United Nations Expert Group Meeting, New York, 14 – 15 May 2015

Gender Equality and Family laws in Africa

Professor Fareda Banda, SOAS, University of London

Much has happened in the twenty years since the 1994 Year of the Family.[1] This paper looks at developments in international and regional human rights (focusing on the African continent), Constitutional changes that have impacted family law and developments in national law. Family law is at the centre of most of the debates around gender equality.

This paper shows that human rights discourse has had a huge impact on decision making in courts and in changes to law to guarantee equality between men and women and to provide specific protection for children. Seismic changes have also been wrought to gender relations and family and other laws by genocide (Rwanda), war (Sierra Leone, Liberia) and political transitions (South Africa). The impact of the AIDS crisis (and now the Ebola outbreak) has been to reconfigure family relations resulting in a de facto recognition of one parent, grand parent and even child headed households. The law has not always kept up with the situation on the ground meaning that a postcolonial focus on the nuclear family as the legally recognised family unit has sometimes left grandparents and child headed households without access to resources because the law does not recognise them as having legal standing. The situation is particularly difficult for female headed households.[2] While much is made about the negative impact of culture on the enjoyment of women's rights in general, the reality is that religion is increasingly playing an equally, if not more dominant role in reinforcing negative gender stereotypes. The two, religion and culture, feed off and reinforce each other in ways that are not always helpful. However, it is equally important to note that religion can be, and has been, used to challenge negative behaviour and to offer more egalitarian options. While plural legal systems have been criticised as impeding women's ability to access justice and as creating different standards, it may be possible to refashion African legal systems in

[1] UNGA 44/82 designating 1994 International Year of the Family. Cited in CEDAW General Recommendation 21 on Marriage and Family Relations, UN Doc. HRI/GEN/1 Rev.9 (Vol II), para.4.
[2] See M. Elias Magoke-Mhoja *Child Widows: Silenced and Unheard: Human Rights Sufferers in Tanzania* (Milton Keynes, Author House, 2006)

such a way that diversity is celebrated, but not at the expense of equality.[3] Denying diversity may create more, not less harm. Equality here, is not merely a formal, rhetorical concept, but the demand for substantive and transformative model that meets the needs of those seeking the assistance of the legal system and community institutions. Culture is of course, not static. Finally, it is self-evident that cultural practices that reinforce negative gender stereotypes are not unique to Africa.[4]

International Human Rights Law

To mark the International year of the Family, the Committee on the Elimination of all Forms of Discrimination (CEDAW), adopted General Recommendation 21 on Marriage and Family Relations.[5] It elaborated on article 16 of the UN Convention on the Elimination of all Forms of Discrimination against Women [6]which focuses on the importance of equality between heterosexual spouses in marriage. It also considered article 9 on nationality of children and nationality rights of married women. The Committee explored article 15 which requires equality for men and women before the law and freedom of contract and movement as well as the right to choose their own domiciles. The Committee called on States Parties to uplift reservations to the Convention, many of which attached to articles 9, 15 and 16.[7] Although all but two African States (Sudan and Somalia) have ratified the Convention, several States have reservations to the provisions already mentioned. The majority of reserving States are North African and give as the reason for the reservations the *Sharia.*[8] Many other States do not enter reservations but fail to meet their obligations. It goes without saying that neither approach is acceptable. To keep States focused, CEDAW has adopted CEDAW General Recommendation 28 on State obligations. Important in this regard is the requirement for

[3] The recognition of pluralism may not be an optional extra. One sees that States that have de jure unitary legal systems still have to grapple with de facto pluralism. In England, courts and the Law Commission are perpetually grappling with the public assumption that long term cohabitation generates rights and entitlements akin to marriage: the myth of common law marriage. Law Commission *Cohabitation*: *The Financial Consequences of Relationship Breakdown* Law Com No 307 (2007).
[4] R. Cook and S. Cusack *Gender Stereotyping: Transnational Legal Perspectives* (Pennsylvania, Penn Press, 2010).
[5] General Recommendation No. 21, 13th Session (1994) on equality in marriage and family relations, UN Doc HRI/GEN/1/Rev.9 (Vol.II)
[6] UN Convention on the Elimination of all Forms of Discrimination against Women, 1979, 1249 UNTS 13.
[7] For detailed analyses of the Committee's interpretation of these provisions, see chapters on individual articles including art. 28 on reservations, in M. Freeman, C. Chinkin and B. Rudolph (eds) *CEDAW: A Commentary* (Oxford, OUP, 2013).
[8] J. Bond "CEDAW in Sub-Saharan Africa: Lessons on Implementation" 2014 *Mich. St. L. Rev* 241.

states to adopt a transformative equality approach which requires reform of both laws and negative attitudes that reinforce women's inequality.[9]

Few African States have ratified the Optional Protocol to CEDAW. This gives residents of ratifying States the option of bringing individual claims to the Committee (after exhausting local remedies). It also offers the possibility of an inquiry procedure for grave and systematic violations of rights.[10]

Post 1994, the Committee has elaborated other General Recommendations, including No. 27 on the rights of older women. It requires States to protect widows from property grabbing by relatives on the death of their husbands and also to ensure that they receive a share of the matrimonial property and are allowed to continue their living in their homes, free from discrimination.[11] Meanwhile, General Recommendation 29 requires equal sharing of property between husbands and wives and brothers and sisters on death and divorce.[12] More recently, and in an unusual move, the Committee has joined up with the Committee on the Rights of the Child to issue a joint General Recommendation/Comment 31/18 on harmful practices.[13] This will be discussed in more detail in the section on child marriage.

Running through all the General Recommendations as well as CEDAW's engagement with States Parties at the reporting stage, is the issue of the impact of culture and gender stereotyping and how these impact negatively on the ability of women to enjoy their rights, especially in the family.[14] Over the years, CEDAW has focused its attention on getting States to recognise the importance of articles 2(f) which requires the State to "take all

[9] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para. 31 and
UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures , 2004, para.8

[10] Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, UNGA Res 5/4 (6 October 1999) UN Doc A/RES/54/4/ In 2012 The African Women's Rights Observatory put the number of signatories at six. digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1077&context=lr

[11] CEDAW General Recommendation No. 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27.

[12]CEDAW General Recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution*)*, 30 October 2013, CEDAW/C/GC/29.

[13] Joint *General Recommendation*/General Comment No. *31* of the *CEDAW* and No. 18 of the CRC on Harmful Practices CEDAW/C/GC/*31*/CRC/C/GC/18, 14 November, 2014.

[14]See R. Holtmaat "Article 5" in Freeman, Chinkin and Rudolph (2013) 141.

appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" and 5 (a):

States shall take appropriate measures to eliminate stereotyping, prejudices and discriminatory cultural practices. States shall also ensure that family education includes a proper understanding of maternity as a social function and the recognition of the roles of men and women in the upbringing of their children.

The Committee's concluding observations point to the continuing challenge of negative cultural practices in all societies across the world.[15] The challenges on the African continent link to the existence of plural legal systems. These encompass imposed or received law, which is often the general law, customary laws of different groups and of course religious personal status laws. These laws often make different demands on men and women for entering and leaving marriage. They also create differences in formalities and entitlements between women within one country, so that while the civil law may prescribe 16 or 18 as the minimum age of marriage, customary law may have a lower age of marriage. Some States have tried to resolve this problem by recognising plural marriage forms, but insisting that each must subscribe to certain minimum conditions including a minimum age of marriage, consent of the parties, registration and divorce obtained in court.[16]

While CEDAW has prescribed that States should recognise plural family forms, the dominant, state sanctioned and preferred model of family in most African countries is still the heterosexual marital unit.[17] Although some States recognise customary law woman to woman marriages,[18] there is little appetite, outside of South Africa, for recognising lesbian and gay family relationships.[19]

CEDAW has had a huge impact at the local level. As Bond notes, it has influenced the drafting of gender policies (in South Africa) and also the drafting of fairer family laws

[15] *Ibid*
[16] See for example Tanzania Law of Marriage Act, 1971 and Ethiopia Revised Family Code, Proclamation 212/2000 arts. 1-30.
[17] CEDAW General Recommendation 21: Equality in Marriage and Family Relations, 13th Session (1994), UN Doc HRI/GEN/1/REV.9 9 (Vol II) para.13.
[18] *Monica Jesang Katam v Jackson Chepkwony & Another* [2011] eKLR (www.kenyalaw.org)
[19] In keeping with its Constitution which protects people from discrimination on grounds of sexual orientation, South Africa recognises marriage between two same sex people. The *Civil Union Act*, 2006 (Act No. 17 of 2006). By way of contrast, Nigeria, Kenya and Zimbabwe have altered their laws and constitutions to make clear that marriage is strictly between people of the opposite sex. For Nigeria see, Same Sex Marriage Prohibition Act, 2014; Constitution of Kenya, 2010, s. 45(2); Constitution of Zimbabwe, 2013, s.78 (3).

covering inheritance, marriage and abolishing the distinction in ages of capacity to marry for boys and girls (for example in Sierra Leone). [20] Ratification of the Convention has also had an impact on Constitutional drafting processes.[21]The 2003 Rwandan Constitution explicitly mentions CEDAW in its preamble. In 2009, CEDAW noted in its concluding observations to the Rwanda report:

It commends the State party for the strong political will and commitment it has manifested since the end of the civil war and for the policies and measures taken to eliminate discrimination against women in all fields covered by the Convention and for the progress already achieved in such a short period of time.[22]

Constitutions

In former British colonies, one can see a radical shift from the Constitutions that were handed down by Britain at independence. These constitutions guaranteed non-discrimination on grounds of sex. However, they often went on to exempt customary personal status laws from the non-discrimination provision which had the effect of permitting differential treatment of women, more often than not, to their detriment. [23] There has been a dramatic shift in the past 25 years. States have moved from constitutions that are culturally relative, or culturally sensitive, depending on one's perspective, to ones influenced by international human rights norms. These new constitutions demand equality for all and do not exempt custom, culture or religion from scrutiny.[24] The exemplar of this Constitutional "universalism" is Uganda, which, in addition to outlawing sex-based discrimination, guarantees equality for all before the law and has a provision that explicitly provides for the rights of women making clear:

[20] J. Bond (2014) 255-257.
[21] This is in keeping with article 2(a) of CEDAW.
[22] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Draft concluding observations of the Committee on the Elimination of Discrimination against Women: Rwanda*, 12 February 2009, CEDAW/C/RWA/CO/6, para. 5. Positive changes include a law guaranteeing women equal rights to land. For a discussion of the law and the challenges of implementation see, A. Polavarapu "Procuring Meaningful Law Rights for the Women of Rwanda" 2014, 14 (3) *Yale Human Rights and Development Journal* 104, at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1100&context=yhrdlj.

[23] See Constitution of Zimbabwe, 1979, s.23 (3). This provision resulted in a woman being denied the right to inherit from her father. Her brother was said to be the customary heir. The irony is that it was the daughter who had looked after her parents as "a son should" and not her brother. *Magaya v. Magaya* 1999 (1) ZLR 100.
[24] See for example J. Bond (2014) above note 8. See also two chapters on the new constitutions of Kenya (2010) and Zimbabwe (2013) discussed by F. Banda in Atkin, B. (ed) *International Survey of Family Law 2014* and more generally F. Banda *Women, Law and Human Rights: An African Perspective* (Oxford, Hart, 2005) 25-40.

"Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution."[25]

These constitutional changes have been transformative. Across the continent one can see multiple examples of Constitutional and Supreme Courts granting equal inheritance rights to women in defiance of claims for customary rules of inheritance which favour men. In their decisions, the courts have all stressed the importance of equality and cited the obligations undertaken by States when they ratify human rights instruments as requiring delivery of those promises. They have confronted challenges grounded in assertions of cultural entitlement by noting that while culture can be factored in, it cannot be allowed to undermine or limit the rights of women to equal treatment. [26] All emphasise that customary law is not static or set in stone, but a living system which must adapt to change.

These developments deserve to be celebrated. However, one needs to temper this with a more realistic picture. The cases point to women who have managed, more often than not with help from NGOs bringing test cases, in accessing justice and vindicating their rights. What of the majority who do not know their rights, or who, knowing those rights feel unable to challenge family decision making, in part because of the need for continued family support (both emotional and financial)? Moreover, Constitutional courts are far removed from the source of much decision making-the Community, including community courts. An example of this is provided by Oomen who conducted research with chiefs and traditional authorities in South Africa. They told her:

"There have been some changes with the new Constitution…They also say that women have equal rights to land now, but we don't apply that one; it seems to be too fast. Sometimes we ask the magistrate for advice, but he does not always understand our custom."[27]

However, the situation, as Oomen notes, is not clear cut. She gives an example of the authorities giving land to an unmarried woman who, in support of her claim, cited the new

[25] Constitution of Uganda, 1995, s. 33 (6).

[26] M. Ssenyonjo "Women's rights to equality and non-discrimination: Discriminatory family legislation in Uganda and the role of Uganda's Constitutional Court" 9 International Journal of Law, Policy and the Family 21 (3) (2007) 341- 372; J. Bond (2014) note 8 above and T. Weinberg "Mmusi Ruling a Watershed Moment for Gender and Customary Law in Botswana and Beyond" Oxford Human rights blog, 23 September 2013. Available at:www.ohrh.law.ox.ac.uk

[27] B. Oomen *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (Oxford, James Currey, 2005) 212.

constitution and also drew support from her uncles. This leads Oomen to observe: "As a resource, state law cannot only be deconstructed but also reinterpreted, invented, presented as tradition or plagiarised in terms of procedure."[28] Much the same is said of culture and customary law.

Challenges and Conundrums

The first section of this paper looked at the international human rights framework focusing on CEDAW. However, that does not tell the whole story, for there are also regional human rights instruments to consider. The main regional body is the African Union. All but one State (Morocco) is a member. They have all ratified the African Charter on Human and Peoples' Rights, 1981 which guarantees protection for the family and requires states to remove *every* discrimination against women.[29] In 2003, the region adopted a Protocol on the Rights of Women which uses CEDAW as its starting point.[30] However, the Protocol departs from CEDAW in two significant respects. The first is equality. Both CEDAW and the Protocol start with equality between men and women in all spheres as their foundation.[31] However, when detailing women's entitlement to property on death or divorce, the language in the Protocol slips to "equitable" as the benchmark for entitlement.[32] The challenge is in the lack of clarity. To be fair, does equity require equal sharing, or, as argued by some States on the basis of religion (Shariah) and custom, does equity require women to receive less because they do not have the same religious/cultural obligations of support for the wider family? The Egyptian Reservations to CEDAW article 16 would suggest that the latter interpretation is the correct one.[33] This is reinforced by the fact that eight African States are also members of the Arab League which has its own human rights instrument and Declaration, both of which suggest different entitlements for men and women.[34]

---

[28] *Ibid.*
[29] African Charter on Human and Peoples' Rights, 1981, 21 *ILM* (1982) 59, art. 18.
[30] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003, Assembly/AU/Dec.14 (II).

[31] *Ibid* art. 1(f) and CEDAW art. 1.
[32] *Ibid* arts. 7(d) and 21. Cf art. 13 (h) requiring States to "take the necessary steps to recognise the economic value of the work of women in the home."
[33] UN Women, Declarations, Reservations and Objections to CEDAW. Available at: http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm
[34] Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), arts. 3(1) and 11 guarantee non-discrimination on grounds of sex and equality before the law, while art. 3(3), in part provides: "Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Sharia, other divine laws and by

The second point of distinction between CEDAW and the African Protocol is over polygyny. In General Recommendation 21 CEDAW is clear that polygamy (technically polygyny) constitutes a direct violation of women's rights to equality and is a breach of article 5(a) of the Convention on stereotyping.[35] However, the African Protocol is more circumspect. It says, in article 6 on marriage, that monogamy is preferred, but that in the event of polygyny, the rights of women "are to be promoted and protected."[36] CEDAW takes the view that polygyny is harmful to women. The African Protocol position is rooted in a recognition that custom, and, with some argument, the Sharia, recognise the rights of men to take more than one wife.[37] This recognition is echoed in national legal systems which recognised plural marriage forms based on religion (Hindu, Judaeo-Christian, Islamic) as well as civil law and custom. Would an outright ban on polygyny help or hurt women? Customary law specialist, Professor Chuma Himonga argues that failing to recognise polygyny may not always serve women's interest. She argues that refusing to provide protection (especially after the death of a polygynous husband) does not penalise the "wrong-doing husband" who is no longer around to take his punishment, but the often unwitting second wife.[38] Moreover, the recognition of marriage systems which recognised polygyny for some groups (customary), but not for others (Muslims) may constitute discrimination between women as well as between women and men. Post-democratic courts in South Africa have noted that the State's failure to recognise Muslim marriage was to women's detriment. To remedy this, they awarded maintenance and allowed for inheritance including in situations involving

---

applicable laws and legal instruments." The relation between arts. 3(1) and 3(3) is unclear. Does the Sharia (which School of jurisprudence?) provide for men and women to receive the same? Does "positive discrimination" suggest a bigger share for women? The Charter appears to suggest that national and not international law, should govern the interpretation of the Charter. In this regard art. 33(1) on the family provides in part: "The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution." Finally, the Charter, in its preamble references both the international human rights framework, religion and the Cairo Declaration on Human Rights in Islam, 1991 as sources. The Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. provides for different rights and duties of men and women, including in the family (art.6).Sharia is cited as the only acceptable interpretive framework (art.25) while children's rights are subjected to parental control which is to be exercised through the prism of the Sharia.(art.7).

[35] CEDAW General Recommendation 21 para. 14.9

[36] African Protocol on Women's Rights, art. 6©.

[37] It is worth noting that both Rwanda and Tunisia ban polygyny, while other North African states including Libya and Morocco put strict restrictions on undertaking polygynous marriages. Constitution of Rwanda, 2003, art. 26; L. Welchman, *Women and Muslim Family Laws in Arab States* (Amsterdam, Amsterdam University Press, 2007) 78, 85

[38] C. Himonga "Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications" Blog post on *Custom Contested: Views and Voices*. Posted on 2 July 2013. Available at: http://www.customcontested.co.za/mayelane-v-ngwenyama-and-minister-for-home-affairs-a-reflection-on-wider-implications/

polygyny.[39] It could of course be argued that allowing polygyny merely reinforces a conservative interpretation of customary law and religion. This could be seen as a backward step for women.

The next section looks at children's rights focusing on child marriage.

Child Marriage

There is not a shortage of analyses about the causes and consequences of child marriage. Nor, it must be said, is there a shortage of laws and norms outlawing the practice.[40] The African Charter on the Rights and Welfare of the Child, CEDAW and the UN Committee on the Rights of the Child have all noted that 18 should be the minimum age of marriage for both males and females.[41] Despite all this, the list of the 20 states where child marriage is most prevalent contains 15 African countries. In the list of ten countries with the highest absolute rate of child marriage, Nigeria comes in at number three, the Democratic Republic of Congo at eight, and Niger at 10. India tops the list.[42] The continuation of a practice that sees 15 million girls under 18 married each year suggests that there is no single solution or actor.[43] Various solutions have been proposed including increasing the marriage age to 18 or even 21, making education compulsory until the age of 18 and ensuring that resources are in place (including giving parents grants to encourage them to keep their girls in particular, in school), criminalising early and forced marriage, and holding any marriage before the age of 18 to be null and void. Also advanced is the importance of providing employment and other access to resources including land, to free women and girls of the need for husbands to guarantee their livelihoods. All of these solutions are commendable.

However, it may be important to think about why parents marry their children off. The discussion is often framed as a form of parental abuse, or greed (for dowry) or neglect. Gendered inequalities and stereotyping are also cited as causal factors. It may be however, that parents see early marriage as a protective and loving act, not an abusive one. In an increasingly insecure world, not least in Nigeria, DRC and Niger, political insecurity and the

[39] Daniels v Campbell NO *[Daniels v Campbell NO and Others 2003 (9) BCLR 969 (C)*], Hassam v Jacobs NO *[Hassam v Jacobs NO* 2009 (5) SA 572 (CC)

[40] See African Charter on the Rights and Welfare of the Child, 1990, OAU CAB/ LEG/TSG/Rev.1, art. 21; CEDAW/CRC General Recommendation/Comment 30/18 paras. 20-24, Constitution of the Republic of South Africa, 1996, s.27, Nigeria Child's Rights Act, 2003.

[41] *Ibid*

[42] Girls not Brides "Where does it happen?" at: http://www.girlsnotbrides.org/where-does-it-happen/

[43] Girls Not Brides advocate what they call the theory of change. At http://www.girlsnotbrides.org/child-marriage-theory-of-change/

resulting physical threats (especially for girls) as well as economic insecurity pose the most pressing challenges.[44]

We need to provide the context for effective implementation of laws. If a parent is not to marry their daughter off early, what are viable options? Marriage, is for many, the only career choice on offer. It may offer the only possibility of financial security and, in conservative societies, the only acceptable context for child bearing. It is also important to acknowledge the importance of legal change going hand in hand with efforts to change other practices which may undermine the legal impact of raising the marriage age. Malawi recently passed a law making 18 the minimum age for marriage. However, practices of having an older man "inducting young women into sex" prior to marriage, remain. This cannot be allowed to continue.[45] Further, there needs political will, including among religious leaders, whose focus on sexual purity (interestingly only for girls), acts as a spur for parents to marry their daughters off early under pain of their being "spoiled".

Conclusion

The complexities of a continent of 54 countries cannot be captured in a book, let alone a short overview paper. As a result, this paper suffers from a lack of both depth and scope. It has not managed to discuss (outside of child marriage) the place of children within the African family, nor did it touch on controversial discussions over moves to protect the traditional family and the implicit rejection of diverse families. Hopefully, it has highlighted the positive impact wrought by the adoption by African states, of human rights norms and the resulting changes in national Constitutions which have in turn impacted positively on the family case law of higher courts. The paper acknowledged the continuing challenges of conflicting regional human rights frameworks and plural legal orders as well as the resistance to changing customs and culture. Child marriage requires an holistic approach that engages with the reasons (political and economic insecurities as well as cultural pressures) which sometimes compel parents to force their predominantly female children to marry before the age of 18. The solutions to the problem of continued gender discrimination in family laws can be found in the recommendations made by CEDAW in its General recommendations, as

[44] Zimbabwe Girl Child Network "Political and Economic Crises Put Girls at Great Risk", Newsflash November 2008 (http://www.gcn.org.zw/) posted on WURN Listserv, 1 December 2008.
[45] E.Chimwaza, "Malawi - New Marriage Law - What Is Next to End Child Marriage?" Centre for Social Concern and Development (CESOCODE) – 5 March 2015 posted on 10 April 2015 by http://www.wunrn.com

well as those of the UN Working Group on Laws and Practices that discriminate against women. Central is tackling gender stereotyping within society and also of judges. This should involve engagement with informal and community justice systems which should be encouraged to facilitate the participation of women as members. Finally, one cannot emphasise enough the importance of making access to justice a reality for all.