman's right to protection and safety at work and seeks to ensure that women are protected from anything that could affect their reproductive function. Article 11 (2) highlights a woman's right to work regardless of her marital status or whether she is pregnant. Article 12 is fundamental to the reproductive health rights of women. It gives due consideration to the fundamental biological differences between men and women, and forbids discrimination against women in terms of access to health-care. The Article states that there should be equal access to health-care services, including family planning. Article 12(2) focuses on women's reproductive health rights and enjoins state parties to ensure adequate nutrition during pregnancy and lactation and to provide free ante- and post-natal medical care, where necessary.³⁵

Article 16 of the Convention deals with a wide range of issues ranging from the right to enter into marriage, to the right to autonomy in the choice of spouse, rights and responsibilities during marriage and its dissolution, guardianship, adoption, ownership and the acquisition of property among others. Of particular interest is the equal rights of the couple in decisions relating to the number and spacing of their children, and to have access to information, education and the means to enable them to exercise these rights. While the Convention is silent on the age of marriage, Article 16 (2) forbids child marriage.³⁶

The Convention focuses on how to combat all forms of discrimination against women. It establishes a committee to monitor the activities of state parties to determine the progress made in complying with its provisions.³⁷

2.4 The African Charter on Human and Peoples' Rights (ACHPR) 1981

The African Charter on Human and Peoples' Rights³⁸ marked the genesis of the promotion and protection of human rights at the African regional level. The charter has 68 articles that focus on different aspects of human and people's rights. The Charter is unique because its classification of rights departs from the traditional classification of human rights in other treaties, where some rights were regarded as first generation rights and given priority over those that were regarded as second generation rights.³⁹

The African Charter considers all human rights as being interrelated, essential and universal to all Africans. It does not regard one set of rights as being superior to another.⁴⁰

The Charter not only considers individual human rights, but also recognises human rights in collective terms. This reflects the African culture of interdependence. The political history of the continent which ranges from imperialism, to colonialism and apartheid deprived African nations of their collective rights. Despite the UDHR,

³¹ Article 7(b).

³² Article 8.

³³ Article 10(f) CEDAW.

³⁴ Article 10(g).

³⁵ Article 12 CEDAW, adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981.

³⁶ Article 16.

³⁷ Article 17.

³⁸ Adopted at Nairobi on 26 June 1981, and entered into force on 21 October 1986, in accordance with Article 63.

³⁹ Civil and political rights are classified as first generation rights, while economic, social and cultural rights are classified as second generation rights.

⁴⁰ Dejo Olowu "The African Charter on Human and Peoples' Rights, its regional system, and the role of civil society in first three decades: Calibrating the "paper tiger"" (2013) *Obiter* 29, 35.

African nations could not realise their human rights, as apartheid, imperialism and racism violated its principles.⁴¹ In acknowledgement of African nations' past agonies, articles 19-24 of the Charter capture rights which enhance Africans' quality of life. These include the right to self-determination, the right to exercise autonomy over wealth and natural resources, and the right to economic, social and cultural development, among others.

The African Charter recognises that for there to be a right, there must be a corresponding duty on the part of citizens. Articles 27 to 29 enumerate the various duties an individual owes to different groups ranging from the family to society among others. The Charter makes no provision for derogation clauses. Any nation that subscribes to it must comply with all its provisions, without any variation.⁴² The unique nature of the Charter's provisions has been attributed to the communal way of life in many African societies. African people believe in interdependence.⁴³

Despite the uniqueness of the Charter in promoting and protecting human rights, it has some inadequacies one of such is that the focus of the Charter is on promoting general rights. Consequently, its provision for women's rights is grossly inadequate. Although the Charter recognises the rights of women in article 18 (3), this is ambiguous as it does not define what constitutes discrimination against women in this context- and does not identify international declarations and conventions that uphold the rights of women which the Charter intends to protect.⁴⁴ Women's rights can also be inferred from the provisions of Articles 2 and 3 of the Charter, which guarantee unrestricted enjoyment of the rights and freedom recognised and guaranteed in the Charter, as well as equality before the law. Nevertheless, African women still suffer various injustices and are unable to realise their rights.

The Charter does not provide for the right to consent to marriage or equality in marriage. It also recognises cultural rights including an individual's right to participate in the cultural life of his/her community and a state's right to promote the traditional values recognised by the community.⁴⁵ This aims "to preserve and strengthen positive African cultural values in relations with other members of the society ..."⁴⁶ However; it is highly likely that this might be interpreted in a way that will impinge on the rights of women.⁴⁷ Notwithstanding, the inadequacies of the Charter in its provision for women's right, the African Commission has played a tremendous role in the protection of women's rights. This is evident in the activity and sessional reports of the commission.⁴⁸ At its recent Session, the Commission organised and facilitated panel on the importance of Sexual and Reproductive Rights, panel on the role of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Advancing Equality and Human Rights for All. The Commission also considered and adopted some observations and amendments on the study on child marriage.⁴⁹ To further ensure that the Commission fulfills its mandate of advancing women's rights in the region, the commission appointed a Special Rapporteur on the Rights of Women in Africa.

The theme of the Rapporteur ranges from promotion and protection of the rights of women in Africa, to assist African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, to undertake promotional and fact finding missions in African Countries Member of the African Union, among others. The special Rapporteur⁵⁰ has held about ten missions since its inception to intimate themselves on the status of women's rights in the various state parties.

⁴¹ Bahame Tom Nyanduga "Perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20th anniversary of entry into force of the African Charter on Human and Peoples' Rights" (2006) 6 *African Journal on Human and Peoples' Rights* 255, 256.

⁴² Nyanduga, note 41 (above).

⁴³ *Ibid*

⁴⁴ The Article states: "the state shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of the women ... as stipulated in international declarations and conventions".

⁴⁵ Article 17(2)(3).

⁴⁶ Fitnat Naa-Adjeley Adjetej "Reclaiming the african woman's individuality: The struggle between women's reproductive autonomy and African society and culture" (1995) 44(4) *The American University Law Review* 1351-1381.

⁴⁷ *Ibid*.

⁴⁸ Available at www.achpr.org.

⁴⁹ Final Communiqué of the 58th Ordinary Session of the African Commission on Human and Peoples' Right, available at www.achpr.org accessed on 27th January 2017

⁵⁰ Available at www.achpr.org/mechanism/rights-of-women accessed on 27th January, 2017

As the world progressed and the inadequacies of the Charter came to light, efforts were made to address its weaknesses. Several protocols were put in place to enhance its scope, and, by implication, redeem the name of the Charter. The first of these efforts was the African Charter on the Rights and Welfare of the Child otherwise known as the African Children's Rights Charter.⁵¹ Its 45 articles focus on the different rights of a child ranging from non-discrimination, to survival and development, and name and nationality, among others. There is also a Women's Rights Protocol⁵² which seeks to improve women's quality of life. This Protocol emphasises gender equality and the total elimination of discrimination against women. It considers a number of practices that should be abolished in order for women to fully enjoy their fundamental human rights. The Protocol seeks the elimination of discrimination against women,⁵³ protection from violence against women⁵⁴ and the elimination of harmful practices.⁵⁵ It sets 18 years as the minimum age for marriage,⁵⁶ and provides for health and reproductive rights,⁵⁷ among other rights.

2.5 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005

This Protocol came into force in 2005 amidst complaints about the inadequacies of the African Charter's provisions on the rights of women. The adoption of this Protocol boosted Africa's image in terms of the promotion and protection of human rights. The Protocol departs from the norms of African patriarchal culture by affirming reproductive choice and autonomy for women. This is a milestone in the protection of human rights in Africa, as it is the first human rights instrument where the reproductive rights of women are expressly spelt out. Some of the preceding instruments only guaranteed the right to family planning and women's right to health.⁵⁸

Prior to the Protocol, the right to reproductive autonomy was inferred from the right to dignity, and the right to liberty among other rights.⁵⁹ Article 14 of the Protocol provides for reproductive autonomy and reproductive health. This enables women to control their fertility⁶⁰ and to decide on the number and spacing of children,⁶¹ using the contraceptive method of their choice.⁶² Considering that a sexual relationship precedes reproduction, the article gives due consideration to women's sexual rights, the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS, and the right to family-planning education.⁶³ To further ensure the realisation of women's rights, the second part of Article 14 focuses on reproductive health services which the state is expected to provide to assist women in exercising their right of autonomy in reproductive matters. Exercising and realising such autonomy can be impeded by several negative factors in the private or public sphere. Apart from setting out women's rights to make reproductive choices the Protocol addresses impediments in realising this right. One such factor is violence against women. The Protocol defines violence against women as: all acts perpetrated against women which cause or could cause them physical, sexual psychological, and economic harm, including the threat to take such acts;

To undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.⁶⁴ The Protocol thus considers different forms of violence and offers protection to women from all these forms of violence.⁶⁵ It is unique in that it does not overlook any form of violence; it considers even the least serious form of violence, verbal assault. In most cases, these infractions on the dignity of a woman occur within the confines of the home. The Protocol advances

⁵¹ Adopted in 1990, and entered into force on 29 November 1999.

⁵² Adopted in 2003, and entered into force in 2005.

⁵³ Article 2.

⁵⁴ Articles 4 and 11(3).

⁵⁵ Article 5.

⁵⁶ Article 6.

⁵⁷ Article 14.

⁵⁸ ICESCR and CEDAW, among others.

⁵⁹ Article 14.

⁶⁰ Article 14 1 (a).

⁶¹ Article 14 1 (b).

⁶² Article 14 1 (c).

⁶³ Article 14 1 (f).

⁶⁴ Article 1(j).

⁶⁵ Articles 3(4), and 4 (2) (a).

women's rights by shifting any violence that occurs within the home from the realm of a private or family matter to the realm of infringement of the rights of the victim, thereby making such matter public.⁶⁶ Furthermore, due to its proactive nature, it offers protection to women during situations of armed conflict or war.

The Protocol defines the type of traditional practices that can impede a woman's right to autonomy. Any cultural practice that impedes the fundamental human rights of a woman is harmful⁶⁷ and state parties have an obligation to ensure the elimination of such practices by following the various steps highlighted in the Protocol.⁶⁸ The Protocol thus fills the lacuna created by the African Charter which supports the promotion of all cultural values but fails to distinguish between a cultural practice that has a positive influence on women and one that has a negative impact. This has greatly affected the views of many on cultural practices, as they relate to women's rights. This is because, prior to the Protocol, cultural practices took precedence when there was conflict between the rights of a woman and a particular culture.⁶⁹

Given that in some African cultures, a girl child can be betrothed to a man at birth, the Protocol seeks to avert forced marriages by guaranteeing a woman's right to consent to marriage. It thus moves away from cultural practices to affirm a women's fundamental right to consent to marriage before entering such a union. The Protocol also prohibits child marriage by setting the age of marriage at 18 years, in order to ensure that a girl child is sufficiently mature to make such a decision. Furthermore, given the nature of the African cultural practices that infringe on the rights of widows, unlike several preceding international instruments, the Protocol sets out the various rights of a widow particularly her right to re-marry the person of her choice. This is also a clear departure from African cultural practices, as in some cultures a woman is expected to marry a family member of her deceased husband.⁷⁰ The Protocol also includes several other provisions that can foster marital relationships and promote reproductive autonomy.⁷¹

While the Protocol's provisions are undoubtedly outstanding in advancing the rights of women, enforcement remains problematic. As at October, 2015 only 37 countries have ratified the Protocol, only few countries have taken steps to domesticate the Protocol. Some of the countries domesticated fully the provisions of the Protocol while some countries have only implemented a few provisions of the Protocol. African countries that have taken steps to domesticate the Women's Protocol are; Kenya, Zimbabwe, Namibia, Benin, Burkina Faso, Rwanda, Sierra Leone, Mozambique, Malawi, Guinea Bissau, Angola, Liberia, South Africa, Gambia, Ghana, Democratic Republic of Congo, and Senegal.⁷²

State parties to the Protocol, as with other international human rights treaties, are expected to furnish a report on the legislative and other measures they have taken in realising the protection of the rights of women, as provided for in the treaty. However, the reporting mechanism of the Protocol is attached to the African Charter.⁷³ The guidelines for the reporting system are unfortunately too lengthy, ambiguous and vague.⁷⁴

Nine states are up to date with their reports. They are Republics of Algeria, Burkina Faso, Djibouti, Ethiopia, Kenya, Namibia, Niger, Nigeria, and South Africa.⁷⁵

3. Customary Law and Women's Rights in Africa

However, while African countries have signed and ratified these instruments and incorporated them in their national laws, there is a gap between policy and implementation.

⁶⁶ Center for Reproductive Rights, "The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights". Available at www.reproductiverights.org 9.

⁶⁷ Article 1(g).

⁶⁸ Articles 2 (2) and 5.

⁶⁹ "The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights" 11.

⁷⁰ Article 20.

⁷¹ Articles 6, 7.

⁷² L. Asuagbor, "Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa" 60th Meeting- Commission on the Status of Women, New York, 18th March 2016, available at www.achpr.org accessed on 27th January, 2017.

⁷³ Article 62 of the African Charter.

⁷⁴ Japhet Biegon "Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of Pretoria Gender Expert Meeting, 6-7 August 2009" (2009) 9 *African Human* 615, 621.

⁷⁵ L. Asuagbor, note 72 (above) .

Considering the origin of most of the human rights instruments, human rights have been viewed by African societies as a Western concept. The concept of human rights such as the principle of equality, non-discrimination, freedom, integrity and dignity are not familiar to some African cultures. As such, its provisions were regarded as impracticable due to cultural differences. As a result of this, the various cultural practices that subjugate women's rights which are entrenched in the various African communities are still thriving. Some of these practices include primogeniture rule, sex preference, women as property or chattel, widowhood practices, female genital mutilation, levirate and sororate unions among others. Some of these practices are discussed below.

a. Primogeniture Rule

Primogeniture rule is one of the rules of the customary law of succession that states that upon the death of a man his properties, including land, devolve on his male children. This practice is well-entrenched in most African countries. According to this rule, devolution of property is patrilineal. It follows the blood line and is based on the belief that men as permanent members of the family will perpetuate the father's dynasty while women are expected to marry and cease to be members of their father's family. Equally, if a woman marries into a family, she does not bring any property into it and what she acquires in the course of the marriage is due to the conducive environment in the husband's house and as such, belongs to him⁷⁶. Consequently, the rule forbids widows from inheriting from their husbands and daughters from inheriting from their parents.

However, in the Nigerian case of *Mojekwu V Mojekwu*,⁷⁷ the property in dispute was owned by one Okechukwu who married two wives, Janet and Caroline, who were the defendants in the case. The plaintiff, a nephew of their deceased husband, sought a declaration that he was entitled under customary law to the deceased's land since the deceased left no male child. The Court of Appeal ruled that the Oli-Ekpe custom in Ibo land in Nigeria which bars women from inheriting land is repugnant to natural justice, equity and good conscience.

Similarly in the South African case of *Bhe and Others v Magistrate, Khayelitsha and Others*⁷⁸ the court held that excluding women from inheritance on the grounds of gender violates their right to equality and is a form of discrimination: "... it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, by placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from interstate succession and denied the right which other members of the population have, to be holders of, and to control property"⁷⁹ These rules violate the fundamental rights principles of equality and dignity and are incompatible with the provisions of the constitution, and therefore cannot stand. Primogeniture rule is the genesis of the cultural practice of sex preference.

b. Sex Preference

This is one of the African cultural practices which give preference to a male child. As noted earlier, some African cultures do not regard a woman as a permanent member of the family; hence, a male child is always preferred to a female child as such a child will succeed the father and continue his dynasty. Most African families enthusiastically celebrate the arrival of a male child, while a girl child does not generate such excitement, especially when she is not the first in the family⁸⁰. Given that a female child cannot succeed her father, she cannot inherit property in most African cultures.

c. Women as property or a chattel

In most African societies, one of the requirements of a valid customary marriage is the payment of a dowry / bride price. In ancient times, the dowry consisted of the labor services rendered by a man to the parent of the woman he sought to marry. However, modernization has changed this cultural practice and labor services have become monetized. The notion that payment of the bride price connotes buying the bride is mistaken. It has been argued

⁷⁶ O. Gbadamosi *Reproductive Health and Rights (African Perspectives and Legal Issues in Nigeria)* 1 ed (2007)285

⁷⁷ (1997) 7 NWLR 283(CA) (2004)

⁷⁸ (2004) ZACC17 CCA49/03

⁷⁹ Paragraph 92, Bhe case.

⁸⁰ A.F. Steyn and C.M. Rip, "The Changing Urban Bantu Family" (1968) *Journal of Marriage and Family* Vol.30:3 499,507-508

that the bride price is a form of compensation to the bride's parents for what they have spent on her. This suggests that the parents are selling their daughter.⁸¹ The bride price has a grave effect on the fundamental human rights of women as the husband who pays a bride price regards his wife as a commodity that he bought. Consequently, she is part of his property.

In declaring his assets, a Nigerian senator listed his two wives as part of his portfolio.⁸² Similarly, in the case of *Omo Ogunkoya v Omo Ogunkoya*.⁸³ The Nigerian Court of Appeal opined that: "The wives left are regarded as chattels that are inherited by other members of the family ... of the deceased under certain conditions." Payment of a bride price entrenches male domination and exploitation. In another Nigerian case, *Suberu V Summonu*⁸⁴ it was stated that "... it is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property since she herself is like a chattel to be inherited by the relative of her husband".

In most traditional African communities, the primary duty of a woman is child bearing and rearing. Women are not expected to engage in any serious work for their sustenance. They rely solely on their husband for survival. However, in some cases women support their husband by growing food crops. Since women are regarded as adjunct to their husbands, they are not expected to lay claim to the farm produce. It is believed that the land, the produce and the woman are the husband's property. Hence, a woman is not expected to inherit her husband's property since she is part of the properties that would be inherited. Upon the demise of the husband the woman is often ejected from the husband's property.

d. Widowhood practices

Widowhood practices are another cultural practice that constrains women's rights. Although the mourning pattern varies from one community to another in most African countries, however, most African societies believe that the death of a man erodes his wife's rights and dignity. The Yoruba tribe in Nigeria expresses this axiom as follows: "*oko ni ade ori aya*" meaning that the aura, glory, dignity and covering of the wife are the husband which symbolizes the crown. This means that, the moment the husband dies, the crown is removed and the wife loses are dignity. This is demonstrated by the dehumanizing treatment meted out to widows. These include shaving of their hair, ostracism, and being forced to drink water that was used to bathe the corpse of the deceased, sleeping on bare floor, staying indoors for a certain period of time, being forced to sleep with the corpse of the deceased among others.

Equally, widows are not allowed to inherit their husbands' property as the husband's property devolves to the children, particularly male children. Under native law and custom, devolution of property follows the blood. Since a widow is not of the blood, she has no share in the property of her deceased husband. In the case of *Sogunro-Davies v Sogunro-Davies*, the court held that "intestacy under the native law and custom, the devolution of property follows the blood. Therefore a wife or widow not being of the blood has no claim to any cause"⁸⁵ Most traditional African cultures do not recognize the concept of co-ownership of property. There is a general belief that substantial family property cannot be owned by women.⁸⁶ It is implicit from the above that widowhood practices do not reflect the principle of equal ownership of property acquired during marriage.

3.2 The Influence of Customary law on the Implementation of Human Rights Instruments in Africa

Most African countries are multicultural in nature. The cultural practices are so entrenched in the various communities, that it is difficult to adopt laws to protect the rights of women.

Women's rights have been subjugated by these cultural value systems. As a result, whether married or not, women are precluded from participating in decision-making processes. This has greatly affected women's participation in politics. Since their levels of representation are very low, issues that relate to women are not taken seriously in the legislative process. This has affected the domestication of various treaties that prohibit cultural practices that impede the rights of women.

⁸¹ *Ibid*

⁸² Abati "The Misogynist in the Nigerian Senate" www.bella.naija.com/2016/03

⁸³ Appeal No. CA/L/46/88

⁸⁴ (1957)2 F.S.C 31

⁸⁵ (1929)2 NLR 79at 80

⁸⁶ T.C Iruonagbe, "Women's Land Rights and the Challenge of Patriarchy: Lessons from Ozalla Community, Edo State, Nigeria"(2010) *Gender and Behavior* Vol. 8. No 1 2603, 2604

These practices are so entrenched in society that women themselves sometimes contribute to their furtherance. For example, in South Africa, some black women vehemently opposed the abolition of some cultural practices that inhibit the realisation of their rights.⁸⁷ The influence of a cultural practice became potent because the concept of women's right is alien to most African communities. As a result, notwithstanding their health consequences, most of the cultural practices are observed as a demand of tradition, and are practiced as a way of sustaining some of the African cultures. Equally, despite the establishment of special courts to adjudicate on matters of this nature, few cases have been brought to challenge women's subjection to the various practices that impair their rights. This is because women are not aware of their rights or that some cultural norms could infringe these rights and are, indeed, dangerous to their health. In the same vein, women are culturally trained not to see themselves as equal to men. Consequently, they do not oppose some of the practices that discriminate against them. In Nigeria, although the United Nations Convention on the Rights of the Child was domesticated by the Nigerian National Assembly in 2003, it is yet to be domesticated in some states particularly northern states.⁸⁸ This is because people from this part of the country adhere strictly to Islamic customary law that allows child marriage. A senator of the Federal Republic of Nigeria who should know better, vehemently supported child marriage which has been outlawed by the National Assembly stating that "maturity has little to do with age and to him, child marriage is marriage of a girl who has not reached the age of puberty".⁸⁹ The same senator married a 13-year old.⁹⁰ Supporters of child marriage in this part of Nigeria argue that it concurs with Islamic customary law. Hence, child marriage is still thriving in some northern states, despite the fact that the Child Rights Act prohibits it. In the same vein, some women in a bid to preserve their culture support and enforce some of the cultural practices that may impair the realisation of the reproductive health rights of women. Mothers in most African countries subject their daughters to FGM and women play some roles in enforcing widows' rituals among others. The influence of cultural practices on the rights of women is also evident in Nigeria, as women are not allowed culturally to take part in decision-making processes. As a result, it is difficult for women to agitate for the domestication of treaties that promotes their rights. The various cultural practices embraced in these countries are the clog in the wheels of realisation of these rights.

Conclusion

This paper explored the status of women under international law and African customary law. It is evident from the paper that African countries are multicultural, and some of the cultural practices embraced could impede the realisation of the rights of women. Despite the various frameworks for the protection of women's rights, women in most African countries are yet to enjoy fully their fundamental human rights, due to continued adherence to various cultural practices that subjugate women. While the cultural values of a particular society could have an enduring influence on the perceptions of such a society about some issues like society itself, cultural values are not static but change in response to internal or external pressure.⁹¹ Ibhawoh notes that individuals may embrace change in culture after being exposed to new ideas. Such individuals could initiate change in dominant cultural values.⁹² The notion that human rights are alien to African society and that their principles can only be followed by abandoning traditional African values and embracing Western ones, is patently absurd. Traditional African cultures could be modified to accommodate women's fundamental rights in such a way that women's needs are given priority in cultural practices.

An example is the modification of widowhood practices in South Africa and some parts of Nigeria. Where it is not possible to accommodate a particular cultural practice without impairing the reproductive health rights of women, such a practice should be abolished. Furthermore, legal institutions responsible for the implementation of the various laws must be established to ensure that these laws make the necessary difference in the lives of the people for whom they are promulgated.

⁸⁸ "UNICEF urges state governments to domesticate Child Rights Act". Available at: www.ngrguardiannews.com/2015/05/unicef-urges-state-govts-to-domesticate-child-rights-act.

⁸⁹ "Child marriage in Nigeria: The senate to the rescue?" Available at: thelawyerschronicle.com/child-marriage-in-nigeria-the-senate-to-the-rescue.

⁹⁰ *Ibid.*

⁹¹ B. Ibhawoh "Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African states" (2000) 22 *Human Rights Quarterly* 838.

⁹² *Idem* 840-842.

Equally, there is a need to change laws that are discriminatory and adopt new laws that recognize women's right. This could be achieved by increasing women's participation in legislative processes, as they are best placed to agitate for their rights. Human rights education is also essential to the realization of women's rights. Women that are trained on their fundamental human rights will be able to go to court to challenge discriminatory cultural practices that violate their rights. At different times, women in Africa have challenged the denial of their rights in court. Finally, to fully enjoy these rights, whenever there is a conflict between the various cultural practices and women's rights in line with international norms and standards on the protection of women's rights, women's rights should take precedence