

Simisola Obatusin

Customary law principles as a tool for human rights advocacy: innovating Nigerian customary practices using lessons from Ugandan and South African courts

**Article (Accepted version)
(Refereed)**

Original citation:

Obatusin, Simisola (2018) *Customary law principles as a tool for human rights advocacy: innovating Nigerian customary practices using lessons from Ugandan and South African courts*. [Columbia Journal of Transnational Law](#), 56 (3). ISSN 0010-1931 (In Press)

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**CUSTOMARY LAW PRINCIPLES AS A TOOL FOR HUMAN RIGHTS ADVOCACY:
INNOVATING NIGERIAN CUSTOMARY PRACTICES USING LESSONS FROM
UGANDAN AND SOUTH AFRICAN COURTS**

SIMISOLA OBATUSIN

ABSTRACT

The concept of human rights has been criticized by some African scholars and leaders as a Western imposition of values, with such criticisms delegitimizing human rights efforts in Africa. In addition, international human rights institutions are often too far-removed from the everyday realities of most Africans, and thus are abstract means of vindicating basic rights and freedoms. This Note argues, in light of this context, and in response to anti-imperialist human rights criticisms, that a more immediate and seemingly legitimate means of human rights reform lies in courts using customary law norms, and the principles inherent at their origin, to push customary law to be more human rights compatible. The Note analyses a case from South Africa and a case from Uganda, where the customary practices of first-son inheritance and “bride price” were at issue, to showcase how Nigerian courts can draw on historical customary law principles to advance the law. The Note discusses women’s rights in Nigeria as a body of law where such reform can be useful.

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I. INTRODUCTION

The human rights regime has been the subject of criticism from scholars who contend it is an imperialist imposition of Western values.¹ International human rights movements have faced sharp resistance from non-Western critics, yet the legitimacy of human rights norms is crucial in order for it to be effectively used to advance justice.² This paper argues that a possible avenue for human rights norms to gain legitimacy, and for international human rights agendas to be effective in Africa, is for judicial systems and human rights advocates to find principles in the history of customary practices that are compatible with international human rights law and use such principles to advance the law. In this manner, advocating for change comes through human rights norms that have existed historically within the local legal systems in which they operate. Every society has a concept of justice, or a sense of right and wrong, from which one can find human-rights-compatible principles.³ This includes the very societies where critiques that human rights are a neo-colonialist instrument come from. This paper focuses on human rights efforts in Africa, while analyzing historical African customary law principles that certain customary practices developed from.⁴

¹See generally, PHILLIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 531–56 (2013); Raimon Panikkar, *Is the Notion of Human Rights a Western Concept?*, *DIOGENES*, Dec. 1, 1982 at 75; YASUAKI ONUMA, A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW 370 (2010). Generally, arguments have been made by both African and non-African scholars who critique the universality of human rights. The use of “Western” in this paper refers to Euro-American or Anglo-American tradition.

²See Lauren Fielder, *African Courts and African Values: Harmonizing International Human Rights and Customary Law*, in *TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS* 177 (Kyriaki Topidi & Lauren Fielder eds., 2013). See also, Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 *AMERICAN ANTHROPOLOGIST* 38, 49 (2006). Engle states, “[t]his is the paradox of making human rights in the vernacular: To be accepted, they have to be tailored to the local context and resonant with the local cultural framework. However, to be part of the human rights system, they must emphasize individualism, autonomy, choice, bodily integrity, and equality—ideas embedded in the legal documents that constitute human rights law.”

³MARY ANN GLENDON, *A WORLD MADE NEW* 222 (2001); Richard D. Schwartz, *Human Rights in an Evolving World Culture*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES* 368 (Abdullahi A. An-Na’im & Francis M. Deng eds., 1990).

⁴The discussion around “Africa” in this paper generally refers to Sub-Saharan Africa.

Africa's history, rife with an amalgamation of historically exploitative cultural contact with the Western world, has put Africans on the defensive and led to the resistance of legal reforms that are perceived to be neo-colonialist in nature.⁵ The legacy from colonialism and the vestiges of anti-imperialist sentiments provoke the need for a more autochthonous approach to human rights. Legal principles and norms often reflect the culture from which they originate; they therefore inherently have values that are connected to their origin.⁶ Today's human rights norms reflect values which derived from historic events that affected some parts of the world more than others, namely, the global North more than Africa.⁷

Human rights norms would be more representative and widely accepted amongst African communities if they derived from local norms and were not removed from the historical context they developed in. Human rights principles found in customary law, a legal system consisting of traditional laws and practices of African peoples, can provide a compelling alternative to advance justice, in response to the alienation some communities may feel in appealing to internationally-made treaties that they had little voice in developing.⁸ At the same time, using local customary law in this way diminishes the argument that human rights are a Western

⁵Such events include, the Trans-Atlantic slave trade, colonial conquest, Cold War era political maneuvering, present-day extractive firms from Western countries, etc. See MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002). For more historical analyses, see e.g. WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1973), and ROBERT BATES, *WHEN THINGS FELL APART* (2008).

⁶American Anthropological Association, *Statement on Human Rights*, 49 *AMERICAN ANTHROPOLOGIST* 539, 542 (1947).

⁷The norms discussed here generally refer to those derived from the Universal Declaration of Human Rights. See Merry, *supra* note 2, at 49 (referring to how human rights emphasis on individualism, autonomy, etc. are part of "a modernist view of the individual and society embedded in the global North," and "whether this is the most effective approach . . . is an open question."). See generally, ALSTON & GOODMAN, *supra* note 1, at 58–154; see also, MALCOLM SHAW, *INTERNATIONAL LAW* 13 (2008).

⁸Manfred Hinz wrote, "[i]n training programmes of the Human Rights and Documentation Centre at the University of Namibia, we have always paid special attention to the perception of human rights by those who attended our programmes. Some of these perceptions we had to listen to were: human rights are western concepts; human rights interfere with the values of our culture; human rights are there to protect criminals; human rights prevent us from doing the job." Fielder, *supra* note 2, at 183–84.

imposition, an argument which may sometimes be made as a pretext to legitimize practices that are harmful to or subjugate certain groups.⁹

Customary law in Africa existed prior to the common law and civil law systems imposed through colonial rule.¹⁰ Throughout African history, customary law has undergone significant changes—existing customary frameworks have evolved through societal developments brought about by decades of cross-cultural influences. Many customary practices no longer serve their historical purposes.¹¹ Some have been distorted to push the interests of one group at the expense of another or to maintain social inequalities.¹² Certain customary law principles concerning women provide an example; for instance, bride price and primogeniture are two customary practices that are now used in ways detached from their historical purpose, as discussed further below.

These customary practices relating to women also reveal the tension between African customary law and international human rights law. The treatment of women in African customary law has received a great deal of attention for its seemingly oppressive practices, which entrench power imbalances and adversely affect women. Along with bride price and primogeniture, examples of such critiqued customary practices include child marriage,¹³ female

⁹See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 1–35 (2006). Merry argues that struggles over cultural values could in fact be reformulated as struggles over power; she describes feminist scholars that identify culture and tradition as means of legitimating the oppression of women. See also, Joseph Mlenga, *How sociology enriches human rights: The case study of Malawi's first openly-gay couple*, in *BEYOND THE LAW: MULTI-DISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS* 95, 95 (Frans Viljoen ed., 2012), discussing how the “rights for gays may be institutionalized in Malawi considering the country’s dependence on aid” from “donor countries, who call for acceptance of homosexuals.”

¹⁰See generally, Gordon R. Woodman, *Some Realism about Customary Law – The West African Experience*, 1969 *WIS. L. REV.* 128 (1969).

¹¹See discussion *infra*, IV.

¹²Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 9, 12 (Jeanmarie Fenrich et al. eds., 2011).

¹³*Ending Child Marriage in Africa- Opening the Door for Girls' Education, Health, and Freedom from Violence*, *HUM. RTS. WATCH* (Dec. 9, 2015), <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa>.

circumcision,¹⁴ polygamy,¹⁵ and divorce law.¹⁶ This note addresses customary practices in present day Nigeria, and argues for using the governing principles behind such practices that were present at an earlier point in their history, and that are more compatible with human rights, in advocating for change. This was successfully done in cases before the courts of Uganda and South Africa, used here as examples. Although there is immense diversity amongst African cultures, and thus in African customs and customary law, key features of customary law that serve to disenfranchise women are widely present in similar forms across the continent. This note will discuss in detail two practices: bride price and primogeniture, drawing influence from two significant court decisions in Uganda and South Africa, *Mifumi* and *Bhe*, respectively.

Customary law affects a vast share of society in Africa. Human rights as an abstract concept fails to adequately advance the rights of those who it was created for if its reach does not extend fully to customary practices. As Fenrich, Galizzi, and Higgins explain, peoples' lives across the continent are regulated by customary law, whereas formal legal systems are often beyond the reach of many, in particular the poor and uneducated.¹⁷ Thus, weaving human rights into a legal system in a manner that incorporates customary practices, which affects those who

¹⁴*Eliminating Female genital mutilation: An interagency statement UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, WORLD HEALTH ORG. (2008), http://apps.who.int/iris/bitstream/10665/43839/1/9789241596442_eng.pdf.

¹⁵Ruth Gaffney-Rhys, *Polygamy: A Human Right or Human Rights' Violation?*, 2 WOMEN IN SOCIETY (2011); Caitlin Shay, *Human Rights Group Challenges Uganda's Polygamy Laws*, HUM. RTS. BRIEF (Apr. 6, 2010), <http://hrbrief.org/2010/04/human-rights-group-challenges-uganda%E2%80%99s-polygamy-laws/>.

¹⁶DISSOLUTION OF MARRIAGE, LEGAL PLURALISM AND WOMEN'S RIGHTS IN FRANCOPHONE WEST AFRICA, DANISH INSTITUTE FOR HUMAN RIGHTS (Stéphanie Lagoutte, ed. 2014), https://www.humanrights.dk/sites/humanrights.dk/files/media/billeder/nyheder/engelsk_version.pdf.

¹⁷Jeanmarie Fenrich et al., *Introduction in THE FUTURE OF AFRICAN CUSTOMARY LAW* 1, 1 (Jeanmarie Fenrich et al.eds., 2011). The editors state:

“In villages, towns, and cities across the African continent, peoples' lives continue to be regulated by customary laws. Traditional legal systems are often the only ones functioning in remote corners of the continent, where the reach of the State is at best limited and at times non-existent. Even where available, the formal legal system, with its legitimate obstacles, intricate rules, formalities and expense, is often out of reach of the poor or uneducated. In addition, the persistence of long-standing expectations and social practices informed by customary laws has given rise to many problems in enforcing contract or constitutional or statutory law.”

are likely to be most marginalized in society, is essential. Cornell Law Professor Muna Ndulo has similarly argued, “[i]t is important to evaluate customary norms in the context of human rights because legal norms capture and reinforce deep cultural norms and community practices.”¹⁸

It should be highlighted that this Note goes beyond a mere romanticization of a historical, pre-colonial past whose customs and traditions may no longer be relevant for African contemporary societies. It aims instead to address those historical principles that can be applied today to advance human rights in a manner that is contextual. As stated by Dr. Aquiline Tarimo, “[i]t is worthless to continue articulating the way of life found in African traditional societies without showing their relevancy in post-traditional African societies.”¹⁹

This Note examines customary practices in Nigeria, while drawing on how South Africa and Uganda have used historical customary principles to advance human rights in their constitutional courts. Part II addresses the criticisms of human rights and discusses the limitations to the effective implementation of human rights laws. It explains how the barriers to human rights in Africa call for human rights approaches that are more relatable to the people it seeks to protect. Part III discusses customary law and its role in society, with a particular focus on Nigeria. Certain controversial customary practices regarding women will be addressed as potential areas where customary principles may be useful for reform. Part IV proposes using a historical analysis of customary principles in jurisprudence to advance the law, by drawing on examples of landmark cases in the Supreme Courts of Uganda and South Africa, discussing customary practices, their origins, and their contemporary applicability. It highlights lessons from these judicial decisions that Nigerian courts can incorporate.

¹⁸Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOBAL LEGAL STUD. 87, 90 (2011).

¹⁹AQUILINE TARIMO, HUMAN RIGHTS, CULTURAL DIFFERENCES, AND THE CHURCH IN AFRICA 11 (2004).

II. CRITIQUES AND FAILURES OF HUMAN RIGHTS IN AFRICA

Human rights has only moderately been able to have an impact on those most oppressed in Africa. However, in a continent so vast, even the present-day advancements in human rights are quite remarkable.²⁰ That being said, there is still considerable room to advance the human rights regime in ways that will allow it to retain its legitimacy and accomplish the goals it was developed to achieve. One way of advancing human rights in this regard is by making it more relatable and authentic to Africans whom it applies to.²¹ Politicians may sign international human rights treaties, or promote legal developments to conform formal laws to international human rights norms, but a vast majority of Africans are excluded from the discourse when these norms fail to reach places where customary law is predominant. When this is the case because local communities resist human rights, human-rights-compatible principles found in customary law can be used to advance the law.

This section describes how the failure to incorporate African voices into the human rights framework from its foundation has led to resistance against the regime. Debates of cultural relativism and universality highlight arguments within the human rights discourse that are relevant to African scholars' and communities' criticisms. This section then describes how existing regimes may be insufficient in their application to several parts of the continent where formal laws govern less of societal day-to-day functioning than customary laws do. It presents the rejection of human rights in contemporary contexts in Africa.

A. THE ORIGINS OF HUMAN RIGHTS

²⁰See *infra* Parts II.2.ii and II.3.

²¹As Tarimo states, "the fact is that for a theoretical assumption to be valid a perception arising from concrete social life must support it." TARIMO, *supra* note 19, at 9 (discussing the debate between cultural relativists and ethical universalists, and calling for the examining of the validity of theoretical assumptions inherent in an abstract conceptualization of human rights).

The human rights discourse derived from a context that was particularly non-universal. At the end of World War II, the most powerful countries in the world founded the United Nations, through the U.N. Charter, and the Universal Declaration of Human Rights (UDHR) to assert solidarity over universal principles and denounce the crimes against humanity perpetrated against Jews in the twentieth century.²² The UDHR, drafted against the backdrop of the Cold War and thus subject to the ideological battles between the global powers of the time, was approved in 1948 by the U.N. General Assembly. It was the primary formulation of the human rights regime until the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Political Rights (ICESCR) were adopted in 1976.²³

Although the Allies played a leading role in creating the UDHR and the U.N. Charter, they did so through institutional arrangements that strived to be more representative of the global community.²⁴ Nonetheless, during this period, most African countries were under colonial rule, and their involvement in the normative and procedural framework behind the developing regime was negligible.²⁵ Makau Mutua, a prominent Kenyan-American scholar, stated, “[t]he human

²²See Virginia A. Leary, *The Effect of Western Perspectives on International Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 3, at 15; *International Human Rights Law: A Short History*, UN CHRONICLE (January 2009), <https://unchronicle.un.org/article/international-human-rights-law-short-history> [https://perma.cc/CN42-AMRF]; GLENDON, *supra* note 3, at 221 (2001).

²³ALSTON & GOODMAN, *supra* note 1, at 139, 149.

²⁴*Id.* at 140. Discussing the institutional arrangements which the human rights regime is embedded in, the authors note, “the basic instruments of the universal system were drafted within the different organs of the United Nations and adopted by its General Assembly, before . . . being submitted to states for ratification.”

²⁵GLENDON, *supra* note 22, at 221 (“It is true that much of the world’s population was not represented in the UN in 1948: large parts of Africa and some Asian countries remained under colonial rule; and the defeated Axis powers . . . were excluded as well . . . But . . . literally hundreds of individuals from diverse backgrounds had participated.”); *see also*, ALSTON & GOODMAN, *supra* note 1, at 141 (stating, when discussing the votes on the draft Declaration in 1948, “[i]t is something of a jolt to realize today, in a decolonized and fragmented world of over 190 states, that UN membership in 1948 stood at 56 states.”). *See also*, CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 12 (2014), discussing the history of the concept of human rights and its European foundations. *See generally* Anthony Angie, *The Evolution of International Law: colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739 (2006), discussing the constitutive role of imperialism and colonization in the development of international law, and how international law is characterized by a civilizing mission.

rights corpus, only put into effect following the atrocities of the Second World War, had its theoretical underpinnings in Western colonial attitudes. It is rooted in a deep-seated sense of European and Western global predestination.”²⁶ Mutua argues that human rights principles espoused by the regime that emerged in the late 1940s were fundamentally Western: “[n]on-Western philosophies and traditions particularly on the nature of man and the purposes of political society were either unrepresented or marginalized during the early formulation of human rights . . . There is no doubt that the current human rights corpus is well meaning. But that is beside the point.”²⁷

Despite the lack of involvement in the historical events that led to the foundation of the human rights regime, it is worth noting that newly-independent African states were important driving forces behind the U.N. Convention on the Elimination of All Forms of Racial Discrimination (CERD) which passed in 1965.²⁸ This Convention opened the door for such multilateral human rights treaties to be passed. African states, in this regard, perhaps may not have been the historical drivers of the human rights regime, but are now a part of it, and through it, are able to shape the regime along with Western nations and exert influence towards rights and freedoms as they deem fit. The push by African states to adopt the treaty had wide-reaching effects, including direct influence on U.S. domestic policy.²⁹ The CERD provisions had an ensuing cascade effect; the enforcement mechanisms provided for in the treaty were accepted in all subsequent human rights treaties.³⁰

²⁶MUTUA, *supra* note 5, at 17.

²⁷Makau Mutua, *The Complexity of Universalism in Human Rights*, in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51, 61 (András Sajó ed., 2004).

²⁸Kathryn Sikkink, *International pressure on US human rights matters now more than ever*, OPENDEMOCRACY, Nov. 11, 2016, <https://www.opendemocracy.net/openglobalrights/kathryn-sikkink/international-pressure-on-us-human-rights-matters-now-more-than-ever>.

²⁹*Id.*

³⁰*Id.*

B. HUMAN RIGHTS AS MORAL IMPERIALISM

In human rights scholarship, there are criticisms that human rights are a form of moral imperialism, particularly in the African context.³¹ This section briefly outlines the debate between cultural relativism and universality, to reveal contrasting theoretical viewpoints behind human rights. This debate provides a backdrop for understanding the sources of resistance to human rights in Africa and the challenges that need to be overcome for human rights to be viewed as legitimate in African communities. Unique features of the African human rights system, described below, were made as an attempt by African scholars to legitimize human rights for the continent.

i. CULTURAL RELATIVIST ARGUMENTS

Cultural relativism challenges the universality of human rights. The theory of cultural relativism includes diverse arguments, but its starting point is that the conception of rights is based in the cultures that they derive from, and thus different cultures will have different conceptions of what human rights are or should be.³² Rights are related to the self-determination of people, and vary by context and culture because of different notions of right and wrong and moral rules across the world.³³ Arguments promoted by strong relativists suggest that “no culture or state is justified in attempting to impose on other cultures or states what must be

³¹MUTUA, *supra* note 5; Claude Ake, *The African Context of Human Rights*, AFR. TODAY, 1st Qtr – 2nd Qtr. 1987, at 5. *See generally*, MORAL IMPERIALISM: A CRITICAL ANTHOLOGY (Berta Hernández-Truyol, ed. 2002), Laura Nader, *Human Rights and Moral Imperialism: a Double-Edged Story*, ANTHROPOLOGY NEWS, Sept. 2006, at 6.

³²ALSTON & GOODMAN, *supra* note 1, at 531. *See* Kofi Quashigah, *Justice in the Traditional African Society within the Modern Constitutional Set-up*, 7 JURISPRUDENCE 93, 95 (2016) (discussing the incongruence between African customary practices and the universal human rights’ idea of justice, noting that the universal idea of justice must reflect the circumstances and aspirations of the particular peoples or societies which that concept is to serve); *see also* Thaddeus Metz, *African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights*, 13 HUM. RTS. REV. 19 (2012), discussing conceptions of dignity grounded in African moral thinking.

³³ALSTON & GOODMAN, *supra* note 1, at 531-532.

understood to be ideas associated particularly with it.”³⁴ The term “culture” used by relativists is broad and includes political and religious ideologies as well as institutional structures.³⁵

Universalists, on the other hand, argue that international human rights transcend culture and geography. Certain rights, such as equal protection, free speech, and freedom from torture, are fundamental and do not and should not vary according to culture and context.³⁶ Human rights instruments generally adopt a universalist stance, purporting to extend to *all* people. The UDHR, for example, states in its Preamble, “[n]ow, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for *all* peoples and *all* nations.”³⁷ The UDHR has now become part of customary international law, that is, law which results from a general and consistent practice of states followed by them from a sense of legal obligation.³⁸ It is therefore applicable to all states regardless of whether or not they are signatories. The U.N. generally takes a universalist approach to human rights law.

Relativist critics arguing from an African point of view often target the assumption that human rights are individualistic.³⁹ J. F. Holleman, a professor and ethnologist who researched Southern African indigenous legal systems, in an anthropological study comparing the peculiarities and characteristics of the African Bantu⁴⁰ society with the West, found that Bantus are more inclined than Westerners to regard themselves communally rather than

³⁴*Id.*

³⁵*Id.* As Bonny Ibhawoh writes, “human rights discourse at the non-formal level of social and cultural relations remains shrouded in a great deal of conceptual ambiguities. For one, the concepts of ‘culture’ and ‘cultural legitimacy’ have been caught in a considerable amount of confusion within the context of human rights discourse, because of the diversity of their uses.” Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUMAN RIGHTS QUARTERLY 838, 841 (2000).

³⁶Ibhawoh, *supra* note 35, at 841; Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 415-417 (1984).

³⁷G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [emphasis added].

³⁸RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987).

³⁹MUTUA, *supra* note 5, at 71; Ake, *supra* note 31, at 5; Quashigah, *supra* note 32, at 9, 18; Metz, *supra* note 32, at 25.

⁴⁰Bantu refers to ethnic groups in the Central Africa and Southern Africa regions.

individualistically.⁴¹ This viewpoint affects the development of the rules that govern society. Rules which affect the interests of the community are of greater significance than rules which affect the individual in the Bantu society.⁴² The disputes which arise out of such a community are therefore less impersonal in nature, whereby the approach tends towards reconciliation and preserving the community.⁴³ The different approaches to dispute resolution among different societies globally implies an alternative approach to human rights may have been possible, yet the Western individualistic approach is what underlies human rights today. As Donnelly writes, “human rights are inherently ‘individualistic’; they are rights held by individuals in relation to, even against, the state and society.”⁴⁴ He further argues that traditional communitarian practices “cannot be extended to modern nation states and contemporary nationalist regimes.”⁴⁵ This highlights the contrasting approaches to human rights law and legal theory.⁴⁶

In addition, the individualistic dimension to human rights is intertwined with liberal democracy, and thus, the human rights regime has political implications for all countries,

⁴¹Holleman’s study found that a Western person regards himself firstly as his individual self, “holding and exercising his individual rights and protecting his individual interests,” and secondly, regards himself as a member of the community with responsibilities and privileges therefrom. On the other hand, the Bantu person “knows himself in the first place as a member of his community . . . with duties [and] responsibilities . . . and in the second place he is an individual.” J. F. Holleman, *An Anthropological Approach to Bantu Law*, in *AFRICAN LAW AND LEGAL THEORY* 5 (Gordon R. Woodman & A. O. Obilade eds., 1995).

⁴²In the Bantu society, “the approach is undoubtedly *communal*, in that not only do the interests of the community naturally rank first, but that, a person being in the first place a member of the community, the infringement of individualized interests by other individuals, affects the community *itself* more directly than it would in the West.” *Id.* (Emphasis in original).

⁴³*Id.*

⁴⁴Donnelly, *supra* note 36, at 411 (1984).

⁴⁵*Id.* Donnelly points to articles in the UDHR, such as Article 1, 2, and 7, and points out that they “reflect an essentially individualistic modern view of man, state and society.” *Id.* at 415.

⁴⁶From a philosophical perspective, a conception of personhood that is fundamentally communitarian, as in Africa, can warrant a different approach to human rights. For example, it may be more duty-based. *See generally*, Metz, *supra* note 32; *see also* Ifeanyi A. Menkiti, *On the normative conception of a person*, in *A COMPANION TO AFRICAN PHILOSOPHY* 324 (Kwasi Wiredu ed., 2006); KWAME GYEKYE, *TRADITION AND MODERNITY: PHILOSOPHICAL REFLECTIONS ON THE AFRICAN EXPERIENCE* 35 (1997) (on philosophical discussions of the conception of personhood in Africa).

suggesting an ideal way in which a country ought to be governed.⁴⁷ Human rights is often linked to democracy, and reforms of constitutions to include principles of democratic governance have taken place as part of the human rights or development regime in Africa.⁴⁸ Nevertheless, it is indeed true that “the most *dramatic* violations of human rights in Africa have occurred in conditions of political dictatorship: Amin’s Uganda, Bokassa’s Central African Republic, Banda’s Malawi, apartheid South Africa, and Equatorial Guinea.”⁴⁹ It is empirically sound to draw a connection between repressive and nondemocratic governments and human rights violations in Africa.⁵⁰ Thus, the position that some civil and political rights, regardless of their association with democracy, should be universal, is a justifiable position.

The debate between relativists and universalists has a strong North-South and West-East dimension.⁵¹ Mutua argues:

It is one thing for Europeans and North Americans, whose states share a common philosophical and legal ancestry, to create a common political and cultural template to govern their societies. It is quite another to insist that their particular vision of society is the only permissible civilization which must now be imposed on all human societies, particularly those outside Europe.⁵²

⁴⁷MUTUA, *supra* note 5, at 39–70, where Mutua generally argues that human rights and Western liberal democracy are virtually tautological. See generally, Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 91 (1992); TOMUSCHAT, *supra* note 25, at 155-159 (2014).

⁴⁸See Charles M. Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFFALO L. REV. 1007; see also Christof Heyns & Waruguru Kaguongo, *Constitutional Human Rights in Africa*, 22 S. AFR. J. OF HUM. RTS. 673 (2006), for a comparative study of domestic constitutional provisions across Africa dealing with human rights, including civil and political rights and democratic freedoms.

⁴⁹Akwasi, Aidoo, *Africa: Democracy without Human Rights?*, 15 HUMAN RTS. Q. 703, 705 (1993). (Emphasis in original). Another example includes President Yaya Jammeh’s Gambia. According to Human Rights Watch’s 2016 country chapter on Gambia, President Jammeh, who was in power from 1994 to 2017, and had rejected the 2016 democratic election results which ousted him, had run a government that frequently committed serious human rights violations including arbitrary detention, enforced disappearances, and torture against his opposition. Gambia Events of 2015, HUM. RTS. WATCH (2016).

<https://www.hrw.org/world-report/2016/country-chapters/gambia> [https://perma.cc/5WW2-CF6P].

⁵⁰Francis Viljoen & Lurette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights*, 101 AM. J. INT’L L. 1, 25–26 (2007). See generally, Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCIENCE REV. 567, 576 (1993).

⁵¹ALSTON & GOODMAN, *supra* note 1, at 533.

⁵²MUTUA, *supra* note 5, at 19. He continues, “The merits of the European and American civilization of human rights notwithstanding, all missionary work is suspect, and might easily seem a part of the colonial project. Once again, the allegedly

Mutua's arguments frame human rights as moral imperialism. He further argues that since 1945, the United Nations has played a key role in preserving a Western-dominated global order.⁵³

Mutua writes, "[the] abstraction and apoliticization [of the human rights movement] obscure[s] the political character of the norms it seeks to universalize."⁵⁴

The dichotomy between universalism and cultural relativism is not completely irreconcilable.⁵⁵ Some human rights theorists believe that the two conceptions are compatible.

For example, Jack Donnelly contends:

the international consensus represented by the Universal Declaration of Human Rights and the International Human Rights Covenants, in the conditions of the modern world, supports a weak cultural relativist approach to human rights; that is, an approach that views human rights as *prima facie* universal, but recognizes culture as a limited source of exceptions and principles of interpretation.⁵⁶

There is agreement, at least through customary international law, that there are *jus cogens* norms, *i.e.* peremptory norms that ought not to be violated in the international community, while there is also an appreciation of different cultures.

ii. AN "AFRICAN" CONCEPTION OF HUMAN RIGHTS

There are unique features of the African Charter on Human and Peoples' Rights (ACHPR) compared to other international human rights treaties. These demonstrate the regional

superior Europeans and North Americans descend on supposedly backward natives in the Third World with the human rights mission to free them from the claws of despotic governments and benighted cultures."

⁵³*Id.* at 18.

⁵⁴*Id.* at 3.

⁵⁵As Mary Ann Glendon writes, "[i]f relativism and imperialism were the only choices, the prospect for the Declaration's vision of human rights would be bleak. Fortunately, this is not the case." GLENDON, *supra* note 25, at 229.

⁵⁶Donnelly, *supra* note 50, at 402 (Emphasis in original).

differences in an African conceptualization of a human rights regime. The history of the regime is described here. The motivations behind the creation of the system are critical to understanding it.

The Organisation of African Unity (OAU) Charter was adopted in 1963 and upheld similar principles to those enshrined in the UDHR.⁵⁷ It firmly rooted itself in a “doctrine of noninterference between states,” because it was developed during a period when several countries were emerging from colonialism.⁵⁸ The possibility of creating a convention of human rights was addressed at the time the OAU charter was adopted. However, these discussions did not go very far because “states and other perpetrators of human rights abuses on the continent often used a cultural relativist argument to dispel criticism and resist change in policy and practice.”⁵⁹

By 1979, the OAU took steps to adopt a human rights charter. In July 1979, the OAU Assembly, consisting of the Assembly of Heads of State and the Government of the OAU, called on the Secretary General, Mr. Edem Kodjo of Togo, to urge the Member States to create “certain international conventions whose ratification would help to strengthen Africa’s struggle against certain scourges, especially apartheid and racial discrimination, trade imbalance and mercenarism.”⁶⁰ The Assembly called on Mr. Kodjo to organize a meeting of experts to prepare a draft of an African human rights charter that would establish bodies to promote and protect

⁵⁷The OAU had 32 signatory states at this time. Taslim O. Elias, *The Charter of the Organization of African Unity*, 59 AM. J. INT’L L. 243, 261 (1965). It was later replaced with the African Union (AU) which launched in 2002. RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION 31 (2004); *AU in a Nutshell*, AFRICAN UNION, <https://au.int/en/au-nutshell>.

⁵⁸Hakima Abbas, *Africa’s Long Road to Rights*, in *Africa’s Long Road to Rights: Reflections on the 20th Anniversary of the African Commission on Human and People’s Rights* 1, 1 (Hakima Abbas ed., 2007).

⁵⁹*Id.* at 2.

⁶⁰*Rapporteur’s Report (CAB/LEG/67/Draft Rapt. Rpt (II) Rev. 4), Report of the Secretary-General on the Draft African Charter on Human and Peoples’ Rights*, in *HUMAN RIGHTS LAW IN AFRICA 1999*, 94 (Annex II) (Christof Heyns ed., 2002).

human and peoples' rights.⁶¹ A committee of experts convened in Dakar to prepare the preliminary draft.⁶² In drafting the ACHPR, the drafters sought to modify the UDHR by including language believed to represent "African" values.⁶³

Firstly, the ACHPR, adopted in 1981, is unique in its conception of "Peoples' Rights." At the time of its drafting in June 1980, some delegates highlighted that in Africa, "man is part and parcel of the group," and "individual rights could be explained and justified only by the rights of the community."⁶⁴ The major principles adopted by the committee of experts who drafted the ACHPR included "the specificity of African law, the different political regimes, [and] the importance of traditions and morals in Africa."⁶⁵ Thus, the Member States pushed for a draft charter that emphasized peoples' rights.

Secondly, the ACHPR enunciates economic, social, and cultural rights in a more robust manner than other international human rights treaties. In the June 1980 meeting, the delegation expressed concerns for "the total liberation of Africa from foreign domination, the need to eradicate apartheid . . . and the need for a new economic and legal order, particularly the right to self-determination."⁶⁶ The desire to "eradicate all forms of colonialism from Africa," as written in the Preamble⁶⁷ was a strong consideration during the drafting of the ACHPR.⁶⁸ Thus, the

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.*; B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 *HUM. RTS. Q.* 141, 145 (1984).

⁶⁴Rapporteur's Report, *supra* note 60, at 95.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷African Charter on Human and Peoples' Rights pmbl, June 12, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 [hereinafter ACHPR].

⁶⁸Rapporteur's Report, *supra* note 60, at 94-95. *See also*, U. O. Umozurike, *The African Charter on Human and Peoples' Rights*, 77 *AM. J. INT'L L.* 902, 902; Manisuli Ssenyonjo, *An Introduction to the Development of the African Regional Human Rights System: 30 Years after the Adoption of the African Charter on Human and Peoples' Rights*, in *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 3, 5-6 (Manisuli Ssenyonjo, ed. 2006). Both articles discuss the concerns of the OAU when drafting the OAU Charter, the predecessor to the ACHPR. *See* Okere, *supra* note 63, at 145.

goals of the ACHPR were the preservation of culture along with economic and social rights that would protect Africans from exploitative foreign activity.

Notably, the ACHPR includes the right to economic, social, and cultural development.⁶⁹ The Preamble notes that civil and political rights “cannot be dissociated” from economic, social, and cultural rights.⁷⁰ The ACHPR also provides for the right to work (Article 15), the right to health (Article 16), the right to education and the right to take part in cultural life (Article 17) and the right to a general satisfactory environment (Article 24).⁷¹ This is an important departure from the human rights regime’s traditional focus on civil and political rights, which Western countries strongly advocated for.⁷² The right to culture, in particular, is also important to note because it has the potential to conflict with other human rights protections.⁷³

Despite the ACHPR’s attention to economic, social, and cultural rights, African States fail to promote the rights guaranteed in the ACHPR when governments do not make adequate arrangements to enforce such rights. For example, many human rights violations are experienced by African communities at the hands of extractive industry firms—including oil companies in Nigeria,⁷⁴ mining companies in Guinea,⁷⁵ and diamond mining companies in Sierra

⁶⁹ACHPR, *supra* note 67, at art. 22.

⁷⁰ACHPR, *supra* note 67, at pmb1.

⁷¹*Id.*

⁷²Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* ¶¶ (2013); Tomuschat, *supra* note 25, at 32, 35. For example, the United States is a party to the treaty on civil and political rights, the ICCPR, in contrast to the treaty on economic, social and cultural rights, the ICESCR, which the United States has, to date, not ratified. *Status of Ratification Interactive Dashboard*, United Nations Human Rights Office of the High Commissioner, <http://indicators.ohchr.org/>.

⁷³*See generally* Fielder, *supra* note 2.

⁷⁴*Nigeria Should Not Do to Ogonis What Was Done to Saro-Wiwa*, AFRICAN HERALD EXPRESS (Jan. 14, 2018), <http://africanheraldexpress.com/blog8/2018/01/14/nigeria-should-not-do-to-ogonis-what-was-done-to-saro-wiwa/> [https://perma.cc/P78E-BY3D].

⁷⁵Dr. Aliou Diouf, *Guinée: Etude sur les entreprises et les droits de l’homme en République de Guinée*, ALLAFRICA (Mar. 5, 2014), <http://fr.allafrica.com/stories/201403051157.html> [https://perma.cc/3ECP-2FE9].

Leone⁷⁶ and Zimbabwe.⁷⁷ Yet governments lack the ability to successfully address the economic, social, and cultural rights violated under these conditions. In such circumstances, the ACHPR's provisions are noble in theory but fail to fulfill the ACHPR's goals in practice.⁷⁸ As stated by Obinna Okere, "it is one thing . . . to proclaim rights and quite a different matter to establish the infrastructure necessary for the enjoyment of these socioeconomic rights. . . . These socioeconomic rights are purely exhortatory."⁷⁹ In this manner, there is a gap between the rights African governments intend to promote and the actual efficacy of human rights in Africa simply by the creation of treaties.

Finally, the ACHPR contains several provisions that outline the duties of individuals within the state.⁸⁰ Although there is limited jurisprudence interpreting these duties, their inclusion in the ACHPR demonstrates Member States' belief that for a society to function, individuals must have obligations to their neighbors. Chapter II of the Charter, in Articles 27–29, outlines individual duties. Article 27 provides that every individual shall have duties towards his family and society, the State, other legally recognized communities, and the international community,⁸¹ and that rights and freedoms should be exercised with due regard for the rights of others, collective security, morality, and common interest.⁸²

⁷⁶*Sierra Leone: Mining Boom Brings Rights Abuses*, HUM. RTS. WATCH (Feb. 19, 2014), <https://www.hrw.org/news/2014/02/19/sierra-leone-mining-boom-brings-rights-abuses> [<https://perma.cc/2EX8-JHRU>]; *Sierra Leone mining mired in human rights concerns*, ENEWS CHANNEL AFRICA (Feb. 23, 2014), <https://www.enca.com/africa/sierra-leone-mining-mired-human-rights-concerns> [<https://perma.cc/H6NB-ZL28>].

⁷⁷*Diamond mining in Zimbabwe: A story of the people fighting state and corporate human rights abuses and their stranglehold on natural resources*, FRIENDS OF THE EARTH INT'L (Dec. 18, 2017), <http://www.foei.org/features/diamond-mining-zimbabwe-story-people-fighting-state-corporate-human-rights-abuses-stranglehold-natural-resources> [<https://perma.cc/5N9F-5SKK>].

⁷⁸This will be further demonstrated in the following section of this note. See *infra* I.C.

⁷⁹Okere, *supra* note 63, at 147 (1984).

⁸⁰ACHPR, *supra* note **Error! Bookmark not defined.**, art. 27.

⁸¹*Id.*

⁸²*Id.* Article 28 and 29 outline further duties, including the duty to respect others without discrimination, to preserve the harmonious development of the family, to respect parents, to serve one's national community by placing physical and intellectual abilities at its service, to not compromise the security of the State, to preserve and strengthen national independence and the

The provisions of the African Charter *do* include rights that are considered universal. Certain rights, it seems, appear to apply across the globe, regardless of culture and context, to ensure a stable and functioning society. These include, among others, the right to freedom from discrimination, equality, life, freedom from torture and cruel, inhuman and degrading treatment, fair trial, and freedom of assembly.⁸³ These rights are important when considering the political instability and dictatorial rule of several African states in the decades since the 1960s. Grave human rights violations committed in Burundi, Rwanda, Democratic Republic of Congo, and Central African Republic, to name a few, reinforce the need to include these rights in human rights charters, especially the ACHPR.

Claims of cultural relativism are very important, but do not justify resisting human rights as a whole. The arguments of moral imperialism, and of human rights as a neocolonial concept, may be more apt in addressing the institutional structures on the international level charged with policing human rights than the rights themselves. Taking into account relativist claims, the human rights framework can still be used to address issues pertinent to human beings in all forms of society regardless of the cultural framework in which they might be situated.

Thus, “human rights” can be dissected in a manner that makes it applicable to all Africans by promoting human rights principles found in customary law. This can be a more effective way of addressing violations, while also bypassing criticisms of international human rights institutions and the power imbalances inherent in them.

C. HUMAN RIGHTS APPLICABILITY IN AFRICA

territorial integrity of his country, to work and pay taxes, to strengthen positive African cultural values and contribute to the promotion of the moral wellbeing of society, and to contribute to the achievement of African unity.

⁸³ACHPR, *supra* note **Error! Bookmark not defined.**, arts. 2–5, 7, 11.

The success of the ACHPR since its adoption in 1986 is debatable. On the one hand, the ACHPR has created avenues for rights violations to be adjudicated in an international, independent quasi-judicial body.⁸⁴ It has also empowered a remarkable number of non-governmental organizations. For example, the African Commission on Human and Peoples' Rights ("the African Commission") allows for close participation of NGOs in its work, strengthening the avenues of civil society participation in human rights issues.⁸⁵ The ACHPR provides a means for holding states accountable for human rights violations in their countries, and because the African Commission's work is presided over by the African Union, there is, in theory at least, public pressure, both within the Africa Union and internationally, for Member States to adhere to their obligations and pay more attention to human rights than they perhaps otherwise would. In addition, the system has set in motion the recognition of rights in other areas. This is demonstrated by the recent human rights instruments regarding women's rights,⁸⁶ entered into force in 2005, and children's rights,⁸⁷ entered into force in 1999. As noted by Abbas, the Protocol to the African Charter on the Rights of Women in Africa ("Maputo Protocol"), entered into force in 2005, "is perceived to be groundbreaking in its breadth of rights," yet it was "the fastest African treaty to come into force."⁸⁸

On the other hand, the African human rights system leaves much to be desired. First, it is the least developed compared to other regional human rights systems, perhaps because it is also

⁸⁴*Id.*, arts. 45–59

⁸⁵Christof Heyns & Magnus Killander, *The African Regional Human Rights System*, INT'L PROTECTION OF HUM. RTS.: ACHIEVEMENTS AND CHALLENGES 524 (F. Gomez Isa & K. de Feyster eds., 2006). NGOs are allowed to submit shadow reports during the state reporting process (where each state party reports on its efforts to adhere to the Charter. They may also register for "observer status," propose agenda items at the Commission's sessions, and provide support to the Commission, including through funding interns, organizing workshops, and developing normative resolutions alongside the Commission.

⁸⁶Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, July 11, 2003, *available at* <http://www.achpr.org/instruments/women-protocol/> [hereinafter Maputo Protocol].

⁸⁷African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/153/Rev2 (1990).

⁸⁸Abbas, *supra* note 58, at 5–6.

the youngest.⁸⁹ It has the fewest resources and has to contend with limited support from Member States.⁹⁰ Compared to the Inter-American Human Rights Commission, which by 2005 had issued an average of 100 decisions each year, the African Commission had issued only an average of ten decisions each year by 2012.⁹¹

Human rights efforts have achieved limited success through the African Commission and such formal institutions for several reasons. First, the African Commission recommendations are not formally binding.⁹² Although there have been efforts to give the human rights agenda in Africa more teeth by instituting the African Court on Human and People's Rights ("African Court"), whose decisions have a stronger binding force, these efforts are still in their developing stages.⁹³ Only eight states have signed on to the special declaration allowing for individuals and NGOs to bring a complaint against a state at the African Court, and only thirty states have ratified the special declaration.⁹⁴

Second, there is a lack of internal pressure within states to implement the African Commission's recommendations.⁹⁵ Given their already limited resources, governments are unlikely to implement costly measures to comply with human rights recommendations without

⁸⁹ ALSTON & GOODMAN, *supra* note 1, at 1025.

⁹⁰*Id.* See also generally Abbas, *supra* note 58.

⁹¹ Abbas, *supra* note 58, at 7.

⁹² Org. of African Unity [OAU], *Communications Procedure Information Sheet No. African Commission on Human and People's Rights*, <http://www.achpr.org/communications/procedure/>. See also, RACHEL MURRAY & DEBRA LONG, *THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS* 10–26 (2015).

⁹³ *About Us*, AFRICAN CT. ON HUM. AND PEOPLE'S RTS., <http://en.african-court.org/>.

⁹⁴ As of July 2017. The 8 states are Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tanzania and Tunisia. Note that there are other avenues for the Court to issue decisions regarding a State regardless of the State signing the Declaration, for example, when the Commission decides to refer a case to the Court or if an AU Member State requests for the Court to give an advisory opinion regarding a State. See generally AFRICAN CT. ON HUM. AND PEOPLE'S RTS., <http://www.achpr.org/about/afchpr/>. See also Welcome to the African Court, AFRICAN CT. ON HUM. AND PEOPLE'S RTS., <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court>.

⁹⁵ Abbas, *supra* note 58, at 5.

serious pressure to do so.⁹⁶ Moreover, the lack of internal pressure weakens the force African Commission recommendations carry.

This lack of pressure can be explained in part by the third factor, which is that there is “no widespread popularization of the [African Charter] rights and [the African Commission] recommendations.”⁹⁷ This may be due to a lack of a concerted, multi-stakeholder effort across the continent.⁹⁸ In addition, the fact that governments are required to approve the African Commission’s reports before they become public is a limiting factor to widespread public knowledge of the African Commission’s work.⁹⁹

Lastly, the lack of political will from governments to support an African human rights regime hampers its effectiveness.¹⁰⁰ Governments generally fail to implement recommendations when given.¹⁰¹ Moreover, domestic courts are reluctant to apply international human rights law in their domestic decisions, and as a result, its strength is not felt as much as it could be in the domestic legal structure.¹⁰²

One example of the limited success of applying international human rights in domestic decisions, despite the ratification of international human rights treaties, is a Zimbabwean case, *Magaya v. Magaya*.¹⁰³ International human rights treaties were directly implicated, yet, the Magistrate’s Court refused to find discrimination against women in customary intestate succession practices that favored male heirs, contrary to the court finding in the South African

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰Viljoen & Louw, *supra* note 50, at 33.

¹⁰¹*Id.* at 8.

¹⁰²Lauren Fielder writes, “[w]hen African courts apply international human rights law in their decisions, it may cause legitimacy problems, even when the state is obligated to do so under its treaty requirements. This is problematic because the legitimacy of the courts is of vital concern.” Fielder, *supra* note 2, at 182.

¹⁰³*Magaya v. Magaya*, (1999) 3 LRC 35 (Zim. S.C.).

Bhe case.¹⁰⁴ Zimbabwe's Constitution at the time exempted matters involving the devolution of property upon death, and matters involving the application of African customary law, from the prohibition against discrimination.¹⁰⁵ Moreover, the Zimbabwe Constitution, unlike South Africa's, did not provide for protection against discrimination based on gender, although it did provide for protection against discrimination based on other factors.¹⁰⁶ The *Magaya* court relied on this omission to uphold primogeniture, finding it to not be a violation of the Zimbabwean Constitution. Despite the ratification of international human rights treaties protecting against gender discrimination, the Zimbabwean Supreme Court still refused to apply the protections because of constitutional limitations.

The barriers faced by the African human rights system thus compound the problem of using international human rights as a means of advancing rights in an African context. Todd Landman, a political scientist, carried out a comprehensive comparative study on human rights enforcement which illustrates how formal international human rights efforts are not as effective in Africa as in other regions. Landman summarizes his research as follows,

the descriptive analysis of the different measures of rights protection...showed that depending on the collection of rights, time-series trends show general improvement in political rights and mixed results for civil rights protection and the use of torture . . . [however,] regionally, some of the worst [human rights] performers are in the MENA region, *Sub-Saharan Africa*, and South Asia.¹⁰⁷

¹⁰⁴*Id.* For a further discussion on *Bhe*, see *infra* IV.A.

¹⁰⁵Const. of Zim. (1980) §23.

¹⁰⁶The Zimbabwean Constitution at the time *Magaya* was decided, in 1999, provided in its anti-discrimination section 23 (emphasis added):

(1) Subject to the provisions of this section:

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, *persons of a particular description by race, tribe, place of origin, political opinions, colour or creed* are prejudiced. . .

Const. of Zim. (1980) §23.

¹⁰⁷TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* 163 (2005)

Kayode Fayokun provides further support of human rights implementation failure in an article where he observes a wide gap between global standards and customary norms and practices in Nigeria, despite Nigeria's status as a signatory to numerous international human rights treaties.¹⁰⁸ Such scholarship suggests that alternative means of advancing human rights are necessary. This Note responds to the need for additional advancement in human rights in Africa by appealing to human rights-compatible principles in customary law.

III. NIGERIAN CUSTOMARY LAW

A. HISTORY AND MODERN RELEVANCE

Customary law consists of traditional rules and practices that govern society, developed over time, and are in a constant state of evolution. In Africa, “[c]ustomary laws and traditional institutions . . . constitute comprehensive legal systems that regulate the entire spectrum of activities from birth to death.”¹⁰⁹ African customary laws have certain distinguishing characteristics.¹¹⁰ First, they are complex bodies of norms with varying degrees of mandatory force. Second, they reflect and preserve inequalities amongst members of society in the social order of the communities, just as other legal systems across the world tend to do. Third, they constantly change.¹¹¹ As Fielder notes, “the dynamic feature of customary law potentially makes it an excellent vehicle for the protection of other rights, including women’s human rights.”¹¹² Lastly, customary laws include uncertainties—parts of customary law are objects of controversy,

¹⁰⁸Kayode O. Fayokun, *Gender Justice in Nigeria: Incoherence of Global Treaties and Customary Law*, 12 U.S.-CHINA L.R. 677 (2015).

¹⁰⁹See Fenrich et al., *supra* note 17.

¹¹⁰Woodman, *supra* note 12, at 12-18.

¹¹¹Woodman states, “there is abundant empirical evidence that the content of the customary laws of Africa has changed significantly in the past century and continues to change today.” *Id.* at 15.

¹¹²Fielder, *supra* note 2, at 179.

as it varies from region to region, and it is sometimes unclear regarding the boundaries of whom it governs.

The history of the role of customary law during colonialism is complex and varies across the continent. Discussing the colonialists' understanding of the pre-colonial legal framework in Africa, John Murungi writes:

Under the delusion that Africans are law-less, Europeans have taken up the mission of sending missionaries of law in Africa. These missionaries have accompanied other European missionaries of civilization to Africa to uplift Africans from the state of savagery. They suffer from the illusion or the delusion that what law means has already been universally settled, and what remains is to have everyone else recognize and implement it. For most of them what is ignored is what Africans have experienced and what they still experience in the regime and the empire of the Western conception of law. This regime has not only been consistent with the colonization of Africans but also with the enslavement of Africans. It has provided justification for the inhumane treatment of Africans.¹¹³

Murungi's quote highlights a link between the resistance to European "civilizing" projects and resistance to today's human rights reform because its origin is closely linked to the West.

Another scholar, Clever Mapaire, makes a similar assertion:

Skepticism about the existence of an African jurisprudence stems from the mistaken belief that African customary law is only custom and not law at all. This can be explained by Eurocentricism and the lack of understanding about African ideas about law. It is important to understand that Africans have a longstanding understanding of natural justice, the law and legal systems despite the fact that indigenous practice may have not developed in abstract theoretical terms.¹¹⁴

Today, customary law's fusion with formal codes of law inherited from colonial rulers has resulted in a pluralist legal system, consisting of statutory law, common or civil law, and international treaties.¹¹⁵ However, customary law today still plays a significant role in society.

¹¹³JOHN MURUNGI, AN INTRODUCTION TO AFRICAN LEGAL PHILOSOPHY 2 (2013).

¹¹⁴Felder, *supra* note 2, citing Clever Mapaire, *Reinvigorating African Values for SADC: The Relevance of Traditional African Philosophy of Law in a Globalising World of Competing Perspectives*, 1 SADC L.J. 149, 153 (2011)

¹¹⁵See generally Woodman, *supra* note 12, at 18. Some regions also adhere to religious laws. Ndulo, *supra* note 18, at 87.

For the most part, and in most parts of the African continent, people's lives are governed by customary law.¹¹⁶

Customary law thus exhibits very strong potential as a tool to advance human rights. The World Bank recognized the potential for change through customary law, describing it as “pragmatic” and “constructive,” given that it is more familiar and accessible to many.¹¹⁷ The World Development Report 2012 states: “[r]emoving gender biases in the customary system through sensitization, encouraging greater participation by women, and promoting the system's values, such as the protection of women, should thus be encouraged. . . . Forging links between the informal and formal systems can help bring about greater parity throughout the legal system.”¹¹⁸

B. NIGERIAN CUSTOMARY LAW AND WOMEN

The rights of women in customary law provide an area of focus which highlights the interrelationship between customary law and human rights. This section describes some customary laws and practices in Nigeria relating to women. The customary practices discussed here are disadvantageous to women, but it is possible, as the later cases will show, that from the history of how these customary practices came about, there are human-rights-compatible principles that can be drawn out. It is, however, necessary to provide a background on the customary practices in Nigeria first. In this section, customary laws are presented to demonstrate where there is potential for reform, as some of these laws seem to *prima facie* constitute discrimination on the basis of gender. They highlight the areas where human rights reformers could direct their efforts, and provide a backdrop for the cases in Uganda and South Africa

¹¹⁶ Ndulo, *supra* note 18, at 87.

¹¹⁷ WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT 288–329 (2012).

¹¹⁸ *Id.*

discussed in the next section of this note. The focus is on customs regarding traditional heads of power, inheritance and succession, and marriage and marriage duties.

As a preliminary matter, it should be noted that the “woes of women” are often a matter of interest to an outside observer of African practices but, when judged against a foreign standard, one may misconstrue the important role women play in traditional societies, and imply from certain practices subordination where in fact subordination does not exist, or did not exist in its original form (as opposed to its present-day form).¹¹⁹ The practice of “bride price” is one such example, as will be described in the following Part IV.

i. Traditional heads

In Nigerian customary law, women are generally excluded from becoming traditional rulers.¹²⁰ This is an area of customary law that could be reformed to be more compatible with international human rights norms. Ascendancy in royal families is generally reserved for male children.¹²¹ Across all the communities in Nigeria, in the North-Central, South-East, South-West, and South-South, the rule that ascendancy to a throne is reserved for males is ubiquitous. For example, females are absolutely barred in the Delta state region.¹²² Some kingdoms base ascendancy on primogeniture, while in some regions the titles for women generally reflect their roles as wives to the kings (*e.g.* “Ikeyo oro” in Oron, whose literal translation is “Mother of Oron”). In 1987, the Nigerian Supreme Court held in *Edewor v. Uwegba* that proposed candidates for rulers shall be male members of the society.¹²³ In *Victor Adegoke Adewumi v. The*

¹¹⁹One author, Justice Anyebe, cautions against this, stating “[t]he mistaken belief about the assumed adverse role of women ignores the invaluable contribution women have made, for example in the fields of culture, farming, commerce, discipline, home management, baby rearing, and, more recently, the civil service. A woman can, therefore, with dint of hard-work rise on merit.” JUSTICE A. P. ANYEBE, CUSTOMARY LAW: THE WAR WITHOUT ARMS 34 (1985).

¹²⁰ Restatement of Customary Law of Nigeria, Nigerian Inst. of Advanced Legal Stud. 13 (2013).

¹²¹Two queens ruled in the Ijesha Kingdom in the 19th century, which today is closely linked to Akure. *Id.*

¹²²*Id.* This is in the Delta state region of the rule of Onitsha Ukwu.

¹²³*Edewor v. Uwegba* [1987] 1 NWLR 15, pt. 50 (Nigeria), in RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123.

Attorney General of Ekiti State the Court similarly held that only members of the male line of the royal family who are sons of previous throne title-holders and born during the reign of the king are eligible as heirs.¹²⁴ Comparable holdings can also be found in *Adesanoye v. Adewole*¹²⁵ and *Oguigo v. Oguigo*,¹²⁶ where primogeniture was the rule governing heirship. Although this pattern of male successors is not unlike successorship in other monarchies in other parts of the world, it contrasts with formal systems that have recently become more inclusive to females.¹²⁷

Advocates for female leadership should focus efforts on means of including females as part of the decision-makers in customary governance systems. Studies have shown that female leadership can have important implications on economic growth, the dispersion of resources, and the development of young people in the society.¹²⁸ Rulers play a prominent role in promoting development initiatives in their communities,¹²⁹ and having women involved in those initiatives helps reduce inequalities and harmful effects on females.¹³⁰ Customary law should be advanced

¹²⁴Victor Adegoke Adewumi v. The Attorney General of Ekiti State [2002] 2 NWLR pt. 751, 475, in RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 121.

¹²⁵ Adesanoye v. Adewole [2006] 14 NWLR 242, pt. 1000 (Nigeria S.C.).

¹²⁶Oguigo v. Oguigo [1999] 14 NWLR 238, pt. 638 (Nigeria S.C.), in RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 16.

¹²⁷For example, the Covenant on the Elimination of Discrimination Against Women (CEDAW), the primary international human rights treaty concerning women, has endorsed affirmative action, or “temporary special measures.” Convention on the Elimination of All Forms of Discrimination Against Women, art. 4., Sept. 3, 1981, 1249 U.N.T.S. 20378 [hereinafter CEDAW]. See also General Recommendation No. 25, UN Committee on the Elimination of Discrimination Against Women (CEDAW) of Its thirtieth session, Temporary Special Measures, para. 15 (2004),

http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/General_Recommendations_1-25-English.pdf [<https://perma.cc/A48C-W3XU>]. (“The purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women.”).

¹²⁸For further instrumentalist arguments on gender equality and its effects on development, *see generally*, WORLD BANK REPORT, *supra* note 117.

¹²⁹RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 52. The author states: “Customary practice in this area is uniform. Community development initiatives involves various activities that promote the peace and well-being of the community.” These practices include maintenance of law and order, mobilizing the community for development activities, mediating disputes, overseeing deliberations on matters affecting the wellbeing of the community. RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 53.

¹³⁰As noted by the CEDAW Committee, “[i]ndirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes . . . may be inadvertently modelled on male lifestyles and thus fail to take into

to push for women to be able to exert power and influence in whatever leadership role they might have, even where the role is not necessarily as a ruler of a kingdom.

ii. Inheritance

In Nigeria, where the customary law of the deceased governs inheritance law, a focus of concern is whether a woman can inherit property of a deceased husband or father. Generally, women cannot inherit but can own property under customary law.¹³¹

There are some instances, particularly in the South-West region, where a female member of the community can neither be allocated property nor can she inherit or own land.¹³² Because only males can own and inherit land in such communities, where there are no sons, land is inherited by the male family members of the deceased, in order of seniority.¹³³

In other instances, wives may constitute property under customary law in certain regions. In such communities, a wife may be inherited as part of the property of her deceased husband to the husband's brother or any male member of his family.¹³⁴ Edo state is one of the regions where this custom is prevalent.¹³⁵

Wives and daughters may be treated differently in Nigerian customary law for inheritance. In most cases, where a husband makes a valid will, he is able to pass on his property to his wife. However, the land reverts to a male child or other male relative upon the wife's

account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men." General Recommendation No. 25, CEDAW, *supra* note 134, at n. 1.

¹³¹RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 82–96.

¹³²*Id.* at 82, 96.

¹³³*Id.* at 87.

¹³⁴Oke & Anor v. Oke & Anor [1974] 1 All NLR 401. *See also* Obusez v. Obusez [2001] 5 NWLR 377, pt. 736 (making reference to the native custom.).

¹³⁵RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 85–86.

death; this is common in Ibo communities of the South East.¹³⁶ A father is customarily not to pass down property to his daughter— “a woman does not inherit land, neither can a father include his daughters as . . .beneficiar[ies] to inherit his landed property.”¹³⁷ A woman may have a possessory interest in land, *i.e.* be able to build houses and cultivate land, but does not have a fee simple absolute interest, *i.e.* does not have complete ownership rights in the land.¹³⁸ This is common in the South-East and South-South regions.¹³⁹ Daughters are considered as belonging to their husbands’ or future husbands’, and thus the ownership interest in land inheritance from their father’s house does not extend to them.¹⁴⁰ This is the case in Akwa, for instance.¹⁴¹

The prominent feature of inheritance in various communities, as described in the Restatements, according to a close examination of the field research, is that inheritance of land and titles is patrilineal, passing through the male line of the family.¹⁴² The reason for this is cited as “to ensure that property remains in the family . . . from generation to generation.”¹⁴³ Patrilineal inheritance may vary from primogeniture, where the first son inherits from his father, to ultimogeniture, where the youngest son inherits from his father. The heir not only inherits property, but also duties of his father in caring for the other children and the women in the family.¹⁴⁴ The principle may vary among different ethnic groups, where some types of property pass through to the eldest/youngest son and other types of property are divided amongst all children. In some ethnic groups, the family property is inherited by all children, including

¹³⁶*Id.* at 88. *See also* Nzekwu v. Nzekwu [1989] 2 NWLR 373, pt. 104 (holding that a widow with no sons only has occupancy rights in her late husband’s property, subject to her good behavior.).

¹³⁷*Id.* at 82, 85.

¹³⁸It should be noted also that generally, no individual has exclusive ownership of communal property. *Id.* at 96. This can be considered in light of the communal orientation of personhood discussed in section II.B.i.

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 85.

¹⁴²*Id.* at 106. *See* Uka v. Ukama [1963] FSC 184.

¹⁴³RESTATEMENT OF CUSTOMARY LAW OF NIGERIA, *supra* note 123, at 106.

¹⁴⁴*Id.* at 107–08.

daughters, while personal property is inherited by the first son.¹⁴⁵ A minority practice of matrilineal inheritance exists, “in isolated instances,” where succession is through the female members of the family.¹⁴⁶

iii. Marriage

Marriage in Nigeria is very central to the organization of the family unit—marriage is not merely between a man and a woman, but the union of both families.¹⁴⁷ For a valid customary marriage to be constituted, a gift, which here will be termed a “bride price,” must be presented from the husband and his family to the wife’s family.¹⁴⁸ This takes place in a ceremony where the families of both parties are introduced.¹⁴⁹ The bride price payment is important in some communities for determining the status of children as beneficiaries to their father’s estate.¹⁵⁰

Customary law permits polygamous marriages and governs how property is distributed in such marriages. In most instances, when a husband dies intestate, his property is distributed to the sons of the wives, according to the number of wives.¹⁵¹ However, in some communities, such as in Cross River, property is shared among the wives and not the children.¹⁵² Marriage may exist between two women, but this is for certain objectives such as for bearing children to a barren woman.¹⁵³ A woman to woman marriage thus differs in purpose to a same-sex marriage;

¹⁴⁵*Id.* at 109 (describing this practice as dominant among the Yorubas of the South-West).

¹⁴⁶*Id.* at 109, 111. This is the case in the Nembe community of Bayelsa state, and the Abiriba local government of Abia state, for example.

¹⁴⁷*Id.* at 254–55.

¹⁴⁸This terminology, however, is contestable, which will be described further in the discussion of the *Mifumi* case below

¹⁴⁹*Id.* at 165.

¹⁵⁰*Id.*

¹⁵¹*Id.* at 168.

¹⁵²*Id.* at 168–69.

¹⁵³*Id.* at 257.

“the woman who has been married is handed over to a man chosen by the woman who married her . . . the purpose of such a union is to bear children for the woman who married her.”¹⁵⁴

The customary law practices and rules pertaining to marriage, including woman-to-woman marriages, point to the importance of preserving the family line of inheritance in customary tradition by ensuring there are generations to follow, through which a man can preserve his legacy and property. In this way, social order and preservation of family is the foremost priority. The apparent societal value of preserving social order is reflected in judicial doctrine, where courts prioritize maintaining social order over facilitating social justice.¹⁵⁵

IV. JURISPRUDENTIAL ADVANCEMENT THROUGH CUSTOMARY PRINCIPLES

This section describes, through a close analysis of two cases, *Bhe* and *Mifumi*, how Nigerian courts can advance customary law practices towards human rights principles by looking at historical reasons behind such practices. The cases from South Africa and Uganda provide good examples of how the courts act as a check against customary practices, i.e. primogeniture and bride price, that appear discriminatory yet may not have been created for the purpose of discriminating. The courts appeal to customary law history as a source of human-rights-like principles, rather than pointing to international human rights treaties, which may be too removed from customary-law-governed societies to be legitimately accepted as a basis for the court’s decision. As Lauren Fielder notes, “African courts have demonstrated a particular unwillingness to privilege international understandings of human rights over local customary practices, due in part to domestic political restrictions, the potential appearance of disrespect for local traditions

¹⁵⁴*Id.* at 257–58.

¹⁵⁵Lynn Khadiagala, *Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda*, 46 J. AFR. L. 1, 13 (2002). Khadiagala, a social scientist, states in reference to Uganda that “[w]omen’s property rights are a function of whether the courts view female authority over land as essential to social order or a sign of impending chaos. *Id.*”

and ‘African Values’ and the fear of perceived legal impositions from the west.”¹⁵⁶ Although this unwillingness may not have been the primary reason for the courts’ approach in the following cases, it does provide support for the argument that customary law’s historical principles may be a more legitimate source of appeal in judicial decisions than international human rights law. The examples show how customary law principles can be used to advance justice when re-contextualized to fit contemporary changes in society.

A. *BHE*

In the Constitutional Court of South Africa (“the Constitutional Court”), three cases were jointly decided: *Bhe and others v. The Magistrate, Khayelitsha*; *Charlotte Shibi v. Mantbeni Sithole and Others*; and *South African Human Rights Commission and the Women’s Legal Centre Trust v. President of the Republic of South Africa* (hereinafter referred to jointly as “*Bhe*”).¹⁵⁷ The cases concerned intestate succession in customary law, in particular, the principle of primogeniture. The applicants were concerned with the rights of daughters and sisters to succeed a deceased African male who had died without leaving a will.¹⁵⁸ Each of the applicants were contesting the customary practice that excluded females from being heirs.¹⁵⁹ The Constitutional Court analyzed the customary principle of primogeniture and how it discriminates against female and extra-marital children.¹⁶⁰ The Constitutional Court discussed the positive aspects of customary law and the historical purposes of appointing a male heir.¹⁶¹ It analyzed

¹⁵⁶Valerie Knobelndorf, *Zimbabwe’s Magaya Decision Revisited: Women’s Rights and Land Succession in the International Context*, 15 COLUM. J. GENDER & LAW 749, 790 (2006), quoted in Fielder, *supra* note 2.

¹⁵⁷*Bhe v. Magistrate, Khayelitsha*, 2005 (1) BCLR 27 (CC) (S. Afr.). The South African Human Rights Commission and the Women’s Legal Centre Trust, also a party to the case, brought their application in the public interest, and in the interest of a group or class of people, as permitted by Section 38(c) of the South African Constitution.

¹⁵⁸“African” here describes a non-white person of South African descent.

¹⁵⁹*Bhe* 2005 (1) BCLR, ¶¶ 3, 5.

¹⁶⁰*Id.*

¹⁶¹*Id.* ¶¶ 75–78.

changing circumstances and concluded that circumstances today no longer justify the practice.¹⁶²

The case also highlights the broader problem of codifying customary law; doing this distorts the purposes and values behind some customary practices which differ from the common law.¹⁶³

In the three cases before the Constitutional Court, succession was governed by the Black Administration Act of South Africa, which stated:

(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.

(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).¹⁶⁴

The tables of succession prescribed under subsection (10)(e) was as follows:

2. If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of Section 23 of the Act shall be distributed in the manner following: [The statute outlines a number of conditions the deceased must have met, and if so, “the property shall devolve as if the deceased had been a European.”] . . . (e) If the deceased does not fall into any of the classes described in paragraphs (b), (c) and (d), the property shall be distributed according to Black law and custom.¹⁶⁵

The Constitutional Court analyzed the Act in light of the Constitution which provides in subsection (1) that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law,” and in subsection (3) that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion,

¹⁶² *Id.* ¶¶ 80–94.

¹⁶³ The Court’s dissenting opinion describes this further when discussing the difference between inheritance and succession. *Id.* ¶¶ 167–75.

¹⁶⁴ Black Administration Act 38 of 1927, § 23 (S. Afr.).

¹⁶⁵ *Id.* § 23 (10)(e)

conscience, belief, culture, language and birth.”¹⁶⁶ The Constitution provides that customary law must be developed to promote the spirit, purpose, and object of the Bill of Rights.¹⁶⁷ The Constitutional Court also considered the constitutional protection of one’s right to participate in the cultural life of his or her choice.¹⁶⁸ The opinion of the majority made brief references to the international instruments South Africa had ratified, such as CEDAW, ACHPR, the Maputo Protocol, and the Convention on the Elimination of all forms of Racial Discrimination, in a footnote,¹⁶⁹ and referenced the ICCPR and the African Charter on the Rights and Welfare of the Child (ACRWC) in paragraphs 53 and 55.

The Court first stated the positive aspects of customary law, discussing customary law’s emphasis on consensus-seeking, provision for family, and clan meetings, which furthers the prevention and resolution of disputes, and the contribution it makes towards the unity of family structures and healthy communitarian values.¹⁷⁰ Then, after outlining the rules of law, the Court discussed the racial aspect of the codification of customary law, describing its purpose as to create an exclusionary system of administration, which simultaneously functions as a means of perpetuating oppression against Africans.¹⁷¹

¹⁶⁶S. Afr. Const., 1996 § 9.

¹⁶⁷*Id.* at § 39 (2) (making the administration of customary law subject to the Constitution in § 211).

¹⁶⁸*Id.* at §§ 30, 31.

¹⁶⁹*Bhe* 2005 (1) BCLR.

¹⁷⁰*Id.* ¶ 45.

¹⁷¹The Court stated: “Section 23 cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of “European” descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, “to the Native mind”, would be “both startling and unjust.” What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate. Proponents of the policy of apartheid were able, with comparative ease, to build on the provisions of the Act and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans. Some parts of the Act have now been repealed and modified; most of section 23 however remains and still serves to haunt many of those Africans subject to the parallel regime of intestate succession which it creates.” *Id.* at ¶ 61.

The applicants argued the Act had racist elements in Subsection 10 of Section 23. The Constitutional Court reasoned that the Act was discriminatory because the inheritance scheme it provided for was determined simply by reference to skin color. It stated, “[t]he purported exemption of certain Africans—who qualify—from the operation of ‘Black law and custom’ to the status of a ‘European’ is not only demeaning, it is overtly racist . . . It nevertheless provides a contextual indicator of the purpose and intent of the overall scheme contemplated by section 23 and the regulations.” The Constitutional Court concluded Section 23 was discriminatory, and that despite its recognition of the pluralist nature of society, it was part of a racist program, which “could not be justified in any open and democratic society.”¹⁷² Therefore, the Constitutional Court found it to be in breach of the Constitution’s anti-discrimination clause (Section 9(3)).

The Constitutional Court then considered the context in which the rules of customary law developed and how the rules served society. The purpose of succession under customary law was to preserve the family, and ensure there was a family head that would provide for the surviving family members and serve as the new leader.¹⁷³ As delineated in more detail in the dissent, the female family members were deemed unsuitable for this because they were assumed to be marrying into another family shortly thereafter.¹⁷⁴ The Constitutional Court explained that succession was not merely about the distribution of the deceased’s property, but was about the perpetuation of the family unit, whereby the family head administered property for the benefit of the family unit as a whole.¹⁷⁵ Property was collectively owned; the heir nominally acquired the collective property “only in the sense that he assumed control and administration of the property

¹⁷²*Id.* ¶ 72.

¹⁷³*Id.* ¶ 76.

¹⁷⁴*Id.*

¹⁷⁵*Id.*

subject to his rights and obligations as head of the family unit.”¹⁷⁶ The heir became the new family head, thus customary rules were concerned more about succession to the status and position of the deceased rather than distribution of the deceased personal assets.¹⁷⁷

The majority found the history of the customary practice less redeeming than the dissenting opinion, reasoning that the exclusion of women kept alive a deeply embedded patriarchal system, which “reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.”¹⁷⁸ The changing circumstances in communities, in particular the rise of urbanization and its related effects on family structure, meant that rules of succession had become detached from the original social implications of inherited responsibility to maintain the family and dependents of the deceased.¹⁷⁹ This was so, according to the Constitutional Court, because nuclear families have replaced the traditional extended family structure, and now, the heir “does not necessarily live together with the whole extended family.”¹⁸⁰ The Constitutional Court lamented that the rules of succession, through their ossification in legislation, textbooks, and court decisions, had not been able to adapt and change with social conditions and values, as they otherwise might have.¹⁸¹ The Court stated: “[i]nstead, they have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.”¹⁸² The Constitutional Court also stated that, regrettably, “customary law has, in my view, been distorted

¹⁷⁶*Id.*

¹⁷⁷The text of the decision reads: “The [heir. . .], acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir’s maintenance and support. *Id.*

¹⁷⁸*Id.* ¶ 78.

¹⁷⁹*Id.* ¶ 80.

¹⁸⁰*Id.*

¹⁸¹*Id.* ¶ 72.

¹⁸²*Id.* ¶ 82.

in a manner that emphasises its patriarchal features and minimises its communitarian ones.”¹⁸³

The Constitutional Court concluded that the exclusion of women from inheritance on the grounds of gender was in violation of Section 9(3) of the Constitution.

The dissenting opinion further discussed the historical purpose of primogeniture. The judge found it problematic that the majority repealed the Act and the primogeniture custom completely, and believed it should have been amended to be consistent with the Bill of Rights.¹⁸⁴ He distinguished succession and inheritance in customary law: succession is broader, pertaining to the transmission of all the rights, duties, powers, and privileges associated with one’s status, while inheritance pertains to the transmission of rights to property only.¹⁸⁵ The judge then explained that upon the death of a father, the successor does not inherit all the property, but “steps into of the shoes the deceased by taking over the control of the family property.”¹⁸⁶ It is in this context, he argued, that the terms succession and inheritance must be understood, to avoid perverse consequences which flow from misinterpretations. He described in detail the social context in which the law of succession developed and its purpose, echoing the majority in stating that the family unit was the focus of social concern.¹⁸⁷ The dissenting judge then quotes the case *Magaya v. Magaya*, in describing the rationale for the exclusion of women, which highlights a historical justification for the practice:

[W]omen were always regarded as persons who would eventually leave their original family on marriage, after the payment of roora / lobola, to join the family of their husbands. It was reasoned that in their new situation – a member of the husband’s family – they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new

¹⁸³*Id.* ¶ 89.

¹⁸⁴*Id.* ¶¶ 212–19

¹⁸⁵*Id.* ¶ 158.

¹⁸⁶*Id.* ¶ 160.

¹⁸⁷*Id.* ¶ 167.

family. It was therefore reasoned that in their new situation they would not be able to look after the original family.¹⁸⁸

The analyses of the majority and the dissent underscore the relevance of linking custom with its historical origin.

In conclusion, the Constitutional Court found that, with regard to primogeniture, the exclusion of women from inheritance on the grounds of gender was a violation of the Constitution's non-discrimination provision, because it entrenched past patterns of disadvantage among a vulnerable group, exacerbated by notions of patriarchy and male domination. Primogeniture also violated the right of women to human dignity as guaranteed in the Constitution, as it implied that women are not fit or competent to own and administer property. To the extent that primogeniture prevents all female children from inheriting property, and curtails the inheritance rights of male extra-marital children, it discriminated against both female and extra-marital children.

This is an ideal case through which one can analyze not only customary law as it relates to women, but customary law as it relates to the organization of society under a colonial regime. It discussed how customary law can be used as a discriminatory tool itself and the problems with codification of customary law—a body of laws which is meant to be constantly changing.¹⁸⁹ Most importantly, for the purpose of this paper, it highlights how customary practices may be rooted in principles that were in the interest of society at its origin and may have had humanitarian elements behind it, but which have been subverted in its present state to serve different goals.

¹⁸⁸*Id.* ¶ 174.

¹⁸⁹ Discussing the codification of customary law, the Court stated that the attempt to interpret customary law through the prism of the common law or other systems of law rather than attempting to see it through its own setting led in part to the “fossilization and codification of customary law which in turn led to its marginalisation.” *Bhe*, 2005 (1) BCLR , ¶ 43.

Customary practices should be understood in their historical context, as its function in society may differ at various points in its history. With this knowledge, reform towards equality and human rights norms may be possible by appealing to the historical points where practices were more human-rights-compatible. One such way of this reform is shown in *Bhe*, where the Constitutional Court recognized the historical purposes of primogeniture no longer are appropriate for contemporary society.

B. MIFUMI

The case *Mifumi v. Attorney General & Kakuru*, before the Supreme Court of Uganda (“Supreme Court”), concerned the marriage custom and practice of bride price and its refund, a practice also common in Nigeria, as described above.¹⁹⁰ Mifumi is an NGO focused on women’s rights in eastern Uganda.¹⁹¹ The organization brought a petition challenging the constitutionality of the custom of bride price payment as precondition for a valid customary marriage, contending that it interferes with the free consent of a man and woman intending to marry, leading men to treat their wives as mere possessions, and thereby perpetuating inequality between men and women.¹⁹² This, they argued, is in contravention of Uganda’s Constitution Article 21, which guarantees the right to equality.¹⁹³ The applicants also argued that the demand for bride price by parents of the bride portrayed the bride as an article on the market for sale, which amounts to

¹⁹⁰*Mifumi v. Att’y Gen. & Anor*, (2015) Const. App. No. 2 (2014) UGSC 13.

¹⁹¹*Id.* at 2; *About Us*, MIFUMI, <https://mifumi.org/who-we-are>.

¹⁹²*Mifumi* UGSC at 2–3.

¹⁹³The relevant text of the Uganda Constitution art. 21 (1994) provides:

21: Equality and freedom from discrimination.

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. CONST. OF UGANDA (1994), art. 21.

degrading treatment prohibited by Article 24 of Uganda’s Constitution.¹⁹⁴ The applicants further argued that the demand for a refund of bride price upon divorce was unconstitutional.¹⁹⁵ The respondents in the case appealed to the constitutional protection of culture in Article 37 of Uganda’s Constitution¹⁹⁶ and the freedom of parties to choose whether they wanted to have a civil marriage or a customary marriage.¹⁹⁷ The Supreme Court provided an analysis of the historical context of bride price and concluded that the practice itself did not violate principles of equality but that the demand for its refund was unconstitutional because it had no place in contemporary society.¹⁹⁸

The Court’s analysis here, as in *Bhe*, provides another example of how courts can look to historical principles in customary law to bring practices more in line with human rights principles. Appealing to customary origins that are immediately understandable and within grasp of the population at large, whether in rural or urban areas, rather than appealing initially or exclusively to international human rights law, can be more effective. The importance and relevance of international human rights law is not to be understated however; it has lent support to the reasoning and analysis of the courts in both *Bhe* and *Mifumi*, and is itself very profound in driving civil society engagement.¹⁹⁹

¹⁹⁴The relevant text of the Uganda Constitution art. 24 (1994) provides:

24: Respect for human dignity and protection from inhuman treatment.

No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. *Id.* art. 24

¹⁹⁵*Mifumi* UGSC at 3.

¹⁹⁶ 37: Right to culture and similar rights.

Every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. CONST. OF UGANDA (1995), art. 37.

¹⁹⁷*Mifumi* UGSC at 3.

¹⁹⁸*Id.*

¹⁹⁹For example, in *Mifumi*, the NGO that initiated the suit was a human rights NGO operating under the legal framework set out by international human rights law. *History of Mifumi*, MIFUMI, <https://mifumi.org/who-we-are/history-of-mifumi>. Similarly, *Bhe* was partly led by a human rights NGO, Women’s Legal Center Trust, and the South African human rights state institution. *Bhe*, 2005 (1) BCLR.

In *Mifumi*, the Supreme Court of Uganda looked at the term “bride price” and concluded it was inappropriate, stemming from the failure of colonial administrators to understand its role in society. The idea that customary marriage was a “wife purchase” led to the use of the term “bride price.” Colonial rule did not fully recognize customary marriage because of the colonizers objection to polygamy and “bride price.” Thus, the Court stated:

I respectfully agree with those who object to the use of the term “bride price” to describe the property that is given by the groom’s parents to the bride’s parents. The use of the word “pay” is equally wrong. There is no market in Uganda or Africa for that matter where brides are purchased. Property may be demanded by the bride’s kin and given by the groom’s parents in customary marriage, but it is wrong to call this a “price” for a bride.²⁰⁰

The Supreme Court reasoned instead that bride price, historically practiced, is a gift to the parents of the bride, for their role in nurturing her up until the marriage day.

After the Supreme Court noted that the custom of bride price was prevalent in many Ugandan communities such that the lower court erred in failing to take judicial notice of it, it went on to determine that bride price is not a significant factor in the promotion of gender inequality and violence against women.²⁰¹ The Supreme Court reasoned that inequality, including wife battery, which the petitioners argued was a consequence of bride price, was neither peculiar to Uganda, nor customary marriages, nor the custom of bride price.²⁰² The Supreme Court observed that male domination is rooted in cultures, traditions, and customs of most societies all over the world.²⁰³

The Supreme Court found bride price to have redeemable justifications, even though it can be abused. Firstly, the Supreme Court argued that bride price was good for family stability because the dominant emphasis is on “the formation of an alliance between two kinship groups,”

²⁰⁰*Mifumi* UGSC at 6–7.

²⁰¹ *Id.* at 33.

²⁰² *Id.* at 27.

²⁰³ *Id.* at 28.

not the subjection of women.²⁰⁴ Secondly, bride price is often a pretext rather than an actual reason for spousal abuse.²⁰⁵ More husbands give bride price and do not use it as a justification for abusing their wives, than those who do.²⁰⁶ Thus, there is no sufficient justification to repeal the custom.²⁰⁷ Lastly, bride price does not inhibit free consent into a marriage.²⁰⁸ A man and woman have the constitutional right to choose whether or not to include the bride price custom in their ceremonies.²⁰⁹ Furthermore, the bride has to give her consent to marry before the couple even gets to a discussion of a bride price arrangement.

However, the Supreme Court of Uganda did find that the demand for a refund of bride price undermines the dignity of a woman and violates the right to equality. On this point, the Supreme Court was in agreement with the lower court stating that the refund of bride price is a violation of Articles 31(1) and 33 of the Ugandan Constitution:²¹⁰

In my considered view, the custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2nd respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term “bride price” is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price constitutes gifts to the parents of the girl for

²⁰⁴*Id.* at 30, (quoting Arthur Phillips & Morris Henry, *Marriage Laws in Africa* 7 (1971)).

²⁰⁵*Id.* at 32.

²⁰⁶*Id.*

²⁰⁷*Id.* at 32–33.

²⁰⁸*Id.* at 44.

²⁰⁹*Id.* at 38–39.

²¹⁰ *Id.* at 48. The relevant text of the Uganda Constitution (1994) provides:

33: Rights of women.

- (1) Women shall be accorded full and equal dignity of the person with men.
- (2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
- (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
- (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
- (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.
- (6) 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. CONST. OF UGANDA (1994), art. 33.

nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded. Apart from this, the custom completely ignores the contribution of the woman to the marriage up to the time of its break down. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored.²¹¹

In conclusion, the Supreme Court of Uganda found that bride price does not promote inequality in marriage, does not fetter the parties' free consent into marriage, and is not unconstitutional. However, the custom of refunding bride price as a condition for dissolution of marriage is unconstitutional and in violation of Section 31(1) of the Ugandan Constitution.²¹² In this example, the Supreme Court examined both the customary principle on which the practice is based, as well as the contemporary form in which the practice is observed. It balanced at once Uganda's history, the right to practice one's culture, and *jus cogens* principles of human dignity and equality, without basing its judgment too heavily on international human rights law. At the same time, its reasoning is entirely consistent with international human rights norms. The Uganda Supreme Court's reasoning and integration of the history behind customary practices is a model for how the judicial system in Nigeria can approach similarly contentious customary law practices, which Nigeria is currently battling.

V. APPLICABILITY TO NIGERIA AND SUGGESTIONS FOR COURTS AND HUMAN RIGHTS REFORMERS

The analysis of human rights law, its historical underpinnings and its cold reception in local African communities, contrasted with an analysis of customary law, which permits

²¹¹ *Mifumi* UGSC at 52-53.

²¹² The relevant text of the Uganda Constitution (1994) provides:

31: Rights of the family.

- (1) Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.
- (2) Parliament shall make appropriate 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.
- (3) Marriage shall be entered into with the free consent of the man and woman intending to marry. CONST. OF UGANDA (1994), art. 31.

discriminatory practices yet also has the tendency to be misinterpreted when evaluated through the lens of other legal systems, underscores the need for an alternative avenue for advancing the rights and welfare of those who are most marginalized. This Note has looked at women as a primary example of a marginalized population that can benefit from the reform of customary practices, due to the ample research and attention ascribed to women's rights. However, the same approach advocated for in this Note may also apply to other marginalized groups, such as the elderly, the disabled, children, the poor, and immigrants.

Customary law is a dynamic tool that can be used to advance positive change and may, at times, incorporate within it values that echo human rights principles. Courts and human rights advocates can use customary law in this manner to highlight historical customary principles that mirror principles in human rights treaties. Following the example of the NGOs, amicus authors, and the judges in *Bhe* and *Mifumi*, different actors in the Nigerian judicial system can play a fundamental role in pushing for positive change in Nigeria, where the same customary practices as are illustrated in *Bhe* and *Mifumi* exist.

Judges and human rights activists should consider three main factors when carrying out this approach:

1. *Knowledge of local context and customary practices.* To bring about change in a system without distorting it, one needs to be aware of the system itself and how practices operate within it. This Note has provided examples, such as in *Bhe*, of how laws and systems become distorted when there is ignorance surrounding them. The Note has also argued that human rights advocates must be very sensitive to the delicate balance between culture and history, and progressive changes. Knowledge of custom is also important so that one is able to perceive the

difference between when culture is used as a pretext to entrench inequality and when it is divorced from its historical origin.²¹³

2. *A thorough understanding of international human rights law.* In order to draw connections between customary origins and human rights principles, and to pull custom closer rather than further away from human rights norms, knowledge of fundamental principles behind human rights is necessary.

3. *Awareness of the mechanisms in a given society that can be used for legal reform.* Certain avenues for change may be more effective than others depending on the context. In this Note, the focus has been on using the avenue of the courts, as seen in the *Bhe* and *Mifumi* cases. This might be different in situations where access to courts is unavailable, courts are not independent, or are too costly. Human rights advocates should take such factors into account, and push for change in the manner most fitting, while still looking at historical foundations of customary practices as the basis for human rights reform.

Fielder argues that courts should apply the principle of statutory construction to “choose a construction of African customary law” that is in harmony with international law when domestic legislation has more than one reading, “while at the same time looking for ways to rest their decisions on a foundation that is African.”²¹⁴ This Note pushes Fielder’s argument further by arguing for courts to rely on principles within customary law that are present in its historical foundations, and thus rest its decisions on customary foundations that are human-rights-compatible.

Fatou Camara makes a similar argument, asserting that “whenever the ancient law is more human rights friendly than the current customary law, it would be useful to draw attention

²¹³Merry, *supra* note 9 (arguing that culture can be seen as a mode of legitimating claims to power and authority).

²¹⁴Fielder, *supra* note 2, at 186.

to that and use that ‘discovery’ to promote respect for human rights in a particular community.”²¹⁵ He argues for identifying ancient African human rights and governance principles as a tool to promote socio-legal reforms, with such reforms to be understood as “cleaning up the house as opposed to destroying it.”²¹⁶ In Camara’s argument, he offers a method of inquiry into ancient practices that “can be used to dismiss harmful current practices – either based on or blamed on customary law.”²¹⁷ His argument differs from the argument presented in this Note in the way he draws from ancient principles.²¹⁸ Camara looks to ancient empires, focusing particularly on ancient Egypt and using it as an earlier indigenous model from which to develop a research methodology. The focus here need not extend so far back in history. The historical analysis here is limited in the sense that it merely seeks to find a human-rights-compatible principle behind certain practices, as opposed to a justification derived from a historical presence that may not be as relevant in contemporary African societies.

VI. CONCLUSION

By looking to customary law, which is the primary means of addressing legal disputes for most of the population in Nigeria, and, on a broader level, in Africa as a whole, human rights advocates can find support for the change they intend to promote, and are better able to push for those changes, by appealing to customary law rather than solely to international human rights law. Focusing on women’s rights serves the purpose of illuminating instances where this can be done: customary law regarding women in Nigeria contains many practices that could be considered discriminatory. The courts’ analyses in *Bhe* demonstrate that a historical evaluation

²¹⁵Fatou K. Camara, *From Contemporary African Customary Laws to Indigenous African Law*, in *THE FUTURE OF AFRICAN LAW* 494, 495 (Jeanmarie Fenrich et al. eds., 2011).

²¹⁶*Id.*

²¹⁷*Id.*

²¹⁸*Id.* at 496-503.

of customary practices may lead to a finding that a customary practice is devoid of its original purpose and thus discriminatory. It may also demonstrate, as in *Mifumi*, that a customary practice has been misunderstood and distorted, and is thus not discriminatory as practiced. Such an approach to advocating for change may be more successful than other means because customary law is already understood by most communities in Africa. Therefore, this approach pushes for change from within, which is usually perceived to have more legitimacy than pushing for change from the outside.