

RECLAIMING THE AFRICAN WOMAN'S INDIVIDUALITY: THE STRUGGLE BETWEEN WOMEN'S REPRODUCTIVE AUTONOMY AND AFRICAN SOCIETY AND CULTURE

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OVERVIEW

African culture and custom,¹ as they exist today, are a blend of African customs, imported colonial common and civil law notions, and religious concepts from Christianity, Islam and traditional African religions. The application of these laws within the plural legal systems, which are the legacy of the colonial era, has left women socially and politically in a very subordinate position. The result is the inability of women to protect and ensure their reproductive rights, which include their reproductive autonomy and their reproductive health.

Reproductive rights are defined in terms of the legal notions generally used to express the principle that women, and men as well, are entitled to control their reproductive lives.² A woman's right to control her reproductive life is inextricably connected to other rights in civil, political, economic, and social areas. To be able to control her reproductive life, a woman requires reproductive autonomy.

Reproductive autonomy involves an individual's ability to make decisions with respect to sexuality, pregnancy, childbearing, and formation of families. Autonomous persons have the independence

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1. African culture and custom are used in this Paper to mean the totality of African traditional practices as applied by African peoples.

2. Lynn Freedman & Stephen Isaacs, *Human Rights and Reproductive Choice*, 24 *STUD. FAM. PLAN.* 19 (1993).

and means to exercise decisions as to whether or not to have sex, whether or not to have children, the number and spacing of children, and whether or not to carry a pregnancy to term. Thus, reproductive autonomy is determined by the existing and operative laws in the society in which an individual resides.

The principle of reproductive autonomy has different significance for women than it does for men. The biological characteristics of women and their socially prescribed roles as childbearers and caretakers of families require women to bear reproductive responsibilities. Women are often treated as minors, however, and thus considered incapable of making responsible decisions in respect of their own reproductive lives. Women's reproduction in most parts of the world is controlled by male partners, families, and society in general. Reproductive autonomy and reproductive health are inextricably linked because reproductive autonomy is required by women to enable them to ensure their reproductive health.

Reproductive health, therefore, implies that people have the ability to reproduce, to regulate their fertility, and to practice and enjoy sexual relationships. It further implies that reproduction is carried to a successful outcome through infant and child survival, growth, and healthy development. It finally implies that women can go safely through pregnancy and childbirth, that fertility regulation can be achieved without health hazards, and that people are safe in having sex.³

In light of these definitions, the African woman's reproductive autonomy, reproductive health, and her ability to exercise her rights in these areas, are closely linked to the customary laws and traditional practices that are applied in her community. The nexus between the prevailing customs in Africa and a woman's reproductive health is her reproductive autonomy, which would seem to encompass decisions on whether or not to have sex, whether to have children, how many children to have and the spacing of her births, whether to use contraception and the type of contraception, and whether to carry a pregnancy to term.

There are several traditional practices and customs which keep African women in cultural subordination and put them in such a low bargaining position that they have little, if any, control over decisions which affect their bodily integrity. This is because their reproductive

3. Mahmoud F. Fathalla, *Reproductive Health: A Global Overview*, 626 ANNALS N.Y. ACAD. SCI. 1, 1 (1991).

labor is responsible for keeping the family bloodline alive,⁴ and because this responsibility is of the essence to Africans, they have not been permitted the freedom to make their own reproductive choices. Polygamy, brideprice, leviratic and sororate marriages,⁵ child and forced marriage, an array of puberty rites, female genital mutilation (FGM), and general traditional rules relating to women, greatly impede a woman's ability to exercise her reproductive rights.

The practice of these customs and traditions result in the infraction of several human rights norms. Rights such as the right to the highest attainable standard of physical and mental health,⁶ the right to life, liberty, and security,⁷ the right to marry and found a family,⁸ the right to freedom from customs that discriminate against women,⁹ and the right of sexual nondiscrimination¹⁰ are all violated by African customs and traditions that seek to keep women in subjugation.

Culture and custom are such a mixture of concepts, however, that they cannot be changed without a concerted effort to attack the problem on many fronts. Simultaneous massive action for change on legal, educational, and other fronts is needed to guarantee women's reproductive autonomy. The place to start is at the local level. As such, where local remedies exist, attempts should be made to use local complaint mechanisms, including local court action for the redress of the infringement of constitutional rights, and the filing of charges for criminal prosecution of human rights abuses that fall under the criminal statutes of the State in question. Even those

4. This responsibility is so significant that among the Baganda of Uganda for instance, a woman is not given final funeral rites in her own capacity if she did not have any children before her death. As a result of her inability to provide the family with children to continue the bloodline, the family does not consider her worthy of full funeral rites. Because she has not performed her social duty, as it were, to have children, her funeral rites are not performed until the performance of another family member's rites are due, and then the rites of both persons are merged. Interview with Esther Mayambala, former chairperson of FIDA Uganda (Oct. 20, 1994).

5. These forms of marriage are explained later on in this paper, but suffice it to say for the moment, that these are marriages that treat women as chattel.

6. Economic Covenant, *infra doc. biblio.*, art. 12(1); Women's Convention, *infra doc. biblio.*, arts. 10, 12(1), 14(2), 16(1); African Charter, *infra doc. biblio.*, art. 16(1).

7. Civil & Political Covenant, *infra doc. biblio.*, arts. 6(1), 9(1); Universal Declaration of Human Rights, *infra doc. biblio.*, art. 3; African Charter, *infra doc. biblio.*, arts. 4, 6.

8. Universal Declaration of Human Rights, *infra doc. biblio.*, art. 16(1); Women's Convention, *infra doc. biblio.*, art. 16(1); Economic Covenant, *infra doc. biblio.*, art. 10(1); Civil and Political Covenant, *infra doc. biblio.*, arts. 23(2), 23(3); African Charter, *infra doc. biblio.*, arts. 2, 18(3).

9. Women's Convention, *infra doc. biblio.*, arts. 2, 5; African Charter, *infra doc. biblio.*, arts. 2, 18(3).

10. Women's Convention, *infra doc. biblio.*, art. 2; Universal Declaration of Human Rights, *infra doc. biblio.*, art. 2; Civil and Political Covenant, *infra doc. biblio.*, art. 2(1); Economic Covenant, *infra doc. biblio.*, art. 2(2); African Charter, *infra doc. biblio.*, arts. 2, 18(3).

efforts to enforce women's rights that fail in the short term, for example, the failure to get a local law passed, obtain a conviction in criminal proceedings, or obtain a declaration that a particular local custom is unconstitutional, will be helpful, because they will put the issue of women's reproductive autonomy on the discussion table at the local level. Failed attempts or partial successes will make people aware of the need for change and form the basis of further efforts in this direction. It is only when local remedies are ineffective or nonexistent that regional human rights complaint mechanisms can, and should, be utilized.

International human rights norms can transform the way of thinking in local communities. International human rights norms, however, must be linked to local laws and regional human rights instruments to make people realize that these norms are not part of an alien culture which is to be imposed on them. Where no local laws exist incorporating human rights norms, reproductive rights advocates must ensure that governments and communities understand the importance of passing specific laws that ban harmful traditional practices.

This Paper looks at several specific African customs and traditional practices that impede a woman's exercise of her reproductive rights. These customs must be observed in the context of the evolution of customary law¹¹ and the notions and concepts that are valued within this system. The Paper traces the development of customary law from the precolonial period to the present in an effort to highlight the bases and dynamics of these customs and traditions that affect women's autonomy in general.

Finally, this Paper suggests ways in which international human rights standards may be used in response to the problems that women face with regard to their reproductive autonomy whether at the local, regional, or international levels. This approach should start with the collection of local statistical data both on how traditional practices impact on women's reproductive health and on the use of existing local complaint mechanisms to assert women's reproductive rights. This strategy should be used to put the issue of women's reproductive autonomy on the discussion table at the local level. Local nongovernmental organizations (NGOs) should present these statistics and their

11. Customary law has evolved in different ways in different parts of Africa. This is because there is no homogenous African culture or customary law and customary law differs from tribe to tribe and from ethnic group to ethnic group within the same tribe. Due to time and space limitations, however, I shall limit myself to generally applicable facts and give brief specific examples where possible.

implications in relation to women's rights to the Regional Human Rights Commission in an effort to obtain clarification that these traditional practices violate the African Charter. In addition, the NGOs must obtain declarations from the regional Human Rights Commission that these practices violate women's rights stipulated within the Charter.

In addition to these steps, human rights education of grassroots women leaders is essential for re-orienting the thinking of indigent women and the ways in which they perceive their own roles in society. Widespread educational campaigns to transform the thinking of traditional rulers, opinion leaders, and whole communities on women's reproductive autonomy is an absolute requisite to make communities realize the utility of change. To effectively eradicate traditional practices and norms that affect women's reproductive autonomy, any legislative action will have to be supported by general education and action on other fronts to re-orient people's thinking. This will erase the notion that a woman is a piece of property which can be passed from one man to another. Erasing these notions, however, cannot occur without the help of the traditional rulers and religious leaders who have helped maintain these practices. If traditional leaders have helped to perpetuate these practices, they can also be the agents of change.

I. AFRICAN CUSTOMS AND NORMS THAT IMPEDE WOMEN'S REPRODUCTIVE AUTONOMY

Because traditional African institutions are very diverse, women's rights vary from one society to another. Gender bias in its various forms is often hard to detect because it is so embedded in these traditional institutions. The productive and reproductive labor of women in precolonial societies was highly valued, but was controlled and exploited by men through customs such as brideprice and polygamous marriages.¹² Marriage symbolized the uniting of two families and bolstered the prestige and security of families.¹³ This concept of marriage is still applicable in modern Africa. Most kinship structures were characterized by the purchase of wives through the

12. DORIS M. MARTIN & FATUMA O. HASHI, WORLD BANK, GENDER, THE EVOLUTION OF LEGAL INSTITUTIONS AND ECONOMIC DEVELOPMENT IN SUB-SAHARAN AFRICA 23-24 (June 1992) (Working Paper No. 3).

13. *Id.*

payment of brideprice.¹⁴ In other societies, women were viewed as a medium of exchange through sororate¹⁵ and leviratic¹⁶ marriages.

For the African woman, the most severe violations of her human rights are "rooted deeply within the family system, bolstered by community norms of male privilege and frequently justified by religious doctrines or appeals to custom or tradition."¹⁷ Thus, the reproductive decisions of the African woman are usually made under "enormous pressures from family, community, and society to comply with the prevailing gender and reproductive norms, as well as internalized commitments to act responsibly towards others."¹⁸ Male dominated societies employ customary law to hold women captive to their reproductive functions.¹⁹ An examination of some African traditional practices and norms will show the reasons why African women lack reproductive autonomy.

General Traditional Rules

The African individual is said to be completely merged into the group; he does not have an identity distinct from the group.²⁰ More importantly, he does not have rights outside or against the group: the individual is said to owe duties to the group. For instance, African female children are taught from a very early age that the man is the head of the household, and are advised by their mothers to remain in complete subjugation to their husbands. A married woman's obedience to her husband and her own hard work are the two important virtues that she must exhibit simply because society demands it of her. There are no such corresponding values imposed on male children, who therefore grow up believing that they are free to behave as they please, and that women have to shape their behavior to suit their desires and whims. Prior to marriage, a girl is taught to be ready for sex with her husband at all times and never to

14. See *infra* notes 26-27 and accompanying text (discussing practice of brideprice).

15. This form of marriage is one in which a wife is replaced by her sister upon her death.

16. In this form of marriage a widow is forced to marry her dead husband's brother.

17. Sonia Correa & Rosalind Petchesky, *Reproductive and Sexual Rights: A Feminist Perspective*, in POPULATION POLICIES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHT 107, 110 (Gita Sen et al. eds., 1994).

18. *Id.* at 111.

19. Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U.J. INT'L L. & POL. 645, 655 (1992).

20. See Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and People's Rights*, 31 HOW. L.J. 643, 648 (1988).

refuse his advances.²¹ Boys also receive instruction from their fathers and are told that it is their absolute privilege to have sex. Thus, to the African male, a woman's refusal to have sex is irrelevant.²² Consequently, an African woman has sex when her husband so desires, and the decisions as to when to have sex, and how often, are dictated by her husband's desires and needs.

The Culture of Silence

African societies consider the discussion of sex-related issues to be taboo. This culture of silence keeps many of the hardships women suffer under the cover of custom and tradition. A woman who would like to discuss the issue of marital rape, for instance, would be told she must not wash her dirty linen in public. There is the need to break all the myths and barriers about the discussion of sex-related matters and move towards a discussion of the issues involved.

Polygamy

Polygamy is a tradition by which a man has more than one wife. Polygamy exists all over Africa and denies a woman her sexual freedom and her right to equality in matters relating to marriage. Polygamy is discriminatory against women because, while men can have more than one wife, women are not allowed to have more than one husband. Polygamy thus places women in a very low bargaining position with respect to marriage and family relations.

Most African women living in rural districts have little or no education. They have been brought up to believe that their only goals in life are to marry, satisfy their husband's numerous needs, and bear him children. This belief, coupled with traditional male child preference in a male dominated society, leaves women competing with each other to give their husband as many male children as possible.

In some societies, the concept of the family or lineage consists of all persons who trace their descent from a common ancestor or ancestress.²³ Thus, the family consists of the dead, the living, and

21. Beatrice Akua Duncan, *Marital Rape as a Form of Domestic Violence and the Need for Law Reform in Ghana* (1994) (unpublished LL.M. dissertation, Georgetown University Law Center).

22. *Id.*

23. Kwasi Wiredu, *An Akan Perspective of Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES* 243, 248 (Abdullahi A. An-Na'im & Francis M. Deng eds., 1990).

the yet unborn, and women are considered the facilitators of the continuation of the family line. The reproductive labor of women is therefore considered as a duty to the family. This tradition is a major form of discrimination against women in matters relating to family relations, through which a woman is put in a situation where the decisions whether or not to have sex, whether or not to have children, the number of children she will have, the spacing of her births, whether or not she will practice some form of birth control, and whether she will carry a pregnancy to term, are determined by the desires of her husband.

In my view, women would get some degree of reproductive autonomy if the tradition of polygamy were done away with altogether. Removing the tradition of polygamy would, in turn, have a bearing on the need for customs such as dowry and brideprice. This is so because, in a monogamous union where a woman does not have to deal with the competition of other wives, the woman would gain more control over decisions relating to her reproductive autonomy. This would gradually remove the notion that a woman can be exchanged as chattel for her reproductive capabilities.

Spousal Veto

The spousal veto denies a woman reproductive health care and is a direct result of the position in which women are put by practices such as polygamy and brideprice. By virtue of this practice, a husband may forbid his wife from seeking family planning or other advice. It is the practice of some health clinics to require a wife, but not an unmarried adult woman, to obtain the authorization of her husband in order to receive health care.²⁴ For example, in Swaziland, customary law holds that a woman must provide a written consent from her husband or a male relative in order to receive medical treatment from a clinic or hospital.²⁵ This practice prevents a woman from seeking family planning advice and following a certain course of family planning, or even treating a sexually transmitted disease, without her husband's knowledge and consent. Thus, the spousal veto curtails a woman's freedom to make decisions regarding

24. Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, 24 *STUD. FAM. PLAN.* 73, 78 (1993).

25. ALICE KAVANAUGH ARMSTRONG & RONALD T. NHLAPO, *LAW AND THE OTHER SEX: THE LEGAL POSITION OF WOMEN IN SWAZILAND* 102, cited in DORIS M. MARTIN & FATUMA O. HASHI, *WOMEN IN DEVELOPMENT: THE LEGAL ISSUES IN SUB-SAHARAN AFRICA TODAY* 11 (June 1992) (Working Paper No. 4).

her own body. This practice is also a form of discrimination against women because, while men can deny their wives access to healthcare, women may not place these constraints on their husbands.

Brideprice

In the brideprice system, a prospective husband gives the parents of a prospective bride valuable property in exchange for the bride. This property is usually in the form of livestock, kola, or other gifts, and usually has to be returned by the parents if the bride decides to leave the marriage. In most cases, however, the wife would only want to leave the marriage after many years, by which time the brideprice would have been used for other purposes.²⁶ Married women are thus trapped within restrictive marriages unless the brideprice can be returned. The brideprice system reinforces the notion that women are chattel that can be passed on from one male to another. Before marriage, women are under the control of their father or other male guardian, and after marriage this control passes on to her husband in return for the brideprice.

The payment of brideprice adversely affects a woman's ability to decide whether to use contraception and the type of contraception she will use. This is because after the payment of the brideprice all decisions in relation to a woman's reproductive life are determined by her husband, who has paid for this right. This in turn impacts on her ability to make decisions on how many children she will bear and the amount of spacing between each birth. She is also unable to demand safe sex to protect herself from sexually transmitted diseases and HIV infection.²⁷ Thus, the effect of the brideprice system is to literally transform a woman's person and reproductive capabilities into part of her husband's property.

Rape within Marriage

The law of customary marriages allows a man to rape his wife with impunity. Indeed, the conceptual idea that a wife in a customary marriage can be raped by her husband does not even exist because all sex within a customary marriage is considered "consensual,"

26. MARTIN & HASHI, *supra* note 25, at 16.

27. For a discussion on the inability of African women to protect themselves from contracting the AIDS virus because of traditional practices, see Esther Mayambala, *Women and HIV Transmission in Uganda: An Evaluation of Safer Sex Strategies*, (1994) (unpublished manuscript, Georgetown University Law Center).

whether or not the woman consents.²⁸ This is true because in some parts of Africa marriage results in a woman's physical person and her sexuality becomes part of her husband's property.²⁹ In other parts of Africa, even though customary law did not, in theory, incorporate the very existence of a woman into that of a man's property upon marriage, in practice women are treated as though this were the case.³⁰ This is mainly due to women's ignorance of the laws that protect them.³¹ Moreover, it is a general rule all over Africa that a man can never be said to rape his own wife. As such, forced sex within marriage does not constitute an offense either under customary or statutory law. A woman is therefore not in a position to protect herself from sexually transmitted diseases by ceasing to have sex with her husband or seeking to have safe sex, even though she may suspect, or even know for a fact, that her husband or one of her co-wives has a sexually transmitted disease.

Leviratic Marriage or Widow Inheritance

The leviratic marriage, or widow inheritance, is a custom in which a man is obliged to marry his brother's widow.³² This system perpetually restrains the widow from marrying any other person except the customary successor of her dead husband or a member of his family. The effect of this custom is to thrust many women into unwanted marriages and results in forced marriages and forced sex within marriage. Widow inheritance treats women as chattel, instead of human beings who have rights equal to those of a man.³³ A widow who resists being inherited will most likely be evicted from her home by her in-laws, particularly if she is living on what is regarded as family land.³⁴ Because most rural women are dependent on their husbands for their livelihood, the threat of eviction forces women to comply with the traditional practice.

Sororate Marriage

In the sororate marriage, a wife who fled her marriage or died before giving birth is replaced by her sister. This is the result of the

28. See generally Duncan, *supra* note 21.

29. See Duncan, *supra* note 21, at 14.

30. Duncan, *supra* note 21, at 14.

31. Duncan, *supra* note 21, at 14.

32. THE OXFORD ENCYCLOPEDIA OF ENGLISH DICTIONARY 826 (1st ed. 1991).

33. *Akorninga v. Akawagre*, 1987-1988 GHANA L. REP. DIG. 101, 247 (June 23, 1988).

34. *Mayambala*, *supra* note 27, at 20.

idea that a woman has been purchased by the payment of brideprice or bridewealth and is valued mainly for her reproductive labor which constituted an important part of the purchase. The second wives are just as vulnerable as their sisters before them, having no reproductive autonomy whatsoever. This practice also results in forced marriages and forced sex within marriage.

Child Marriage

During their infancy females in certain societies are betrothed to men of their parents' choice. Upon reaching the age of puberty, women are sent to live in their husband's homes and are forced into having sex at an early age. These girls get pregnant at tender ages and are particularly vulnerable to complications caused by childbirth such as vesicovaginal fistula, a disability resulting from a ruptured uterus and accompanied by tearing of the intestine or bladder, caused by obstructed labor.³⁵ Without corrective surgery, the girls, sometimes as young as twelve, are rendered incontinent for life.³⁶ An estimated 20,000 women in the predominantly Moslem Northern Nigeria suffer from vesicovaginal fistula.³⁷ Another potential problem exists in Botswana, where twenty-eight percent of women who have ever been pregnant were pregnant before reaching the age of eighteen.³⁸ Also, in Nigeria, one-quarter of all women are married by the age of fourteen, one-half by the age of sixteen, and three-quarters by the age of eighteen.³⁹

Female Genital Mutilation

A discussion of the particular reproductive health problems faced by women in Africa would not be complete without mentioning FGM. FGM is the name given to several traditional practices which involve the cutting and removal of female sexual organs.

There are three different types of FGM: clitoridectomy, excision, and infibulation or "pharaonic circumcision." Clitoridectomy is the

35. Naomi Wimborne, *Customs and Taboos Hinder Progress of Women in Modern Africa*, Reuters News Service, Dec. 11, 1989.

36. James Brooke, *A Nigerian Shame: The Agony of the Child Bride*, N.Y. TIMES, July 17, 1987, at A4.

37. *Id.*

38. W.G. MANYENANG ET AL., BOTSWANA FAMILY HEALTH SURVEY 1985, at 111, *quoted in* Cook, *supra* note 19, at 649.

39. NATIONAL POPULATION BUREAU, THE NIGERIA FERTILITY SURVEY 1981/82, PRINCIPAL REPORT 1984, *quoted in* Cook, *supra* note 19, at 649-50.

removal of the clitoral prepuce or tip of the clitoris.⁴⁰ Excision is the removal of the clitoris and the inner lips of the female external genitalia or labia minora. Infibulation or "pharaonic" circumcision is the most extreme of these operations and involves the removal of the clitoris, labia minora and parts of the labia majora. The remaining skin of the labia majora is then scraped to form raw surfaces and stitched together with thorns. The wound is further kept together by binding the woman with pieces of cloth made into a rope, from thigh to ankle for several weeks to enable scar tissue to form, covering the urethra and most of the vagina. A small aperture, the size of the head of a match stick or the tip of a finger, is left open for the flow of urine and menstrual blood.⁴¹ Approximately eighty-five percent of all women who undergo FGM have the clitoridectomy or excision procedure and the remaining fifteen percent have undergone infibulation.⁴²

The short-term effects of FGM are acute pain, post operative shock, urine retention, and bladder infection resulting from lacerations of the bladder, the anal sphincter, urethra, vaginal walls, and Bartholin's glands. In addition, FGM may result in hemorrhaging, tetanus, septicemia and infection that could lead to death, and vulva abscesses. Some of the long-term effects of FGM include keloid formation, infertility, chronic infections of the uterus and vagina, incontinence, painful sexual intercourse (dyspareunia), retention of blood, painful menstrual periods (dysmenorrhea), growth of implantation dermoid cysts, fistula formation, and obstructed childbirth.⁴³

FGM is practiced by communities that exploit the social value of virginity. Proponents of FGM view it as the community's way of protecting women from rape and sexual assault and preventing women from having sex before marriage. This practice is tied to the traditional purpose for virginity, that is, securing the family honor and promoting religious doctrines. Thus, the basis of FGM is the belief that women are considered incapable of thinking for themselves and therefore need society's help to make basic decisions regarding their own bodies.

The Inter African-Committee on Traditional Practices Affecting the Health of Women and Children, an NGO in consultative status with

40. Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993).

41. NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 10* (Gloria Jacobs ed., 1993).

42. *Id.*

43. EFUA DORKENOO & SCILLA ELWORTHY, *FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE 8-9* (3d ed. 1992).

the United Nations Economic and Social Council, submitted a statement at the Thirty-eighth session of the Commission on the Status of Women, saying that FGM is the epitome of gender-discrimination.⁴⁴ The World Health Organization has condemned FGM "as a serious health risk."⁴⁵ FGM is therefore a practice that should be eradicated to ensure women's reproductive health and reproductive autonomy.

Rites de Passage

Rites de passage, or puberty rites, are ceremonies performed by young adolescents to signify their development into adulthood. Puberty rites are also used to keep women in subjugation in traditional societies. For example, according to custom of the Krobo people of Ghana, a female who reaches puberty must undergo a customary rite called *dipo* before becoming pregnant.⁴⁶ If she conceives before undergoing this ceremony she is not only ostracized but is liable to be banished from home and disowned by her parents.⁴⁷

According to societal view, the moral objective of the custom cannot be faulted in that it is designed to oblige women to maintain their purity of sexual life until they are married.⁴⁸ Accordingly, the decision as to when to have sex is not made by the woman. Thus, she is forced to comply with societal norms of when she should have sex or risk ostracism. Therefore, although it may seem to be a personal and freely made decision, the African woman lacks the sexual self-determination to make her own choices. Puberty rites are another way of forcing a woman not to have sex. FGM is also conducted as a significant part of puberty rites in some African countries such as Kenya and Mali.⁴⁹

44. *Preparations for the Fourth World Conference on Women: Action for Equality, Development and Peace*, Commission on the Status of Women, U.N. ESCOR, 38th Sess., at 2, U.N. Doc. E/CN.6/NGO1 (1994).

45. *Objective: Justice, A United Nations Review Dedicated to the Promotion of Justice Through the Self Determination of Peoples, the Elimination of Apartheid and Racial Discrimination, and the Advancement of Human Rights*, United Nations, Secretariat, Vol. 23, No. 2, at 35, U.N. Doc. [ST/DP/1182 (1991)].

46. *Tanor v. Akosua Koko*, 1974 GHANA L. REP. 451, 453 (dictum of Apaloo, J.A.).

47. *Id.*

48. See generally *id.* (discussing *dipo* custom in Ghana).

49. See Robyn Cerny Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449, 2459 (1992); see also Assitan Diallo, *L'Excision en Milieu Bambara* (unpublished thesis), cited in DORKENOO & ELWORTHY, *supra* note 43, at 14.

Female Religious Bondage

Because women are viewed as mediums of exchange,⁵⁰ and their reproductive labor is viewed as belonging to the family, young female virgins are given away as "gifts" to oracles and shrines to pacify gods for offenses allegedly committed by other members of their family. Such an example can be found in Ghana, where females, often as young as ten years old, are left completely at the mercy of the chief priest of the shrine, who becomes her husband/master. She and other females, who have been abandoned at the shrine by their families, serve their husband sexually with no access to healthcare.⁵¹ In these instances, young girls are forced into marriage and forced to have sex. This practice is a form of discrimination against women, for it is interesting to note that these shrines, which are scattered all over the Volta Region of Ghana, have never required a male to pay for the iniquities of his family members.

Custom and Traditional Rules in Context

A combination of the above customs and traditional rules puts women in a very low bargaining position with regards to marriage and family life. It also gives them very little, if any, control over their reproductive lives and thus their reproductive health. It often denies them a choice as to the most fundamental question of whether or not to have sex.

No regard is given in the application of these practices to the fact that there can be no organized society which is absolutely communalistic, nor can there be any organized society which is completely individualistic.⁵² While it is true that the African has a greater group identity than some other peoples, it is not true that the African has no individual identity. The African woman has "some individualized personality which must be recognized, some dignity which must be respected, [and] some freedom which must be

50. DORIS M. MARTIN & FATUMA OMAR HASHI, WORLD BANK, LAW AS AN INSTITUTIONAL BARRIER TO THE ECONOMIC EMPOWERMENT OF WOMEN 14 (June 1992) (Working Paper No. 2).

51. Once given to the shrine, the girls cannot go to clinics or health posts if they exist within the locality, cannot work except on the chief priest's farms, and cannot leave the shrine for fear of the wrath of the gods. No member of their families would take them back even if they contemplated running away. They are, in a manner of speaking, trapped. Their only mission from that point onward is to serve their husband and bear him children. Interview with Joan Atsu, Member: FIDA (Sept. 26, 1992). Ms. Atsu visited one of the shrines in Adidome, Ghana and wrote an internal report on the condition of these girls and women.

52. See Bondzie-Simpson, *supra* note 20, at 656 (noting that all societies have some combination of communal and individual identity, rights, and obligations).

exercised. . . . Group identity never means individual submergence, much less individual nonexistence."⁵³

To fully understand the basis of the traditional practices and norms that exist in relation to African women, one has to consider the evolution of customary law in Africa and realize that it is mainly a male concept of customary law. With that background, it will be possible to confront custom and make progress toward eradicating these practices.

II. THE EVOLUTION OF CUSTOMARY LAW AND THE POSITION OF WOMEN IN AFRICAN SOCIETY

Today's African legal institutions, which include customary law, are a combination of indigenous and imported institutions. African customary law is a blend of African customs, imported colonial common and civil law notions, and religious concepts from Christianity, Islam, and traditional African religions. In some parts of pre-colonial Africa, women had a reasonable amount of power and autonomy. This autonomy, however, was eroded by the colonial ideas concerning the inferiority of women, which figured greatly in the evolution of customary law in the colonial and post-colonial eras. Natural law principles of male superiority, common law and Christian religious principles of female inferiority, and Islamic tenets of female domesticity and incapacity, all contributed to the shaping of customary law into its present form and to the ways in which these legal institutions impact on women's reproductive autonomy.

The historic interpretation of customary law also contributed to the way in which it developed. Customary law was not written and was interpreted solely by males during the colonial era. Thus, the needs and opinions of females were completely ignored in the interpretation of custom. The geographical boundaries of judicial bodies set up by the colonial administrations sometimes cut across tribal lines. Thus, the interpretation of custom as it existed in those jurisdictions was not always consistent with the customary practices of all the tribes within that jurisdiction. This is because African societies are not homogeneous. The customary law that evolved in the post-colonial era was, therefore, devoid of women's needs, greatly discriminatory against women, and often contrary to the practices of some ethnic groups.

Custom is an established usage or practice of society having the force of law.⁵⁴ For a custom to carry the force of law, it must satisfy

53. Bondzie-Simpson, *supra* note 20, at 656.

54. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 252 (6th ed. 1977).

the conditions of common adoption and acquiescence, longevity, and compulsion for the place and time in question. Contrary to the belief of most people, however, custom is not static but develops and changes to meet the changing needs of society.

Law is defined as the institution within society that establishes the formal rules and sanctions that govern legal and nonlegal institutions.⁵⁵ Law, through its function of defining behavior which governs relationships and by imposing sanctions to enforce behavior, plays an important role in determining the position of women in society.⁵⁶ Natural law and custom have been relied on heavily to justify laws that make distinctions between men and women.

Legal principles figured prominently in the molding of customary law. The natural law principle of male superiority, as developed initially in classical Greece, had significant implications for the legal status of African women. Women, regardless of age or status, were treated in law as perpetual minors who had to be controlled by a male.⁵⁷ If unmarried, a woman was controlled by her father, brothers, or paternal grandfather. Upon marriage, the father conceded some control, but in most respects the husband had control over the woman.⁵⁸

This principle also emerged in the English common law, where by marriage a husband and wife were deemed one person in law: that is, the very being or legal existence of a woman was suspended during marriage.⁵⁹ The English common law in turn was imported into British African colonies by the British during the colonial period.

Religious beliefs also played an important part in the development of African customary law. One of the results of religious intervention on the legal status of women has been to subject women to the control of their husbands and families and to isolate them in the private spheres of life.⁶⁰ The laws of Rome and religious principles of Christianity were premised on the inferiority of women and contained rules that subordinated women.⁶¹ The Quran also reinforced the tenets of natural female domesticity and incapacity by

55. See Paul Bohannon, *Law and Legal Institutions*, in *THE SOCIOLOGY OF LAW: A SOCIAL STRUCTURAL PERSPECTIVE* 3, 6-7 (William M. Evan ed., 1980).

56. MARTIN & HASHI, *supra* note 12, at 13.

57. John P. Gould, *Law, Custom and Myth: Aspects of the Position of Women in Classical Athens*, 100 *J. HELLENIC STUD.* 38, 43 (1980).

58. *Id.* at 43-45.

59. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *8.

60. MARTIN & HASHI, *supra* note 50, at 18.

61. O.F. Robinson, *The Historical Background*, in *THE LEGAL RELEVANCE OF GENDER: SOME ASPECTS OF SEX-BASED DISCRIMINATION* 40, 49-51 (Sheila McClean & Noreen Burrows eds., 1988).

emphasizing the need for men to serve as guardians over women.⁶²

Although the traditional concept of women in Africa placed women in an inferior position in relation to men, women in precolonial Africa were not confined to the private sphere, but also operated within political and other spheres. Queenmothers had significant political power and were the female partners to chiefs in the Asante empire.⁶³ The queenmother gave the chief advice on political and administrative matters and helped him give judgement in matters brought before his court. Queenmothers also gave the chief advice in matters relating to women. As a result, the queenmother infused feminist views into the judgements of cases before the court, making decisions of the court less male-biased than they would otherwise have been. In some parts of the Asante empire, queenmothers had a duty to nominate new chiefs to the stool in the event the former chief died or was deposed. Thus, although women were generally considered inferior to men, in some African societies women wielded significant political, administrative, and economic power.

The situation in areas such as the Asante empire changed with the rapid social and economic transformations caused by colonization. These transformations created significant conflicts among Africans, the resolution of which would impact women's control over their bodies and their labor.⁶⁴ The colonial period created legal institutions that frequently contrasted with traditional institutions. With the introduction of a local court system, established and supervised by the colonial rulers, there were radical departures from indigenous patterns.⁶⁵ As part of this process, many rules and practices relating to women were drastically altered.

Judicial interpretations of customary law adversely affected the position of women in society. Because judicial bodies, with defined jurisdiction, were superimposed on the already existing customary judicial systems,⁶⁶ the colonists created a dual legal system of customary law on the one hand, and the "received" law of the colonists on the other. Additionally, before the court could apply the custom, the custom had to pass a test. If the custom was repugnant to justice, equity, or good conscience, it could not be applied.⁶⁷ This process was very subjective, and raised questions about whose

62. THE HOLY QURAN 4:35, *quoted in* MARTIN & HASHI, *supra* note 12, at 20.

63. The Asante people can be found in modern Ghana.

64. MARTIN & HASHI, *supra* note 12, at 31.

65. MARTIN & HASHI, *supra* note 12, at 32.

66. MARTIN & HASHI, *supra* note 12, at 32.

67. Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J. L. & FAM. 314, 328 (1993).

standards of justice, sense of equity, morality, or conscience the custom was to be tested against. This resulted in arbitrary interpretations of the customary law, usually to the advantage of the men who ran the system, and to the detriment of women.

Customary law was interpreted by persons who were not versed enough in the traditions of the society to properly interpret them, thereby causing the erosion of the status accorded to women. This was because the personnel of the colonial courts were not always elders according to customary law. In several instances, the colonial government appointed chiefs who owed greater allegiance to the government than to the tribe. In addition, the advisory role of the queenmother in the judicial system was eliminated because of the colonists' views of female inferiority.

In conformity with their beliefs, the colonial government never appointed women to the colonial courts. Frequently, these colonial-appointed chiefs related custom as what they thought it should be, with self-interest weighing heavily in these decisions. Consequently, the feminist views that would otherwise be infused into interpretations of customary law were eliminated altogether, leaving interpretations of customary law that were purely male in perception.

Often, the judicial bodies set up by the colonial governments had jurisdiction over geographic areas that cut across tribal and ethnic boundaries.⁶⁸ The interpretation of "customs" by these bodies often resulted in the creation of laws governing marriage, kinship, property, and inheritance that were not consistent with traditional practices. This deviation of judicial interpretation of custom from traditional practice emerged because African societies lack homogeneity, and social institutions vary from tribe to tribe and from one ethnic group to another within the same tribe. As such, where the geographic jurisdiction of the judicial bodies cut across ethnic boundaries, the interpretation of "custom" was often contrary to the traditional practices of some ethnic groups within the jurisdiction.

The confusion as to what rights were to be accorded to females within the legal system deepened further in communities where Islam was introduced. In these societies, there was the additional system of the Islamic qadi courts that applied Sharia Law. Sharia law prescribes rules regarding family relations, inheritance, divorce, dress, diet, and hygiene. Sharia law reinforced the tenets of natural female domesticity and incapacity by emphasizing the need for men to serve as

68. MARTIN & HASHI, *supra* note 12, at 32.

guardians over women.⁶⁹

The customary law framework that developed was a product of alliances and struggles between influential and prosperous African men and colonists over authority and resources, and was thus completely devoid of women's views.⁷⁰ Major problems in the administration of law were rooted in the dual or multiple dispute settlement systems within society, each with a different set of rules and norms. Through this pluralistic legal system, it was easy for judges and interpreters who worked within the legal system to manipulate rules and choices in order to obtain the best advantage for them. This also increased the probability that the most restrictive traditional law would be chosen in matters relating to family law, to the detriment of women. Much customary law established during the colonial period remains a part of the legal framework today.

Because customary law has evolved greatly through the ways in which male traditional rulers and colonial appointed leaders interpreted custom and tradition in relation to other elements, feminist views of tradition can and should be infused into customary law by including international human rights norms among the factors that have contributed to the development of this law. Such an approach would lead to different interpretations of the customary law that would secure the reproductive autonomy of women. Indeed, to some extent this has begun to happen already.

III. ADDRESSING THE REPRODUCTIVE HEALTH NEEDS OF AFRICAN WOMEN THROUGH THE USE OF INTERNATIONAL HUMAN RIGHTS NORMS

The reproductive health needs of African women can be addressed through the application of international human rights norms. The African Charter must be used to the fullest extent in order to eliminate the notion that foreign ideas are being imposed on African women. NGOs should make recommendations for the strengthening of the African Charter. Only as a last resort should there be a resort to international fora. Widespread education on human rights is also essential to alter peoples' way of thinking. African NGOs would have to devise a plan of action to eradicate traditional practices that affect the reproductive rights of women and their reproductive health.

69. MARTIN & HASHI, *supra* note 50, at 14-15.

70. See MARTIN & HASHI, *supra* note 12, at 32.

On the domestic front, the plan to ensure women's rights can be executed through the use of local law. In some countries, international human rights norms have been incorporated into national law by virtue of their stipulation within the constitutions of those countries. In some of these constitutions, there is a supremacy clause that gives the constitution superiority over any other laws in the land and declares void provisions of any law to the extent contrary to the constitution. For example, in the 1992 Constitution of The Republic of Ghana article 1 provides that the Constitution shall be the supreme law of Ghana. Any law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void. A similar provision exists in section 1 of the 1989 Constitution of The Republic of Nigeria. In such countries, women's reproductive autonomy should be pursued using the rights of women enshrined in the Constitution.

Another approach that can be used involves the State's explicit adoption of customary law. In some countries this is spelled out in the constitution. An example is seen in article 11 of the Ghanaian Constitution, which states that "[t]he laws of Ghana shall comprise . . . the common law. . . . [T]he common law of Ghana shall comprise . . . the rules of customary law. . . . [C]ustomary law means the rules of law which by custom are applicable to particular communities in Ghana." Attributing the practice of customary law and its violations of international human rights norms to the State is not so difficult in these cases, because the State has incorporated customary law into the laws of the land and the State should be held accountable for the practice of all laws within the land.

Moreover, States are responsible for bringing their domestic law and practice into conformity with their obligations under international law to protect and promote human rights.⁷¹ This responsibility applies not only to laws enacted by formal legislative organs of the State but also to those attributed to religious and customary sources.⁷² This argument can be used to persuade local legislatures to change their laws to conform to the requirements of international law.

71. See Abdullahi A. An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 167 (Rebecca J. Cook ed., 1994) [hereinafter An-Na'im, *State Responsibility*]; Abdullahi A. An-Na'im, *Problems of Universal Cultural Legitimacy for Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 23, at 331, 347-49 [hereinafter An-Na'im, *Problems of Universal Cultural Legitimacy*].

72. See An-Na'im, *Problems of Universal Cultural Legitimacy*, *supra* note 71, at 358-61 (discussing how religion influences social and political change in African culture).

Special use should also be made of the African Charter, which gives special protection to women and children. It provides for the elimination of discrimination against women and the rights of women as stipulated in international declarations and conventions.⁷³ The Charter ensures the right to the respect and dignity inherent in a human being,⁷⁴ the right to freedom from inhuman and degrading treatment,⁷⁵ the right to liberty and to the security of person,⁷⁶ and the right to enjoy the best attainable state of physical and mental health.⁷⁷

The right to marry and found a family and the right to modify customs that discriminate against women can be inferred from a reading of Articles 2 and 18(3) of the Charter. This is because these rights are provided for in Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (Civil and Political Covenant), and the International Covenant on Economic, Social and Cultural Rights (Economic Covenant), and are incorporated into the Charter by the provision eliminating all discrimination against women and the provisions protecting the rights of women as stipulated in international declarations and conventions. The Charter also emphasizes that States must undertake to adopt legislative or other measures to give effect to the rights within the Charter.⁷⁸ Local women's rights activists in countries that have not brought their domestic laws into conformity with these human rights norms must urge their governments to do so.

To achieve reproductive autonomy for women, specific legislation must be passed banning traditional practices that affect the health of women. Legislation recognizing that a problem exists can be a helpful starting point. For example, Article 26(2) of The Ghanaian Constitution states that "[a]ll customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited." This is a clear indication that the people of Ghana have realized that their cultural traditions include some norms and institutions that are contrary to some human rights.

In Abdullahi An-Na'im's view, the constructive approach to this

73. African Charter, *infra doc. biblio.*, art. 18(3).

74. African Charter, *infra doc. biblio.*, art. 5.

75. African Charter, *infra doc. biblio.*, art. 5.

76. African Charter, *infra doc. biblio.*, art. 6.

77. African Charter, *infra doc. biblio.*, art. 16(1).

78. African Charter, *infra doc. biblio.*, art. 1.

problem of negative customs is to enhance the supportive elements and redress the antithetical or problematic elements in ways that are consistent with the integrity of the cultural tradition.⁷⁹ An example of such an approach is seen in the Ghanaian context. Section 88A(1) of the Criminal Code of Ghana states that whoever compels a bereaved spouse or a relative of a bereaved spouse to undergo any custom or practice that is cruel in nature shall be guilty of a misdemeanor.⁸⁰ To remove any uncertainty that might exist as to the definition of a cruel custom, the Criminal Code goes on to state that a custom or practice shall be deemed to be cruel in nature if it constitutes an assault, an assault with battery, or imprisonment within the meaning of the Criminal Code.⁸¹ This amendment to the Criminal Code is designed to do away with the problematic aspects of widowhood rites, but stops short of doing away with the tradition of widowhood rites altogether. Although the amendment is couched in language that makes it applicable to any spouse of either sex, it is targeted toward the infringement of women's rights through the practice of widowhood rites.⁸²

Women's rights should also be pursued at the domestic level through the use of existing penal statutes where traditions inimical to women would fall within the applicable definitions of crimes in those statutes. It is the pursuit of women's rights on this front that has led to the amendment of the Ghana criminal code to outlaw cruel widowhood rites and FGM.⁸³

Domestic courts can serve as a missing link between promulgation and realization of international human rights norms to the benefit of both international and domestic law.⁸⁴ An example comes from the Ghanaian case of *Akorninga v. Akawagre*.⁸⁵ The appellant, (A), appealed the decision of the Chief of Yorugu, awarding damages against A for failing to hand over his adult daughter to the respondent, (R). R brought this action eleven years after his elder brother's death, claiming that the appellant's daughter, (F), who was the widow

79. An-Na'im, *State Responsibility*, *supra* note 71, at 361.

80. GHANA CRIM. CODE § 88A(1) (1960) (as amended by PNDCL 90).

81. *Id.* § 88A(2).

82. In Ghana, women have "hot pepper" put in their eyes, their heads shaven, are confined to rooms alone for long periods of time, made to walk barefoot, and have to hold onto the large digit of their dead husband's foot while the corpse of the deceased is being prepared for burial. In practice no similar rites exist for the spouses of deceased women.

83. The Ghanaian Criminal Code Amendment Act 484, Sept. 9, 1994, makes it a second degree felony with a minimum sentence of three years imprisonment to practice FGM.

84. Anne F. Bayefsky, *General Approaches to Domestic Application of International Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 71, at 351.

85. 1987-1988 GHANA L. REP. DIG. 101 (June 23, 1988).

of R's elder brother, was now his wife under customary law.

The Court of Appeals of Ghana held that damages should not have been awarded because A was in effect being penalized for his failure to obtain possession of a grown woman who was an independent person in her own right with rights equal to those of R. The court stated that the claim was clearly against the general law of the land because it sought to treat F as a chattel instead of a human being.⁸⁶ The court went on to say that because R's stance was blatantly discriminatory against women, it could not under modern conditions be considered part of the customary law of the country. Accordingly, R's claim was contrary to section 1(1)(b) of PNDCL 42, which commands respect for human rights and the dignity of the human person, and would for that reason be dismissed.

This decision effectively outlaws the practice of the leviratic form of marriage in Ghana. Women's rights activists should therefore bring test cases in the local courts, opposing traditional practices that impinge on women's rights, in order to obtain court declarations that would effectively outlaw these practices. In this context, women should argue that the interpretation of specific words and phrases of international conventions given by U.N. agencies should be of persuasive effect in local courts.

Where local laws do not permit the pursuit of women's rights, international human rights norms should be used as effectively as possible in the African context by linking those norms to the regional human rights instrument, the African Charter on Human and People's Rights.⁸⁷ International norms and mechanisms are critical to establish global standards, aid in interpretation, and serve as a final resort for those whose claims are not or cannot be vindicated at the national level. Principles generated and acted on at the national level—even if they are more progressive than the general population might wish—have a certain credibility because they are grounded in local circumstances and beliefs.⁸⁸

International agencies readily concede their status as fora of last resort. The European Court of Human Rights, for example, reminds States that the international machinery for protecting fundamental rights is subsidiary to national systems of safeguarding rights.⁸⁹ Thus,

86. *Id.*

87. African Charter, *infra doc. biblio.*

88. Marsha A. Freeman, *Women, Law and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems* (Mar. 1992) (paper prepared for the Windsor 12th Symposium on Law and Development, Windsor, Ontario, Canada).

89. Bayefsky, *supra* note 84.

to give international human rights norms credibility within African communities, they should be linked with the African Charter, which Africans would not regard as foreign.

The African Charter is unique because it "expounds an African conception of human rights taking cognizance of African culture, but at the same time it incorporates other conventional norms of human rights that are not typically or exclusively African."⁹⁰ The Charter also provides in one document a core of economic, social and cultural rights on one hand, and civil and political rights on the other. I believe that the use of this document will be the most effective means of countering the arguments of cultural relativists.

Some cultural relativists assert that an observer cannot adequately judge a society's cultural practices from outside that culture because he or she is not capable of fully understanding the significance of those practices.⁹¹ This is the prevailing philosophy among governments of nonwestern nations that resist the imposition of international human rights norms. According to one scholar, cultural relativists claim that the Charter and the Universal Declaration of Human Rights "give priority to individual civil and political rights over economic rights—an ideological preference that originates from Western Liberal thought."⁹² Relativists maintain that an interpretation of human rights that gives civil and political rights priority over social, economic, and cultural rights is Western-biased.

The African Charter was prepared by the same proponents of the cultural relativism argument, and embodies the cultural ideas they want to preserve. Thus, because the African Charter provides for the right to respect for the integrity of a person, the right to respect of the dignity inherent in human beings, the right to freedom from all forms of degradation and exploitation, and the right to freedom from cruel, inhuman, and degrading treatment, women's rights activists should present their proposals for change of customs and traditions with the use of these provisions of the Charter.

The enforcement mechanism for the African Charter, however, is weak and needs strengthening. The Charter provides a complaint mechanism which allows one State Party to charge another with a violation of the provisions of the Charter. The African Commission

90. Bondzie-Simpson, *supra* note 20, at 645.

91. Bondzie-Simpson, *supra* note 20, at 645.

92. See Admantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 4 (Admantia Pollis & Peter Schwab eds., 1979), cited in Nancy Kim, *Towards a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS L. REV. 49, 57 (1993).

on Human and Peoples' Rights (African Commission)⁹³ is charged with hearing complaints about violations of the African Charter and helping to bring about an amicable solution to the charge.⁹⁴ Article 50 of the African Charter permits the African Commission to deal only with matters that are submitted after exhausting all available local remedies.⁹⁵ Like all the other international conventions, the African Charter does not provide a means of forcing a State Party which is charged with a violation to accept and implement the recommendations of the African Commission. Consequently, the African Charter cannot be effectively enforced. This should not be seen, however, as an insurmountable setback.

Communications other than those of the State Parties may also be considered by the African Commission.⁹⁶ This permits individuals, NGOs, and other groups, to bring charges against member States that have violated the African Charter. Such communications are drawn to the attention of the Assembly of Heads of State and Government (AHSO), however, only when they reveal a series of serious or massive violations of human and peoples rights.⁹⁷ Similarly, reports of violations of the African Charter that are brought to the attention of the AHSO may be published by the Chairman of the African Commission only after the AHSO gives him the authority to do so. Here again, we come across the culture of silence, which keeps the misdeeds of persons in positions of authority hidden. Thus, women's rights advocates should make proposals for the strengthening of the complaint mechanism of the African Charter.

The African Commission should be able to publicize its reports and recommendations without first waiting for the approval of the AHSO, giving the African Commission the publicity it needs to be effective. African women's rights activists seeking reproductive autonomy and equality for women should make recommendations for the amendment of the African Charter to allow the African Commission to publish its findings and recommendations in relation to a complaint in order to enhance its impact.

Another weakness in the enforcement mechanism of the African Charter is the absence of a court on human rights. This deliberate omission was made to ensure amicable and diplomatic settlement of differences, compatible with the African tradition, which favors

93. African Charter, *infra doc. biblio.*, art. 47.

94. African Charter, *infra doc. biblio.*, art. 52.

95. African Charter, *infra doc. biblio.*, art. 50.

96. African Charter, *infra doc. biblio.*, art. 55(1).

97. African Charter, *infra doc. biblio.*, art. 58(1).

conciliation rather than adjudication. I am of the opinion that the existence of a court would not obstruct amicable settlement of disputes. Courts in most countries encourage settlements, but exist nevertheless to deal with the disputes that the parties are unable to settle amicably. Again, this can and should be remedied by making forceful presentations for the amendment of the African Charter to allow for the provision of a court. Local women's rights activists should use empirical data to show the ways in which the conflicts between women's reproductive autonomy and traditional African values cannot be settled out of court, thereby highlighting the need for an African Court on Human Rights.

On the other hand, there is already room to achieve progress under the Charter even absent these reforms. Women's rights activists could seek a declaration that the provisions of the African Charter that relate to traditional practices ensure women's rights. They will, however, have to overcome some obstacles. Although the African Charter provides for the elimination of *all* discrimination against women, in the same breath it leaves substantial room for ambiguity in the interpretation of what constitutes prohibited discrimination. The Charter provides that "the promotion and protection of the morals and traditional values *recognized by the community* shall be the duty of the State."⁹⁸ The Charter also states that the individual shall have the duty to strengthen positive African cultural values in his relations with other members of the society.⁹⁹ The reference to cultural values requires definition and the questions of which traditional values are recognized by the community and who makes that determination leave a lot of uncertainty in the interpretation of the rights in the Charter.

The African Commission has a duty to interpret all provisions of the Charter at the request of a State Party, an institution of the Organization of African Unity, or an African organization recognized by the Organization of African Unity.¹⁰⁰ It can be argued, and rightly so, that these provisions pertaining to culture or traditional values must be applied constructively and in accordance with the fundamental obligation to respect and observe human rights for all. There still exists, however, room for other interpretations that would be detrimental to women's rights.

African NGOs should, as a matter of the utmost urgency, compile

98. African Charter, *infra doc. biblio.*, art. 17(3) (emphasis added).

99. African Charter, *infra doc. biblio.*, art. 29(7).

100. African Charter, *infra doc. biblio.*, art. 45(3).

a list of customary and traditional practices that impede the exercise of women's rights and show that these practices deny women their rights and thus violate many provisions of the African Charter. NGOs should submit this document to the African Commission and seek a declaration from the Commission that these customs deny women their reproductive health and autonomy and therefore violate the Charter. Without such declarations, the uncertainty created by the provisions that refer to the recognition and preservation of traditional and cultural values could negate several of the protections that the Charter gives women.

The case of FGM could serve as an illustration of the uncertainty created by the provisions of the Charter. FGM is a form of violence and a manifestation of men's control over women's sexuality and freedom of choice. Women's rights activists could bring an influx of complaints to show that FGM is a massive violation of women's rights, which should be brought to the attention of the AHSG.

The African Charter provides that a woman shall have the right to respect for the integrity of her person. The right to respect of the dignity inherent in human beings, the right to freedom from all forms of degradation and exploitation, the right to freedom from cruel, inhuman and degrading treatment, the right to the highest attainable standard of health, and the right to equal protection of the law are all provided for in the Charter. FGM is seen by its proponents, however, as a means of ensuring the virginity and moral values of their young girls, and accordingly as a moral and traditional value that the community must keep. NGOs must urge the African Commission to declare FGM a custom that has no positive cultural value.

In addition to seeking change through law, it is imperative to seek change through education. The African woman's inability to assert her reproductive autonomy is partly due to illiteracy; African women have only fifty-seven percent of the educational opportunities of males.¹⁰¹ Without the enlightenment that comes with general education, local religious and cultural values shape women's attitudes toward medical technologies that may be essential to ensure their reproductive health.

One very important method of implementing human rights at the local level, especially in rural Africa, is to educate women to a level at which she can feel confident enough to assert her rights. Education is one of the most important means of empowering women with the

101. MARTIN & HASHI, *supra* note 25, at 5.

knowledge, skills, and self confidence necessary to participate fully in a development process.¹⁰² As a member of FIDA (Ghana) working at our legal aid clinic, I have experienced the frustration of trying to convince an illiterate woman that she can assert her rights when she cannot understand or believe she has these rights. Rights activists should embark on a massive education effort that stresses international human rights norms in relation to local laws and re-orientes the societies' thinking on socio-cultural issues relating to women's autonomy. NGOs must also begin a dialogue with indigent women to break the myths and barriers about the discussion of sex-related matters, so that they can be easily discussed by women with a view to solution of related problems.

General education in localities on international human rights norms in relation to local laws will go a long way toward acclimatizing African society to the idea that females have a right to reproductive autonomy. Special efforts should be made to emphasize men's shared responsibility, and promote their active involvement in sexual and reproductive behavior, family planning, prenatal, and maternal and child health. It should be stressed that men should also share responsibilities in the prevention of sexually transmitted diseases, including HIV, the prevention of unwanted and high-risk pregnancies, and the recognition and promotion of the equal value of children of both sexes.¹⁰³ Male responsibilities in family life must be included in the education of children from the earliest ages.¹⁰⁴ Local queenmothers, Chiefs, Imams, and traditional headmen are respected in traditional societies, and it is essential to change their views about women in order to get the other citizens of those communities to follow suit. A program of formal and informal education should be conducted by local NGOs and activists to change peoples' attitudes about the necessity or desirability of continuing a particular customary practice.

An effort to change religious and customary laws in accordance with international human rights law should seek to persuade people of the validity and utility of the change.¹⁰⁵ For instance, WiLDAF¹⁰⁶

102. ICPD Programme of Action, *infra doc. biblio.*, ¶ 11.2.

103. ICPD Programme of Action, *infra doc. biblio.*, ¶ 4.27.

104. ICPD Programme of Action, *infra doc. biblio.*, ¶ 4.29.

105. An-Na'im, *State Responsibility*, *supra* note 71, at 347; An-Na'im, *Problems of Universal Cultural Legitimacy*, *supra* note 71.

106. Women in Law and Development in Africa (WiLDAF) is an NGO which promotes networking among women's organizations and activists in Africa, and collaborates with other human rights organizations and networks outside Africa. Its headquarters is situated in Harare, Zimbabwe.

Ghana and its associate member organizations¹⁰⁷ have embarked on a rights-awareness program for grassroots women leaders on leadership skills and legal education on four laws that are of particular interest to women in Ghana: Intestate Succession Law; Wills Act; Marriage Laws; and Maintenance of Children Act.¹⁰⁸ As a result of the legal education carried out by these participants in their various communities, women have identified the need for an information office in various district capitals where women can go to seek information and advice on all issues relating to them, including law, health, and family planning. The realization of the need for change now emerges from within the communities after the introduction of the concept from outside the communities. This signifies that the people within the community have been persuaded of the utility of the change.

Another important way of addressing the reproductive health needs of the African woman is by showing the extent to which paternalistic control of women's sexual and reproductive behavior affects women's health. This can be done through the collection of empirical data. The Committee on the Elimination of Discrimination Against Women has suggested, in General Recommendation Number Nineteen, that State Parties should "encourage the compilation of statistics and research on the extent, causes, and effects of violence" against women.¹⁰⁹ This would enable the States to identify the nature and the extent of violence against women, and formulate effective measures to combat the violence. Similar data should be collected on the negative reproductive health effects of customary and traditional practices, thereby inspiring the creation of effective strategies to combat the problem. This endeavor should be taken on by NGOs and, where necessary, they must seek the help of governments in collecting the data. I propose that NGOs take on this responsibility because this issue is vital for the success of the plan of action to ensure reproductive rights, and should not be left to state governments alone, because these state governments can easily be side-tracked by political concerns.

The advances to be made in the pursuit of women's reproductive autonomy in local and regional fora largely depend on the human

107. One such organization is FIDA Ghana, which is the Ghana chapter of the International Federation of Women Lawyers. This organization has been in the forefront of advocacy for women's rights in Ghana. Among its projects are a legal literacy program and a legal aid clinic for indigent women.

108. Country Report of WiLDAF Ghana, WiLDAF General Assembly (June 27-30, 1994).

109. *General Recommendation No. 19, in Report of the Committee on the Elimination of Discrimination Against Women*, 11th Sess., U.N. Doc. A/47/38 (1992).

rights instruments that have been ratified by specific countries that oblige them to ensure women's rights. Thus, women's rights advocates, in both African countries and outside of Africa, should encourage African countries that have not already done so to ratify the Economic Covenant, the Civil and Political Covenant, and the Women's Convention. For those States that advance the cultural relativism position, an effort must be made to encourage them to ratify the African Charter, because it incorporates the women's rights enshrined in all three covenants into one document.

CONCLUSION

African culture and custom, as they exist today, are a blend of African customs, imported colonial common and civil law notions, and religious concepts from Christianity, Islam, and African traditional religions. The application of these laws within the plural legal systems which are the legacy of the colonial era, and the unauthentic interpretation of customary law through this period, have left women in a very subordinate position, both socially and politically. The result is the inability of women to protect their reproductive autonomy and ensure their reproductive health. Whole communities have to be educated on women's rights in order to re-orient the thinking of society in general. Customary practices should be addressed because they subordinate women and completely deprive them of their individuality.

Customary law is not static, but changes to suit the needs of society. National law already recognizes that custom can be changed. Consequently, while it is possible to change these practices, it is important to work from the ground upwards. It is only when local remedies are ineffective or nonexistent that regional human rights complaint mechanisms can be utilized. Thus, where local remedies exist, attempts should be made to use local complaint mechanisms. In such attempts, even a failure at getting a local law passed or obtaining a declaration that a particular local custom is unconstitutional will be helpful, because it would at least put the issue of women's reproductive autonomy on the discussion table at the local level. Where no local laws exist incorporating human rights norms, governments and communities must be made to see the importance of passing specific laws banning harmful traditional practices.

International human rights norms must be linked to local laws and regional human rights instruments to make people realize that these norms are not part of an alien culture which the West seeks to impose on them. Governments that have not ratified human rights instru-

ments that ensure women's rights should be urged to do so.

Culture and custom are such a mixture of concepts that they cannot be changed without a concerted effort to attack the problem on many fronts. Simultaneous massive action for change on legal, educational, and other fronts will help us make progress in the right direction and towards women's reproductive autonomy.

