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# THE COMMODIFICATION OF WOMEN'S WORK: THEORIZING THE ADVANCEMENT OF AFRICAN WOMEN

*Tiffany M. McKinney Gardner\**

## INTRODUCTION

African States are often criticized for their treatment of women. From female circumcision to bride payment, human rights activists frequently cast African States as the worst offenders of women's rights worldwide. Such cries are often accompanied by appeals to alter African culture, custom and tradition. Calls to affect positive change in the lives of African women, for instance, have historically been argued through the theoretical lens of greater civil and political rights – rights which are often in direct conflict with cultural strictures and hence create schisms between cultural rights and women's rights. Yet, women's rights in Africa would be better protected and promoted if viewed and treated as part of a dynamic, evolving culture. African values and priorities have to be constantly reinterpreted and applied, taking into consideration the needs and demands of the contemporary, modern culture. Hence, a successful theory of gender rights will aim to articulate and project existing and deeply embedded African values, recasting them in contemporary light. Consequently, in this paper, I will argue that the campaign to improve the lives of women in Africa must take on new theoretical underpinnings. First, emphasis must shift away from a normative paradigm in which women's rights in Africa are diametrically opposed to cultural rights, and therefore any improvement in the lives of women must inherently advocate the elimination of certain cultural values and practices. Given the significance of culture in the lives of most Africans (particularly African women) cultural norms and practices must be both recognized and utilized in any successful approach to better the lives of African women. Second, emphasis must shift away from the primacy of civil and political rights for African women over economic and social rights, and we must begin to understand the former as a result of the latter. Civil and political rights and economic destiny are inextricably interwoven.

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Therefore, to fully liberate African women we must first economically empower them. As African women enjoy greater economic prosperity, advancements in civil and political rights will follow. This second observation is particularly poignant given that the majority of African women live in rural settings under immense poverty conditions; hence, the vast majority of their overall hardship is economic. Moreover, shifting focus to the economic empowerment of African women will greatly contribute to current debates over and approaches to the entire continent's economic sustainability and viability. In other words, if we are to successfully fight poverty throughout the African continent, African women, the backbone of many African economies, must be fully economically liberated and their contribution to the economy properly recognized and compensated.

Given these two observations, Section I of this paper will highlight the historical roles African women have played in the family and how these roles shifted during colonization and have since filtered down through generations and been maintained in contemporary African societies. Given that the vast majority of African women live in rural settings, I will focus this analysis on the roles of women in rural areas. In Section II, I will consider the effects such roles have had on gender justice and equality in African societies. Given that most commentary on this issue focuses on civil and political inequalities, the primary focus of this paper will be analyzing and discussing economic and social inequalities between men and women as a result of gender roles with particular emphasis on how these roles affect rural women's economic experiences upon divorce and the death of their husbands. Using a law and economic framework, Section III of this paper will discuss issues surrounding African women's domesticity and set forth the commodification of women's work as a possible remedy to the economic deprivations African women often face upon divorce and the death of their husbands. This section will also query whether such a contractarian approach to husband/wife relations can exist within rural African society. Many scholars have commented on the appeal of contractarian approaches to marriage with respect to gender equality in Western societies. Yet, none have considered the theory's usefulness in an African or developing world context, where issues of economic development are rigorously considered. Hence, this section seeks to provide a new perspective to current debates regarding economic development and approaches to women's rights in developing countries and traditional societies. Lastly, in Section IV, I will evaluate current African legal approaches, including international, regional and national law, to the advancement of women's economic rights. Even further, I will consider whether there is a place for the commodification of women's work in this legal terrain. I will conduct this analysis through an

examination of the Zimbabwean Succession Act and the Ugandan Domestic Relations bill.

I. TRADITIONAL VERSUS CONTEMPORARY ROLES OF AFRICAN WOMEN:  
COLONIZATION'S LEGACY

Life in pre-colonial Africa predominantly revolved around familial settings which were by and large governed by marriages. Marriages in the pre-colonial context were viewed less as unions between two individuals and rather as coalitions between families or, in some instances, clans.<sup>1</sup> In writing about the role and dynamic of marriages in pre-colonial Africa, Salm and Falola write: "Through marriage, new social contracts [were] made and kinship ties [were] extended. Marriages serve[d] to establish alliances between families and between communities."<sup>2</sup>

Marriages not only served to align families and clans but it also structured the economic life of communities. Given that most Africans lived in rural settings with agribusiness being the primary means of subsistence and economic gain, marriages and hence familial structures were organized in ways to best exploit the land resources available to the family. In order to maximize the marriage relationship and familial life, marital duties were assigned along gender lines. Under African custom, there were different roles and expectations for men and women. This genderization of familial life began at marriage and continued throughout the life of the couple. The following case studies provide an account of pre-colonial and present-day marriages and married life in select rural African settings.<sup>3</sup>

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<sup>1</sup> STEVEN J. SALM & TOYIN FALOLA, *CULTURE AND CUSTOMS OF GHANA* (2002). See generally Anne N. Arbuckle, Note, *The Condom Crisis: An Application of Feminist Legal Theory to AIDS Prevention in African Women*, 3 *IND. J. GLOBAL LEGAL STUD.* 413 (1996)(discussing African women's traditional role in the family and home and its implication to HIV/Aids transmission); Anne Griffiths, *Reconfiguring Law: An Ethnographic Perspective from Botswana*, 23 *LAW & SOC. INQUIRY* 587 (1998)(discussing the effects of customary and colonial law on Botswana marital relationships); Brent Wible, *Achieving the Promise of Girls' Education: Strategies to Overcome Gender-Based Violence in Beninese Schools*, 36 *COLUM. HUM. RTS L. REV.* 513 (2005) (discussing the role of forced marriages in Beninese society with respect to gender equality and education).

<sup>2</sup> SALM & FALOLA, *supra* note 1, at 130.

<sup>3</sup> I have chosen to write specifically about present-day Ghana, Malawi and Kenyan marriage practices and traditions as a survey of these practices and traditions throughout Sub-Saharan Africa. These countries provide a sampling of western, central and eastern African approaches to marriage. However, historic and

1. *Ghana*

In the Asante tradition, formal marriages fell into two primary categories: marriage between a free man and a free woman (*adehye awadie*), and marriage between a free man and a pawned woman (*awowa awadie*).<sup>4</sup>

An *adehye awadie* marriage would be formalized by both families giving and receiving *aseda* (or thanksgiving).<sup>5</sup> Upon completion of the *aseda* a strictly legal marriage would be created. Under an *adehye awadie* marriage, both spouses had specific obligations to each other – the most important of which was the husband’s right to collect *ayefare sika* (monetary damages) for a wife’s unfaithfulness.<sup>6</sup> This arrangement, however, allowed wives some level of economic independence. *Awowa awadie* marriages were contracts between a married man and his wife’s family at times when the family experienced economic hardship. This arrangement generally occurred when a man either (i) took as his wife a woman already held in pawn by him or (ii) took as his pawn his wife whom he had previously married.<sup>7</sup> *Awowa awadie* marriages largely occurred under the latter scenario when the family of the wife would ask her husband for a loan and subsequently provide her as a pawn as repayment for the loan. Although the man lost the ability to receive the monetary value of the loan, having his wife as a pawn created greater rewards for him in the marriage relationship. Most significantly, he now had greater control and influence over his pawned wife’s labor.<sup>8</sup>

Under both forms of marriage, the husband and wife coexisted under a system of conjugal production. The husband provided care and maintenance, such as meat, clothing and food crops, and the wife was called upon to provide a broad range of domestic services, such as fetching water,

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present-day marriage rituals and practices are quite similar throughout the whole of Sub-Saharan Africa.

<sup>4</sup> JEAN ALLMAN & VICTORIA TASHJIAN, *I WILL NOT EAT STONE: A WOMEN’S HISTORY OF COLONIAL ASANTE* (2000). Allman and Tashjian describe three other, less popular forms of pre-colonial marriage: marriage between a free man and a slave (*afona awadie*); levirate marriage (*kuna awadie*) and sororate marriage (*ayete awadie*). Allman and Tashjian also discuss concubinage or “the mating of lovers” (*mpena awadie*) relationships. These additional forms of marriages and relationships, however, were less popular and do not implicate gender relationships in terms of conjugal labor as readily as *adehye awadie* and *awowa awadie* do. Therefore, I will not provide a full discussion of them. *Id.* at 50.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 51.

<sup>8</sup> *Id.*

cooking, cleaning and caring for the children.<sup>9</sup> Both spouses co-labored in the fields as well. Through working the fields, under *adehye awadie* marriages, women were provided some degree of economic independence:

In most marriages between free commoners, men and women both had access to plots of family land on which they grew the staple root crops, plantains, and vegetables that formed the basis of the Asante diet. Women typically had food farms located on their family property, men had theirs on their own family's property, and spouses helped each other farm. Joint labor was mutually beneficial, and producing crops together helped ensure a steady supply of food for the couple and any dependents.<sup>10</sup>

Hence, under the *adehye awadie* marriage framework, Asante women were able to farm their own lands, which provided them some level of economic independence.<sup>11</sup> Moreover, and perhaps most importantly, during times of divorce, conjugally labored property was not divided; instead each spouse kept the land he or she maintained on their *abusua* (matrilineal family) land.<sup>12</sup> Consequently, women were protected against deprivation of the fruits of their labor during times of divorce or the death of their spouses. Additionally, since plots of land often became fallow, the ownership of collective land in the *abusua* ensured that women and their children would be cared for regardless of the state of their individual plot of land.<sup>13</sup> However, with the arrival of colonization and the subsequent economic success of cocoa production, with its creation of the monetized economy, marital relations and duties drastically shifted.

A hallmark of present-day Ghana's colonization was Britain's introduction of a monetized economy. The economy was largely carried out through cultivation of cocoa crops, the products of which were sold on international markets. As the cultivation of cocoa crops became more lucrative, husbands increasingly left their *abusua* land and purchased land in far distances to focus entirely on cocoa production. Such moves disadvantaged women in two ways. First, a woman was no longer able to cultivate her own *abusua* plot and, second, the land she did cultivate was in her husband's

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<sup>9</sup> *Id.* at 60.

<sup>10</sup> *Id.* at 61.

<sup>11</sup> Allman and Tashjian note that much of the subsistence crops planted by women were used as supplemental food for the family. *Id.* at 62.

<sup>12</sup> The Asante clan is a matrilineal tribe. *Id.* at 61.

<sup>13</sup> *Id.*

name alone. Hence, she now had no legal right to the land she worked.<sup>14</sup> Given the increased demands on labor cocoa production required and the lack of ownership on the part of women, those women who entered *adehye awadie* marriages (which were largely seen as partnerships) found that their marriages, in actuality, more aptly mirrored the *awowa awadie* marriage system. In commenting on this new dynamic, Allen and Tashjian note:

[A] woman who accompanied her husband to his distant cocoa farms often no longer had access to food farms of her own to turn to in the case of divorce, increasing even more the costs of leaving her husband. In short, conjugal labor in the production of cocoa severely undermined the reciprocity that had previously been a defining element of Asante marriage. The long-standing right of Asante husbands to the labor of their wives did not create gross inequalities in a primarily subsistence economy, so far as can be determined. But it created increasingly unequal and inequitable financial rewards for husbands and wives in the more fully monetized economy of the twentieth century.<sup>15</sup>

Additionally, as more men opted to move away from the *abusua* land and purchase plots of individual ownership, there was an accompanying drive to ensure that one's inheritance remained with those who helped work the purchased land – one's wife and children. Hence, Akan men increasingly began bequeathing purchased cocoa farms to their wives and children rather than allowing it to be held under the auspices of and for the benefit of their *abusua*.<sup>16</sup> Although this may appear beneficial to women at first blush, the effects were just the opposite. Such inheritance decisions, for instance, had dire consequences for women whose husbands did not own private land or who chose not to bequeath such land to them. As men increasingly abandoned their *abusuas* for privately owned land and bequeathed such land to their immediate family members, cultivation of *abusua* land was progressively neglected. Consequently, women who did not receive privately owned land from their husbands (for whatever reason) no longer had the benefit of relying on their *abusua* for support if the marriage dissolved or their husbands died. Moreover, even when husbands did bequeath land to their immediate family members, often it was given to

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<sup>14</sup> *Id.* at 65.

<sup>15</sup> *Id.* at 65.

<sup>16</sup> *Id.* at 107.

their sons, a decision which ultimately left their wives and daughters in vulnerable positions.<sup>17</sup>

These changes to traditional Asante life must be viewed in relation to colonization and its aftermath. The colonial administration's emphasis on monetizing the economy, as a means to maximize wealth from the colony, led to the increase in cocoa production and the changes to rural life which ensued.<sup>18</sup> Additionally, the colonial administration's creation of individual property rights and, as an ancillary, recognition of individual inheritance rights, which directly conflicted with customary law, furthered eroded the functioning of traditional marriages and women's independence within them.<sup>19</sup> Hence, as a result of colonial policies and practices, Akan women's access to the economic fruits of their labor was greatly diminished.

In Malawi, colonial policies likewise adversely affected women's economic independence.

## 2. *Malawi*

During colonialization, the colonial administration's control over land production and resources greatly affected the lives of rural women in two primary ways. First, as a means to secure greater economic gain over agricultural production, colonial administrators began encouraging the development of plantation crops wherein families would produce products to

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<sup>17</sup> *Id.* at 107-8.

<sup>18</sup> *Id.* at 62.

<sup>19</sup> In cases such as *Adjua Agyako v. Yaw Puni and Yaw Donkor and Kwasi Agyei v. Kwame Basoah*, Ghanaian native courts, under immense pressure from colonial administrators and officials recognized the inheritance rights of wives and children despite inherent contradictions in customary law in doing so. *Id.* at 111-14, 120; See generally Angeline Shenje-Peyton, *Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105, 113 (1996) ("The British made no effort to comprehend the relationships between members of an African community, nor to understand African traditional societal structure and its implications for Anglo-Saxon legal ideals such as liberty and equality. Instead, the colonialists simply placed women under the continued guardianship of men, preventing them from ever attaining full legal status. Women were, in effect, deemed 'perpetual minors' throughout their lifetimes, with control over them passing from father to husband . . . The combination of customary practice and colonial influence has resulted in the emergence of a hybrid legal regime that departs significantly from traditional customary law."). In the article, Shenje-Peyton details the ways in which colonial rule disregarded and, at times, negated African legal traditions and customs pursuant to customary law. The author posits that such practices left African women in more vulnerable positions than their status prior to colonization.



sell for international markets.<sup>20</sup> Plantation crops included both edible and non edible items such as maize, rice, beans, cotton and tobacco. Colonial administrators facilitated the evolution from subsistence cultivation to plantation cultivation by making credit facilities available to farmers. Credit facilities tied farmers to plantation cultivation since the produce of plantation crops were used to repay the loans.<sup>21</sup> As rural communities began to focus on plantation cultivation, the traditional system of labor was no longer practical. As subsistence farmers, a family unit jointly worked the land and shared in the benefits of their labor. However, as focus shifted to plantation cultivation, labor arrangements within families likewise shifted and this shift largely occurred along gender lines. Men became responsible for the cultivation and ultimate selling of plantation crops on international markets while women remained responsible for the cultivation of subsistence crops.<sup>22</sup> This arrangement allowed husbands the benefit of both total control over the family's primary source of economic gain (the plantation crops) and the ability to equally share in their wives' production of subsistence crops.<sup>23</sup> "Hence, what characterizes the mode of production associated with [plantation cultivation] is the exploitation of women by men."<sup>24</sup> Second, the advent of labor migration either inside or outside the country also had an adverse impact on Malawian women.

In 1891, British colonial administrators introduced the hut tax as a mechanism to convert pre-capitalist Malawian society into a capitalist society.<sup>25</sup> Malawians were expected to earn money for the tax from British plantations owners for whom they worked. This system of labor migration dictated that while husbands were away working on the plantations (colonial administrators often forbade husbands to bring their families along) wives remained on family plots and continued cultivating such land for the benefit of the entire family. Hence, when husbands returned from migrant labor they would have the benefit of whatever money was left over (if any) after payment of the hut tax and the benefit of whatever crops their wives had produced while they were gone.<sup>26</sup> In commenting on the effects the migratory labor system had on gender relations, Parpart notes:

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<sup>20</sup> WOMEN AND DEVELOPMENT IN AFRICA: COMPARATIVE PERSPECTIVES (Jane L. Parpart ed., 1989); See generally Arbuckle, *supra* note 1; Griffiths, *supra* note 1; Wible, *supra* note 1, Peyton, *supra* note 19.

<sup>21</sup> Parpart, *supra* note 20, at 199.

<sup>22</sup> *Id.* at 200.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 201.

<sup>26</sup> *Id.* at 200.

The exploitation of [plantation producers] and labor migrants in Malawi are, therefore, two aspects of the same historical process, and have had the same effect on the role of women in development. Both [plantation producers] and labor migrants have their positions defined by their integration into the capitalist system. Their subjection arises from the capitalist relations of production which have been superimposed on, and combined with, the pre-capitalist domestic mode of production and social relations.<sup>27</sup>

Consequently, whether one worked in plantation production or as a migrant laborer, the duty of subsistence farming fell squarely on the shoulders of one's wife who often was not recompensed for this labor.

Moreover, as plantation production and migrant labor became the primary means for monetary gain, despite the tremendous amount of work women provided for the well-being of the family through subsistence farming, women's access to capital was greatly reduced. In commenting on the position of women in Malawi society, Kandawire notes:

It is clear . . . that the women of Malawi have played and are still playing an important role in the development of the country. Their contribution is both direct and indirect . . . The contribution of women to development is crucial . . . But it is not matched with their position in society."<sup>28</sup>

It has been noted that in pre-colonial societies, including Malawi, men and women had separate but complementary roles in the agricultural process. Daddieth writes: "The extant historical evidence indicates that men and women in most African communities played separate but complementary roles in agricultural production during the pre-colonial period. During this period, the primary motivation for engaging in agricultural production was to meet the basic needs of producing households/ communities."<sup>29</sup> In meeting the basic needs of the family, men in pre-colonial societies often assisted with feminized subsistence work:

In any event, men performed a variety of tasks that were crucial to the production process. They cleared the land for planting, felled large trees, hunted or trapped game and other animals that might otherwise have destroyed the crops. Men were also responsible for building storage facil-

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<sup>27</sup> *Id.* at 202.

<sup>28</sup> *Id.* at 205.

<sup>29</sup> *Id.* at 166.

ities and they were obligated by cultural practice to help with harvesting as warranted by local circumstances.<sup>30</sup>

However, with the advent of colonialization and its emphasis on plantation crops and migratory labor, gender divisions in rural Malawi life became starker and as a result rural women's economic position and hence independence within marriages became more precarious.

### 3. Kenya

Similar to the Ghanaian and Malawian case studies, women in Kenya have been adversely affected by colonial policies and practices. Under a migrant labor arrangement similar to the Malawian system, men in colonial Kenya were often required to be away from rural areas leaving the cultivation of such lands to their wives.<sup>31</sup> In commenting on the new dynamic colonialism created, Sobania writes:

The most significant altering of traditional family life began early in the colonial period, when men were forced or drawn into the wage-earning economy. Various factors figured in this shift, including the need to pay 'hut tax' (designed to have those with more than one wife pay more because each wife had her own house) and the attraction of trade goods that could only be obtained with cash. The result was always the same. Husbands and, later, eldest sons left their wives and families behind in rural areas to move to cities and towns or large white-owned farms, where they worked for cash. The colonial government actively discouraged or forbade these men to take their families along. As a result their wives and other female family members took on still more responsibility for producing the family's food and meeting the family's needs. That is not to say that the men did not want to send money home, but given the low wages they received plus the necessity of maintaining a place to live in the city, what they could afford to send home was generally very small.<sup>32</sup>

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<sup>30</sup> *Id.* at 168.

<sup>31</sup> WOMEN AND DEVELOPMENT IN KENYA: KAKAMEGA DISTRICT (Gideon S. Were ed., 1990). See generally Arbuckle, *supra* note 1; Griffiths, *supra* note 1; Wible, *supra* note 1; Shenje-Peyton, *supra* note 19.

<sup>32</sup> NEAL SOBANIA, CULTURES AND CUSTOMS OF KENYA 135-36 (2003).

Although women overwhelmingly cultivated the land and made decisions regarding production, husbands were the ultimate decision makers with respect to the income such lands produced.<sup>33</sup> Additionally, where husbands remained at the family land, they were mainly involved with the production of plantation crops such as tea, coffee, sugarcane and cotton. The proceeds of these crops on international markets generally belonged to husbands.<sup>34</sup> In describing the dynamic within Kenyan family relationships, Ayiecho remarks:

It is already indicated that the traditional pattern of live-stock ownership has been strongly based on sex lines. The man owns the cattle, sheep and goats. However, the animal products, that is, milk, butter (ghee), and meat are processed by the woman for the general use of the family. The woman does not have any authority regarding the disposal of any of the animals except the chicken and those acquired by her efforts. The husband also receives the money obtained from the sale of the animals and their products. The decision on how to spend the money lies with the man.<sup>35</sup>

As the above text indicates, women in colonial Kenya were permitted some level of ownership over crops and farming products. However, although women held ownership in subsistence crops, the products of these crops were largely used for family consumption. Any surplus in these crops was sold at local markets. Yet, subsistence crops tended to yield very little additional produce to sell at local markets. Additionally, whatever income was realized was often used for basic household necessities.<sup>36</sup> Hence, despite some ownership ability women remained in tenuous economic positions.

Although men had control over the income produced by plantation crops, women overwhelmingly worked these lands. "Women in rural Kenya work on average about 56 hours a week, men only about 42 . Women in households that farm [plantation] crops such as tea and coffee work the most hours of any rural women – 62 total hours a week."<sup>37</sup> Ayiecho notes,

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<sup>33</sup> Were, *supra* note 31, at 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 31.

<sup>36</sup> *Id.*

<sup>37</sup> U.N. Development Programme [UNDP], Human Development Report, *Human Development Report*, 92 (MAY 22, 1995) available at <http://hdr.undp.org/reports/global/1995/en/> at 92. The report critiques the national income accounting system in its failure to recognize non-monetized work, primarily performed by women, in

[t]hough the average husband spen[t] fewer hours on the [plantation] crops than the wife he [made] the decisions regarding the disposal of the [plantation] crops produce. The money [was] often used within the family to buy the basic family needs, pay school fees and purchase the farm inputs. There [were] cases where the man squander[ed] all the money and [brought] back very little to the family.<sup>38</sup>

The marital relationship which resulted from colonization and its emphasis on international markets stands in contrast to traditional Kenyan married life, which mirrored a joint laboring and use system.<sup>39</sup>

## II. *The Status of Rural African Women: Today's Reality*

The shifts which took place in traditional married life in Ghana, Malawi and Kenya during colonization have not changed much after independence. Presently, women in these countries continue to be the primary subsistence laborers and continue to assist their husbands with cultivation of plantation crops.<sup>40</sup> Yet, the vast majority of women still do not have control over the income generated through these activities.<sup>41</sup> Such deprivations of economic access continue to have devastating effects on women throughout Africa:<sup>42</sup>

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its measure of national incomes. The report estimates that, if recognized, women's work would account for \$16 trillion, or "70% more than the officially estimated \$23 trillion of global output." *Id.* at 97. UNIFEM is currently assisting the Tanzanian government in conducting surveys in rural Tanzania to measure women's work in the home and fields – generally non-monetized work – as a component of household income. U.N. Development Fund for Women [UNIFEM], *Tanzania's National Labour Survey to Include Measurement of Women's Time in Household Economy* (October 31, 2005), available at [http://www.unifem.org/news\\_events/story\\_detail.php?StoryID=343](http://www.unifem.org/news_events/story_detail.php?StoryID=343).

<sup>38</sup> Were, *supra* note 31, at 32.

<sup>39</sup> SOBANIA, *supra* note 32. See generally Arbuckle, *supra* note 1 (discussing the prevalence and detriment to African women regarding their dependence on their husbands' income).

<sup>40</sup> Parpart, *supra* note 20.

<sup>41</sup> See *id.*

<sup>42</sup> Although the lack of land ownership is a significant cause of women's economic deprivation in rural Africa, this paper does not address this issue. This comment specifically considers the commodification of women's work as a possible answer, among the many viable answers, of women's economic deprivation and inequality in Africa. See generally Uche U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the "New" Interna-*

Women in [Africa] remain disadvantaged in terms of access to and control of economic structures and resources. This is generally due to their subordinate legal status, limited access to productive resources, such as land, technology, credit, education and training, formal employment as well as susceptibility to HIV/AIDS . . . married women do not have the same rights as their husbands over family property and decision making.<sup>43</sup>

Another indicator of the disadvantaged position of women in Africa lies in the economic contribution of African women:

In Africa, women's economic contribution is higher than in other regions [of the world]. They work almost 44% of all market hours, mainly because [of] their work in agricultural and services.<sup>44</sup>

Statisticians and researchers have long exposed the correlation between poverty and gender in what they term the feminization of poverty. Reports note that although men experience poverty, its effects are much more devastating on women. One accounting notes: "The number of women living in poverty makes up an overwhelmingly majority of more than 70 percent of the world's poor. Women living in Africa are among the poorest of the

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*tional Trade Regime*, 20 BERKELEY J. GENDER L. & JUST. 75, 85 (2005). ("Local conditions must be constantly scrutinized in any effort to unearth the root causes of women's marginalization from the global marketplace. An adequate understanding of the impact of globalization on African women inevitably calls for an understanding of the relationship between women, culture, and nation states in Africa. Do traditional customs constitute a stumbling block to the survival of women under capitalism? What has been the impact on women, in terms of their vulnerability to global market forces, of the persistence of traditional values that view them as inferior to men and deny them access to vital assets and markets? States in Africa, by embracing, endorsing, and ultimately preserving discriminatory customs and practices, deny African women the right to effectively participate in the global economy.") The article discusses another source of economic inequality among African women and men: globalization and the legacy of multi national corporations in Africa.

<sup>43</sup> U.N. Development Programme [UNDP], *SADC Regional Human Development Report*, 81 (2000) available at [http://hdr.undp.org/docs/reports/regional/SNA\\_Southern%20Africa/sadc\\_2000\\_en.pdf](http://hdr.undp.org/docs/reports/regional/SNA_Southern%20Africa/sadc_2000_en.pdf), at 81.

<sup>44</sup> Human Development Report, *supra* note 37, at 89-90.

poor.”<sup>45</sup> Such figures have dire consequences, close to 40% of the Sub-Saharan African population lives on less than \$1 a day while more than 30% are not expected to live past 40.<sup>46</sup>

In Malawi, ninety percent of the total population currently lives in rural areas.<sup>47</sup> Additionally, all women of working-age living in rural areas are engaged in agricultural production.<sup>48</sup> Such statistics hold true for Ghana, Kenya and the remainder of Sub-Saharan Africa. Sobania notes that “Kenyan women provide the largest measure of labor at the village level.”<sup>49</sup> She further notes that “[i]n Africa as a whole three-quarters of all food production is done by women.”<sup>50</sup> Unfortunately, agricultural laborers are particularly prone to poverty. The 1985/1986 report of the Household Income and Expenditure Survey estimated that 55% of rural families lived below the poverty line; in 1993/1994 this figure was 64%.<sup>51</sup> Additionally, women’s access to economic resources has become more precarious in recent times.

The commercialization of agriculture throughout Africa during the colonial period (a process which continues today) and the recent growths in population have created land scarcity and thereby increased insecurity in land resources for rural women.<sup>52</sup> As noted above, for those women who have access to land, they are often employed as free laborers for their husbands either working on subsistence family plots or co-laboring in plantation crops. Development experts have begun to recognize the benefits this free labor has had on African men’s overall economic sustainability. Dadieh, for instance, observes:

This indirect but indispensable contribution [from wives] has prevented many a male farmer from going into debt to procure additional wage labor for some weeding tasks or saved some farmers from losing the enduring battle against

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<sup>45</sup> AFRICAN WOMEN AND CHILDREN: CRISIS AND RESPONSE at X – XI (Apollo Rwomire, ed., 2001).

<sup>46</sup> *Empowering the Poor at the Local Level: UNDP Honors Women Battling Poverty in Their Communities*, Africa Recovery Online: A U.N. Publication, Africa Recovery/UN/12#2 (Nov.1998) (prepared by Jacqueline Irving), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol12no2/poverty.htm>.

<sup>47</sup> Parpart, *supra* note 20, at 196.

<sup>48</sup> *Id.* at 196.

<sup>49</sup> SOBANIA, *supra* note 32, at 135.

<sup>50</sup> *Id.*

<sup>51</sup> Rwomire, *supra* note 45, at 107.

<sup>52</sup> Parpart, *supra* note 20, at 176-78, 200-01.

weeds and rodents. It has also saved most male farmers valuable time which some have translated into other economic pursuits.<sup>53</sup>

Moreover, the products of female labor on subsistence family farms have allowed men opportunities of securing greater economic advantage.

Furthermore, proceeds from the sale of food crops [produced by women] for new and young farms have provided a source of income to tie many a [male] farmer over the extended gestation period before [plantation] crops could provide profits . . . the degree of control exercised by women over the products of their labor, that is to say the degree to which female cultivators actually account for surplus sales to their menfolk depends very much on the extent of the relationship, the level of obligation of female cultivators to the family or lineage, the age of the female cultivator, etc. In general, however, these accountings are not inconsequential and tend to benefit male farmers disproportionately.<sup>54</sup>

Some husbands recognize the significant support their wives provide their agribusiness and have begun compensating them for their labor. Compensation has come in the form of monetary payment and assistance in helping their wives establish plantation crops on their own smaller plots.<sup>55</sup> Yet, these examples are few and far between.

If women are in tenuous economic positions during the marriage, then their lot becomes even direr at the dissolution of the marriage. Under many African burial customs, upon death of the husband, his property holdings are transferred to his male heirs.<sup>56</sup> This practice often leads to property grabbing during which relatives of the deceased grab land or other property of the deceased immediately following his death, allowing the widow no time to question or object to this deprivation of property.<sup>57</sup> This property

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<sup>53</sup> *Id.* at 175.

<sup>54</sup> *Id.* at 175.

<sup>55</sup> *Id.* at 176.

<sup>56</sup> Odhiambo Okite, *Africa: Traditionalist in Conflict with Evangelicals*, Christianity Today, <http://www.ctlibrary.com/ct1999/september6/9ta030.html>. See also Peyton, *supra* note 19 (discussing the deleterious effects divorce has on Zimbabwean women).

<sup>57</sup> *Id.* See also Kenneth K. Mwenda, Judge Florence N.M. Mumba and Judith Mvula-Mwenda, *Property-Grabbing Under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience, Yet A Troubling Reality*, 37 GEO.



grabbing often leaves “widows poorer, unable to pay their children’s school fees and struggling to provide the basic necessities of life.”<sup>58</sup> Women manage no better during times of divorce. Given the role of bride payment in many rural marriages, wives are discouraged by their families from divorcing. Moreover, since in patrilineal societies children belong to the father’s family, women are further dissuaded from divorcing their husbands for fear they will lose custody of their children. Divorced, rural women face severe economic deprivations. In commenting on the struggles facing divorced women, Sobania notes:

Unfortunately, given the dominance of men in Kenya’s patriarchal society, divorced women are looked down upon and face a difficult future. Those women who have a profession and live and work in an urban area have a considerably easier time than those in more traditional outlying communities. Still, marrying for a second time for a woman is more difficult than it is for a man.<sup>59</sup>

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WASH. INT’L L. REV. 949, 951 (2005) (“When Tamara Zulu’s husband died, leaving her as the sole breadwinner, she turned to her skills as a tailor to support her five children. Then came Ms. Zulu’s in-laws. A month after the funeral, relying on tribal traditions that assign inheritance rights to relatives of deceased men, the out-of-towners swooped in and took everything, including Zulu’s only sewing machine. The suddenly destitute widow scrambled to rent tailoring equipment and feed her family. ‘They don’t even write or ask about the children . . . they don’t help you educate the children. So I have to struggle on my own.’”). *Id.* (quoting Geradine Sealey, *African Widows Left Destitute by Relatives Snatching Property*, Christian Science Monitor, May 13, 2003, at 7). The authors detail the adverse conditions many African widows and their children face after the death of their husbands, including the property grabbing that ensues by their in-laws after their husbands’ deaths.

<sup>58</sup> Okite, *supra* note 56.

<sup>59</sup> SOBANIA, *supra* note 32, at 146. *See also* Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 AM. U.J. GENDER SOC. POL’Y & L. 847 (2003) (discussing the significance of African patriarchy in divorce and domestic violence in Ghana) (2003); Arbuckle, *supra* note 1 (discussing the social and economic benefits of bearing children for African women); Griffiths, *supra* note 1 (discussing the adverse effects of African customary law on women with respect to the deaths of their fathers and husbands and divorce and the legal remedies (or lack thereof) available to them); Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459 (2002) (detailing the interplay between customary law and common law in Kenyan divorce cases and arguing that the two can co-exist within a human rights-compli-

Rural African men are overwhelmingly benefiting from the current structure of marital life and its dissolution much to the detriment of rural women. Moreover, men's labor output is increasing, while women's labor output is decreasing as a result of the burden of children, housework and caring for sick relatives. Under this structure, compensating women for their labor and contribution to the family at the time of the dissolution of the marriage, through either death or divorce, and the commodification of women's work should be considered a persuasive alternative to the current model.

Additionally, the monetization of the African economy during colonization both economically marginalized African women and deprived them of their customary African rights. As such, the impact on gender equality of colonial monetization should be seen as de-Africanizing gender relationships. The struggle for gender economic equality, therefore, is a struggle to re-Africanize gender relationships. Hence, in times of divorce or

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ant regime); Jeanmarie Fenrich & Tracy E. Higgins, *Contemporary African Legal Issues: Promises Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana*, 25 *FORDHAM INT'L L.J.* 259 (2001) (discussing the adverse treatment Ghanaian women often face during inheritance decisions); Adrien Katherine Wing, *Conceptualizing Violence: Present and Future Developments in International Law: Panel III: Sex and Sexuality: Violence and Culture in the New International Order: A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 *ALB. L. REV.* 943, 955 – 956 (1997) (“Despite a new constitution that grants equality to women, Black women are still affected by sexist presumptions found in African customary law as well as the Afrikaner, British, Coloured, and Asian patriarchy of the employers of Black women. The customary law of each Black ethnic group affects marriage, divorce, guardianship, succession, contractual power, and property rights in that group. Women remain ‘perpetual minors and lifelong wards of their fathers, husbands, brothers, or sons. . . Women [cannot] engage in contracts of any kind, acquire property, inherit, or marry without. . . permission.’ Thus, women are literally and figuratively male property”). In the article, Wing describes the ways in which African customary law serves to continue black male domination over black females while women from other racial groups, through progressive constitutional law, are afforded greater instances of gender equality. *But see* Andrew P. Kult, *Intestate Succession in South Africa: The “Westernization” of Customary Law Practices Within a Modern Constitutional Framework*, 11 *IND. INT'L & COMP. L. REV.* 697, 697 (2001) (“[I]f reform movements in other areas of law follow a path similar to the movement for intestate succession, customary law will soon be no more than an insignificant aspect in what will effectively become a completely ‘Westernized’ South Africa”). Kult cautions that campaigns to alter African customary law must consider the long term ill effects of such decisions on African culture. *But see* Juma (arguing that culture is not static but constantly changing and evolving).

death of husbands, commodification of African women's work will not only modernize and promote equality, but retrieve and defend classic African values and customs. Thus, the commodification of women's work is an integral process in the re-Africanization of the gender relationship which had been compromised during the colonial period.

### III. COMMODIFICATION OF WOMEN'S WORK: A VIABLE ANSWER?

The deprivations that African women face during divorce or the death of their husbands can be directly linked to the unrecognized value of their contributions to the marriage relationship.

Much of women's work remains unrecognized and undervalued. This has an impact on the status of women in society, their opportunities in public life and the gender-blindness of development policy . . . Women's work is greatly undervalued in economic terms. This is due in part to the restricted definition of economic activity. But part of the problem is the notion of value itself.<sup>60</sup>

Given the economic deprivation most women in the United States experience upon divorce, American feminist scholars, such as Ertman, Silbaugh and Olsen, have begun discussing and devising ways to best meet the economic needs of such women. One argument which has been advanced urges making private family law more resemble the provisions of private business law.<sup>61</sup> Ertman suggests that in treating the relationship be-

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<sup>60</sup> SADC Regional Human Development Report, *supra* note 43, at 87.

<sup>61</sup> It has been noted that several early societies, including early Chinese society, situated and conducted family life similar to the interworkings of current corporate law. RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (noting that ancient Chinese family law performed many of the functions of current corporate law). See also Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 93 (1998) ("This description of the family economy is critical to understanding my critique of the uneven enforcement of premarital agreements . . . if the monetary and nonmonetary components of a marriage make up an exchange that in most cases defines a significant part of the marriage, then treating them differently in contract law, which is the legal expression of the practice of exchange, would seem to require some serious substantive justification. In the end, the only viable explanations for their different treatment are adjudication difficulties and an inaccurate perception that only nonmonetary issues implicate child welfare.") In the article, Silbaugh critiques court decisions which overwhelmingly invalidate provi-

tween husbands and wives akin to business enterprises, and in particular closed corporations, the duties wives provide to the corporation (or family), be it labor in the formal market as paid employees or labor in the informal sector as housewives or, in terms of rural Africa, field laborers, entitle them, as employees of the corporation (or family), to certain benefits during and upon dissolution of the corporation (or marriage).<sup>62</sup> In analogizing fam-

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sions for monetary consideration for non-monetized services, such as child care, in premarital agreements.; Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983) ("The state has traditionally been expected to facilitate sacrifice and sharing within the family by ratifying the social roles assigned to family members; thus, it would be considered intervention for the state to treat the members of a family as juridical equals. At one time, for example, the father's social role entitled him to control the children. If the mother were to leave him and take the children with her, the courts would ordinarily be expected to force her to return them to him; for courts to refuse to do so would be considered state interference with the family."). Olsen posits that false dichotomies of public/private and family/market have been created to the detriment of gender equality in marital relationships.

<sup>62</sup> Martha M. Ertman, *Marriage As A Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001). See also Silbaugh, *supra* note 61; Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 89, 100 – 101 (1997) (There is substantial sociological literature documenting the way in which women's work is divided between paid and unpaid labor. Women spend substantially more than half of their working hours doing unpaid labor, while men spend less than a quarter of their working hours on unpaid labor. Women enjoy fewer leisure hours than do men. Allocating time to unpaid labor is a choice that women make in considering how to improve the circumstances of their families as well as their own circumstances. The social organization whereby more of women's work is performed in the home than men's may result from historic or current gender discrimination in law and culture, from women's socially or biologically determined greater commitment to children, or from other unexplored causes. Nonetheless, the fact that women perform more home labor should not reduce the value of that work."); Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001) (arguing for government subsidies for caretakers and illustrating the French example as a workable model for the US). *But see* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that the commodification of familial relationships may have unattended, negative consequences); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005) ("Both traditions overlook or understate the degree to which legally regulated and sanctioned economic exchange already exists within intimate relationships. As we will see, the crucial issue for the law has never been whether the legal system will regulate and sanction economic exchange between intimates; it is how the law will regulate and sanction this economic exchange, when, why, in

ily law and business law, Ertman suggests: “These analogies bridge the private/private distinction by drawing connections between private business law and private family law. They also improve upon conventional family law’s understanding of family.”<sup>63</sup> Ertman sets forth three justifications for the incorporation of business law into familial settings.

First, both business law and family law are treated as private institutions. For this reason, judges and legislators will be open to the idea of fusing the two.<sup>64</sup> Second, business law is flexible and its pliability allows it to adjust quickly to changing circumstances.<sup>65</sup> So too are marriage relationships which can change instantly, particularly with respect to a spouse’s economic position in the marriage. Third, since most marital issues revolve around financial concerns, business law’s emphasis on settling financial disagreements between parties is suited for the marriage arena.<sup>66</sup> Lastly, and perhaps most poignant for this discussion, “business models are free of the antiquated notions of status” and are free from the stereotypical gender roles and entitlements which have plagued and historically “hampered family law’s ability to adapt with the times.”<sup>67</sup>

In understanding marital relationships pursuant to business law precepts, Ertman suggests that analogizing marriages to closed corporations

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what forms, and for what purposes.”) Hasday encourages feminist scholars to focus on the economic realities and structures currently present in intimate relationships rather than debating whether such exist.; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 51 (1997) (“Some work in the home is considered spiritual: it is valued highly because it is thought to be essential to the proper functioning of the household and the moral upbringing of children. Other domestic work is considered menial: it is devalued because it is strenuous and unpleasant and is thought to require little moral or intellectual skill. While the ideological opposition of home and work distinguishes men from women, the ideological distinction between spiritual and menial housework fosters inequality among women. Spiritual housework is associated with privileged white women; menial housework is associated with minority, immigrant, and working class women.”) Roberts cautions those advocating for the commodification of women’s work to consider the effects the practice may have on those women (largely poor, immigrant and women of color) who currently perform such tasks.; Khiara M. Bridges, *On the Commodification of the Black Female Body: the Critical Implications of the Alienability of Fetal Tissue*, 102 COLUM. L. REV. 123 (2002) (discussing the adverse effects of alienability on historically disenfranchised women).

<sup>63</sup> Ertman, *supra* note 62, at 80.

<sup>64</sup> *Id.* at 81-2.

<sup>65</sup> *Id.* at 82.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

makes the most theoretical sense. Marriages and closed corporations share several unique features. First, closed corporations are much smaller than typical public corporations and are usually family run entities. Second, closed corporations “rarely separate ownership from control, since the majority shareholders often serve as officers and directors.”<sup>68</sup> Third, “close[d] corporations enjoy the special rights of limited liability and perpetual life, much as spouses enjoy special rights such as inheritance and joint parenting.”<sup>69</sup> Additionally, the law’s historical treatment of both institutions has been quite similar.

Under early English law, for instance, marriage was viewed as “a contract for the purchase of a wife, a purely private transaction, regulated, as were other contracts, for such matters of fraud, tortious interference, and breach.”<sup>70</sup> Additionally, terms of marriages were open to bargaining, such as the Irish year-and-a-day marriages, which were renewable upon the consent of both parties.<sup>71</sup> Similar to the legal underpinnings of early marital law, a corporation “may be formed for any lawful purpose, usually either for profit maximization or for a charitable or educational purpose.”<sup>72</sup> Many legal economists have noted that similar to closed corporations most marriage relationships are structured around economic profitability. Becker, for instance, notes that marriage “is simply shorthand for a written, oral, or customary long-term contract between a man and a woman to produce children, food, and other commodities in a common household.”<sup>73</sup> Perhaps most compelling, doctrinal elements of closed corporation law allow for the alleviation of gender inequality in marriages. Ertman notes: “On a concrete level, three doctrinal elements of close[d] corporation law demonstrate how the corporate metaphor might alleviate inequality within marriage: the minority shareholder cause of action for oppression and other breach of fiduciary duty; annual shareholder meetings; and claims related to ultra vires action.”<sup>74</sup>

These three elements can assist in effectively addressing inherent gender inequalities in marriages. Under a breach of fiduciary duty claim, for example, courts have held that husbands, who control marital property, owe

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<sup>68</sup> *Id.* at 113.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing Mary Anne Case & Paul G. Mahoney, *The Role of the State in Corporations and Marriage*, 2-3, 22 (Oct. 2, 1996) (unpublished manuscript, on file with the author [Ertman]).

<sup>71</sup> Ertman, *supra* note 62, at 114.

<sup>72</sup> *Id.* at 117.

<sup>73</sup> Ertman & Williams, *supra* note 61, at 330.

<sup>74</sup> Ertman, *supra* note 62, at 120.

their wives fiduciary duties. These duties include “the duty to act for the beneficiary’s benefit, the duty to forego profit accrued at the beneficiary’s expense, and the duty to avoid self-dealing and self-preference.”<sup>75</sup> Under an annual shareholder meeting rubric, spouses would be able to periodically address changes in distribution of labor and hence income.<sup>76</sup> This is particularly relevant as women begin having and caring for children and elderly relatives, and therefore are unable to participate in the labor market as they once had. Finally, under an *ultra vires* claim, this cause of action would arise when one spouse exceeds his/her authority in the corporation (or marriage) such as in misappropriating marital assets.<sup>77</sup>

The theoretical underpinnings of marriages as closed corporations assume one has access to and therefore can bring claims under United States corporate law. Yet, this is obviously not the case for women living in rural Africa. Not only are U.S. corporate law provisions unavailable to them, but the corporate law in many African countries is undeveloped. Yet, Ertman’s approach to family life has resonance in the African context and can be employed to advocate for changes to the current approach to marital relations within domestic African legal systems. Moreover, contractarian approaches to marriage buttress the legal armor rural African women have at their disposal when bringing claims against their husbands in times of divorce or against their husbands’ estates upon the death of their husbands. Finally, perhaps the most significant aspect of a contractarian approach to African marriages is its recognition of the work women provide to the family in the informal sector. Housework, childcare and, in the African context, fieldwork – all of which have traditionally been viewed as the work women altruistically provide to their families – can now be understood as having a monetary value. This necessitates compensation to those who perform such work, the application of which requires the commodification of women’s work.

In understanding marriages as contractual obligations and, in particular, within corporate law frameworks, the work which both spouses provide to the family unit is equally valued and monetized. Much like the CEO and CFO of a closed corporation, the separate roles husbands and wives play in the marital relationship allow for the survival and well-being of the entire family. Hence, if one spouse decides not to participate in or contribute to the well-being of the family enterprise, then the entire enterprise will suffer and may eventually dissolve. A husband’s economic value to the family unit is easily identifiable. In the rural African settings, it is often the

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<sup>75</sup> *Id.* at 121.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 121-22.

men who either own the plantation crops or work as migrant laborers – the two activities from which most of the family income is derived. Yet, the vital work wives provide to the family unit has historically been, at best, belittled if not outright ignored. In this context, a legal system which would allow for the commodification of women's work is quite compelling.

As noted above, a significant portion of the success of agribusiness in rural Africa can be attributed to women's work as planters and harvesters of subsistence farms and co-laborers on plantation crops. Moreover, their work in caring for the children and home also has significant value. Rural women's work and assistance in agri-enterprises allow their husbands the ability either to fully concentrate on developing the plantation crops or to travel to distant locales to work as migrant laborers. In either scenario, women go overwhelmingly uncompensated and unnoticed for the work they contribute to the functioning and well-being of the family. American feminist scholars have considered the effects this lack of acknowledgement of women's work has with respect to divorce law. Ertman notes: "Commercializing marriage makes sense because many of the economic problems divorced women face stem from the undercommodification of their contributions to family wealth . . ."<sup>78</sup>

Ertman argues that Premarital Security Agreements (PSA) would best address the issue of undercommodification of women's work. Under a PSA framework, prior to marriage, both parties would negotiate the monetary value of the work the future wife will provide to the family unit. Should the marriage dissolve (through either divorce or death), the wife would then become a secured creditor collecting the debt owed her by the husband from his remaining assets or, alternatively, his estate.<sup>79</sup> In expounding upon PSA, Ertman notes:

[a] conventional security loan agreement grants a creditor a security interest in a debtor's property to secure repayment of a loan. In the marital relationship, a PSA would grant the creditor/homemaker a security interest in marital property to secure compensation for services she has performed and her foregone opportunities for market participation. By anticipating future payment for these valuable contributions to family wealth (through sharing the primary wage

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<sup>78</sup> Martha M. Ertman, *Commercializing Marriage: A Proposal For Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 18 (1998). See also Silbaugh, *supra* 61; Silbaugh, *supra* note 62; Olson, *supra* 61.

<sup>79</sup> Ertman, *supra* note 78 at 21.



earner's income until death ends the marriage), the primary homemaker, in effect extends credit to her spouse.<sup>80</sup>

PSA arrangements would mirror Article 9 of the Uniform Commercial Code, which governs secured transactions between creditors and debtors when personal property secures the debt. In this way, the husband's unpaid obligation to his wife for her contributions to the family would attach as a lien on the husband's assets. In further exploring this lien analogy, Ertman writes:

PSAs are analogous to repair liens in that a homemaker who devotes her time to domestic labor, in order to benefit her family and maximize her wage-earning spouse's earning capacity, expects to be paid for her efforts by sharing his income stream over the years. When the marriage ends in divorce [or death], she loses out just as a mechanic who repairs a car is harmed when the owner drives away without paying the repair bill. If society makes a social judgment that repair people deserve to get paid, it could just as well make the equivalent choice to remunerate the work of homemakers.<sup>81</sup>

The commodification of women's work through PSA addresses women's rights concerns in several ways:

[it] treat[s] men and women the same; [it] accord[s] economic and social value to the homemaking work done by many women; and [it] [has] the potential to seriously undermine the constructed dichotomies of male/female and market/family by combining the powerful market role of secured creditor with the economically weak, domestic role of primary homemaker.<sup>82</sup>

Similar to Ertman's model, an African scheme of commodification and ancillary PSA approach would include payment upon dissolution of the marriage. Additionally, an African approach would necessarily require an expansive understanding of *homemaking* which would include housework and childcare as well as agricultural work and any other traditional roles women perform in rural areas.

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 55.

<sup>82</sup> *Id.* at 29.

Contractarian approaches to marriage and the commodification of women's work have been criticized on several fronts.<sup>83</sup> First, some fear that such approaches will devalue marriage and hence women's role in marriages. Second, appeals to commodify those items which are generally regarded as private matters (e.g. women's work in the home) are met with concerns over contracting out areas of life which are too sacred and special for such impersonal treatment and the concern that it will devalue their importance. Third, some believe that by commodifying women's work, husbands would acquire incentive to work less knowing that a portion of their income will go to their wives. Fourth, critics of the contractarian approach and commodification of women's work posit that such approaches will disincentive men from marrying at all. I will address these concerns in turn.

First, by placing monetary value on the work women perform, and particularly the work African women perform in rural settings, African society will begin to recognize and appreciate the tremendous amount of work such individuals perform not only for their individual families but for African society as a whole. Currently, African women in rural areas are placed at the margins of society particularly with regard to economic development. Hence, placing rural women's contributions within a market framework, and therefore in the public domain, will afford them a place of visibility they have yet to enjoy. Further,

[b]ecause status in contemporary society is so equated with income-earning power, women suffer a major undervaluation of their economic status. This is so despite their larger share of the total work burden and notwithstanding the reality that men's paid work in the market-place is often the result of 'joint production,' much of which might not be possible if women did not stay at home looking after the children and the household.<sup>84</sup>

In discussing the market's relation to women's work, Williams notes: "[s]ince many of women's activities have historically occurred outside of the market, a normative position against market reasoning about home activities is nearly equivalent to a normative position against market reasoning about women's activities."<sup>85</sup> The commodification of women's work would, therefore, allow for a normative shift in which women's work in the home is valued along-side traditional market activities.

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<sup>83</sup> *Id.* at 96-98.

<sup>84</sup> SADC Regional Human Development Report, *supra* note 43, at 97.

<sup>85</sup> Ertman & Williams, *supra* note 61, at 302.

Second, the commodification of private matters will not devalue women's importance in larger society. In addressing this concern, Silbaugh writes:

Radin asks if we can both know the price of something and simultaneously know that it is priceless. I believe the answer is yes. An important illustration of this point can be found in Viviana Rotman Zeliz[e]r's historical examination of the life insurance industry. In the first half of the nineteenth century there was tremendous public resistance to the sale of life insurance in the United States because the public took offense at the suggestion that life could be valued in monetary terms. [But] today's life insurance market does not offend most people on commodification grounds, despite its known actuarial focus. Life insurance is considered a kind and responsible purchase for family members, who do not thereby come to view the insured loved one as bearing a price. Thus, a 'price' does not unseat the understanding of pricelessness.<sup>86</sup>

The same can be said for wrongful death lawsuits. Although under tort law, juries are expected to calculate the value of the life lost, society understands that life inherently can not be monetized and that our current tort system is the best option available.

Third, commodifying women's work in the rural African setting would be no different than hiring third party laborers, which husbands already do. When paying laborers, husbands are not disincentivized to work less. In fact, the additional help may encourage the husband to work more seeing that he can now get more accomplished. Similarly, the commodification of women's work may actually incentive women to work more knowing that they will receive a larger financial reward should the marriage dissolve.

Fourth, given cultural strictures and expectations, the commodification of women's work will not discourage men from marrying. In fact, a man would be better off marrying than remaining single since as a single man he would have to hire laborers to assist with cultivation, whereas as a married man his wife's compensation will ultimately benefit him and his children.

Given the contractual nature of PSA and the contract-like negotiations and discussions present prior to and at the time of traditional African marriages, such a contractarian approach to marriage should fit squarely

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<sup>86</sup> *Id.* at 298.

within African tradition and custom. Prior to traditional marriages, for instance, would-be brides and grooms along with their families/clans, can negotiate such economic arrangements, which will take effect should the marriage dissolve. Additionally, since traditional African marriages are viewed as unions between two families rather than private arrangements between two individuals, as time progresses and economic realities shift, the underlining PSA between the two parties can be amended to reflect such changes with both families witnessing the amendments and monitoring the marriage for compliance. Moreover, and perhaps most significant, at the time of the husband's death, wives could effectively claim portions of their deceased husband's estate irrespective of patrilineal or matrilineal customary inheritance laws. It is undeniable that, under a contractarian approach, wives in rural Africa will be placed in better economic positions.

By adopting a contractarian model of marriage, we need not necessarily adopt or insist on having actual contracts. Contractarian models should be viewed as heuristic devices upon which to ground our understanding of ways in which to economically empower married African women and thereby affect greater gender equality. If a marriage is considered to be a contract (under the contractarian approach) then in the dissolution of the marriage the court or community can proceed as though there had been a constructive contract. The woman would therefore enjoy all the benefits of an actual contract without having to enter into a contract. This formulation avoids requiring rural women to enter into actual marital contracts, a process many in rural areas would likely resist.

Such an approach to rural marriages would require direct intervention into customary law and practices. Such intervention has occurred, with limited success, regarding the Luos' of Kenya burial customs. Luo women are expected to marry the brother (or equivalent thereof) of their husband upon their husband's death. This practice, known as wife inheritance, seeks to provide for the widow's economic needs.<sup>87</sup> Yet, it does not consider the number of wives the brother already has, which can determine whether the brother is realistically able to provide such support. It also fails to consider such factors as whether the widow desires to enter into such a union, and the overall physical health of the brother, the latter of which is particularly significant in light of the HIV/AIDS pandemic.<sup>88</sup> Notably, after consultation with women's rights activists and student groups, elders of the Luo tribe

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<sup>87</sup> Cathy Jenkins, *Africa: Aids Forces Change on Kenya's Luo People*, BBC News Online, (June 7, 1999), available at <http://www.aegis.com/news/bbc/1999/BB990603.html>.

<sup>88</sup> *Id.*

have begun to consider altering the practice of wife inheritance considering its possible connection to the spread of HIV/AIDS.<sup>89</sup>

Yet, customary law, the normative manifestation of long-term practices, cannot be altered overnight. Instead, there must be an intervening force – be it constitutional provisions, legislation or some other external act– which demand immediate change to customary practices. For, to wait for customary law to change by itself would take generations – time rural women do not have.

Any approach to change men's monopoly of ownership over the economic rights of women in marriages must involve targeted, gradual but significant changes to the national law of African States, including pro-women legislation. Legislation such as "Women Savings Rights," which would require every married woman to have access to some portion of her household's savings or wealth under her own name, or micro-credit financing focused on married women's economic enterprises would be ideal. Additionally, such changes would entail including provisions for the commodification of women's work in divorce and inheritance law. Perhaps most importantly, these provisions *must* be applicable to customary marriages if they are to address the plight of rural women. This way, when legal decisions are made regarding the economic rights of divorcing couples, the services wives have provided to the family unit – be it field labor, housework, childcare or all three – would be given a monetary value to which she would be entitled. Moreover, with respect to inheritance law, a similar valuing system should be put into place. This way, whoever inherits the property, be it through customary or national law, the wife would still be entitled to some share of the estate's value. Politicking for such changes to national law provisions would necessarily entail persuading legislators and other decision makers that such a move would not diverge from the current practices and objectives of the State. Fortunately, international and regional

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<sup>89</sup> *Id.* See also L. Amede Obiora, *The Issue of Female Circumcision: Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997) (criticizing theories and agendas which essentialize culture and fail to recognize or acknowledge the various social stratifications and marginalization present in the very creation of culture); David M. Bigge and Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289 (2000) (discussing the tensions between women's rights and cultural rights in traditional societies); Juma, *supra* note 59, at 475 ("Therefore, culture is not a mere 'passive inheritance.' Instead, it is 'an active process of creating meaning, not given but constantly defined.'").

agreements entered into by the majority of African States and national laws enacted by them can be employed to effectively argue this point.

#### IV. LEGAL APPROACHES: THE WAY FORWARD

Of the 53 signatories to the African Union,<sup>90</sup> the vast majority have ratified international and regional instruments regarding women's rights and provided such protections in their national constitutions. Moreover, several Sub-Saharan African States have even established or proposed legislation which directly addresses the recognition and commodification of women's work in the home. The following section provides an overview of the legal instruments developed and utilized by Sub-Saharan African States to deal with women's rights and details two instances of actions by national parliaments, one an act of parliament the other a proposed bill. Respectively, these are the Zimbabwean Succession Act and the Ugandan Domestic Relations bill. Both seek to recognize and commodify women's work in the home. All of these legal instruments provide compelling evidence and persuasion for Sub-Saharan African States to consider the inclusion of the commodification of women's work in national divorce and inheritance laws.

##### 1. *International Conventions and Covenants*

For the scope of this paper, the two international instruments I will discuss are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Political and Civil Rights (ICCPR).<sup>91</sup>

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<sup>90</sup> Signatories to the African Union are Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Republic of Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe. The only African state which is not a signatory to the African Union is Morocco, which withdrew in 1985 following the admittance of the disputed state of Sahrawi Arab Democratic Republic (Western Sahara) as a member in 1984. African Union, *available at* <http://www.africa-union.org/> (last visited Feb. 25, 2006).

<sup>91</sup> Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180 (Dec. 18, 1979), reprinted in 19 ILM 33 (1980) [CEDAW];

Of the 53 signatories to the African Union, only three States, Sahrawi Arab Democratic Republic, Somalia and Sudan, have not ratified CEDAW. Moreover, of the 50 African States which have ratified CEDAW, less than a quarter of those ratifying States (namely, ten States) have entered reservations, understandings or declarations.<sup>92</sup> The majority of such conditions came from the Islamic States in North Africa regarding the supremacy of Sharia law over CEDAW provisions.<sup>93</sup> Of the Sub-Saharan African States which made reservations, understandings or declarations, such conditions were with respect to the dispute mechanism system outlined in Article 29 of CEDAW and provisions in Article 2 regarding succession to national thrones and chieftainships.<sup>94</sup> Hence, the conditions made by the Sub-Saharan States did not implicate CEDAW's provisions regarding women's economic rights. The only Sub-Saharan African State which made conditions regarding CEDAW's applicability to the economic treatment of women was Niger. Niger's conditions stated that its current practices regarding the treatment of women are an integral part of Niger custom and therefore can not be abolished through acts of government but must, instead, dissolve through passage of time.<sup>95</sup> Niger, however, was the only Sub-Saharan State to make such a claim. Accordingly, the goals and principles of CEDAW are overwhelmingly accepted by the vast majority of Afri-

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International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 [ICCPR].

<sup>92</sup> The 10 states which have entered reservations are Algeria, Egypt, Ethiopia, Lesotho, Libya, Mauritania, Mauritius, Morocco, Niger and Tunisia. Malawi withdrew its reservation on October 24, 1991. *Id.* at Declarations, Reservations and Objections to CEDAW. *See generally* Anne Hellum, *Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism*, 25 LAW & SOC. INQUIRY 635 (2000) (discussing the role of international instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women, on domestic African legal reform); Kerri L. Ritz, Note, *Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination Against Women*, 25 SUFFOLK TRANSNAT'L L. REV. 191 (2001) (discussing the Convention on the Elimination of All Forms of Discrimination Against Women's ineffectiveness in fully protecting the rights of women throughout the world).

<sup>93</sup> The reservations of Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia are all related to Islamic law's supremacy over their obligations under the Convention on the Elimination of All Forms of Discrimination Against Women. CEDWA *supra* note 91, at Declarations, Reservations and Objections to CEDAW.

<sup>94</sup> Ethiopia, Lesotho and Mauritius made such claims. *Id.*

<sup>95</sup> CEDWA *supra* note 91, at Declarations, Reservations and Objections to CEDAW.

can Union signatories and, in particular, the Sub-Saharan African States where the work of rural women is of particular importance.

With respect to the recognition of the value of rural women's work, the pertinent CEDAW provisions are provided below:

Article 2 (f):

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to [t]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.<sup>96</sup>

Article 5 (a):

State Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>97</sup>

Article 14 (1):

State Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.<sup>98</sup>

Consequently, CEDAW expressly articulates the need for rural women to be compensated for their work in "non-monetized" sectors.

The ICCPR provides similar protection for women's economic rights. Of the 53 signatories to the African Union, only four States have not ratified the ICCPR: Comoros, Guinea-Bissau, Sahrawi Arab Democratic Republic and São Tomé and Príncipe. Of those 49 which have ratified the ICCPR, four have entered reservations, understandings or declarations: Botswana, the Republic of Congo, Gambia and Guinea. Fortunately, the condi-

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<sup>96</sup> *Id.* at Art. 2(f).

<sup>97</sup> *Id.* at Art. 5(a).

<sup>98</sup> *Id.* at Art. 14(1).



tions made to the ICCPR by these States do not implicate the status of women under the covenant.<sup>99</sup> The pertinent provisions of the ICCPR with respect to women's rights and economic freedom are below:

Article 2 (2):

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>100</sup>

Article 23(4):

State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution .<sup>101</sup>

Similar to CEDAW, the ICCPR envisions gender equality within marriages and particularly focuses on the rights of spouses at the dissolution of the marriage.

Taken together, the ratification by African States of CEDAW and ICCPR reflect their acknowledgement of the value of women's work in society, their acknowledgement that such work is often overlooked and undervalued and their acceptance that such practices are unjust and require adjustment. Although CEDAW and the ICCPR do not have enforcement mechanisms, they both operate through committees which may make recommendations, concluding observations and general comments. These observations and general comments cannot be enforced, and therefore constitute soft law. However, the very fact that African States have voluntarily committed to such instruments can be employed as persuasive evidence

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<sup>99</sup> Botswana's reservation narrows the definition of torture; the Republic of Congo's reservation narrows its obligation under Article 11 of the International Covenant on Civil and Political Rights which relates to the treatment of unfulfilled contractual obligations; Gambia's reservation deals with the availability of free legal services for the accused and Guinea's reservation is a general comment on accession to the Covenant. ICCPR *supra* note 91, at Declarations and Reservations.

<sup>100</sup> ICCPR *supra* note 91, at Art. 2(2).

<sup>101</sup> *Id.* at 23(4).

of their understanding of the value of women's work and the need to acknowledge this value in some meaningful way.

2. *Regional Agreements*

Several African regional agreements also recognize the value of women's work and the importance of economic freedom for women. For the remainder of this paper, I will discuss relevant provisions of the African Charter on Human and Peoples' Rights, the Constitutive Act of the African Union, and the New Partnership for Africa's Development (NEPAD).

The African Charter on Human and Peoples' Rights was adopted on June 27, 1981 and went into effect on October 21, 1986.<sup>102</sup> All 53 members of the African Union signed the charter, and the pertinent sections of the African Charter are as follows:

Article 2:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>103</sup>

Article 18(3):

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the

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<sup>102</sup> African Union, *supra* note 90; *See generally* Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L L. REV. 1177, 1182 (2002) ("The Treaty is merely rousing a desire without the possibility of real satisfaction, for the simple reason that Africa is a continent built out of barricades, one that slaps a bandage on its worst problems and gives up on the rest.") The article calls into question the newly organized Africa Union's ability to bring about real change with respect to human rights in Africa.; Nsongurua J. Udombana, "A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development," 13 IND. INT'L & COMP. L. REV. 185 (2002) (discussing the integration of the African Union and the New Partnership for Africa's Development and the likelihood of success of both entities).

<sup>103</sup> African Charter on Human and Peoples' Rights, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> (last visited Feb. 25, 2006).

rights of the woman and the child as stipulated in international declarations and conventions.<sup>104</sup>

Article 18(3), therefore, expressly condemns discrimination against women and incorporates international declarations and conventions on this matter, which would include CEDAW and ICCPR provisions.

The Constitutive Act of the African Union was adopted on July 11, 2000.<sup>105</sup> The act was signed by the 53 aforementioned States. One of the principle goals of the African Union can be found in Article 4(1), which reads: “[t]he Union shall function in accordance with the following principles: promotion of gender equality.”<sup>106</sup>

Lastly, the New Partnership for Africa’s Development (NEPAD), a project of the African Union, is a strategic document which provides an integrated socio-economic development framework for Africa. In July of 2001, the members of the African Union formally adopted the plan.<sup>107</sup> Those provisions of NEPAD with respect to women’s economic rights are as follows:

Article 49:

To achieve [the objectives of NEPAD], African leaders will take joint responsibility for the following: promoting the role of women in social and economic development . . .<sup>108</sup>

Article 67:

[NEPAD’s] long term objectives [are to] promote the role of women in all activities.<sup>109</sup>

<sup>104</sup> *Id.*

<sup>105</sup> The Constitutive Act, available at [http://www.africa-union.org/root/au/AboutAU/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm) (last visited Feb. 25, 2006).

<sup>106</sup> *Id.*

<sup>107</sup> The New Partnership for Africa’s Development, available at <http://www.nepad.org/2005/files/home.php> (last visited Feb. 25, 2006); See generally Nsongurua J. Udombana, *How Should We Then Live? Globalization and the New Partnership for Africa’s Development*, 20 B.U. INT’L L.J. 293 (2002) (discussing the role of the international community and globalization on the New Partnership for Africa’s Development’s success); Elizabeth Justice, *The African Union: Building a Dream to Facilitate Trade, Development, and Debt Relief*, 12 CURRENTS INT’L TRADE L.J. 127 (2003) (discussing those mechanisms, including those internal and external to African states, required to ensure the New Partnership for Africa’s Development’s success).

<sup>108</sup> The New Partnership for Africa’s Development, Art. 49, available at <http://www.nepad.org/2005/files/documents/inbrief.pdf> (last visited Feb. 25, 2006).

<sup>109</sup> *Id.* at Art. 67.

Similar to the international instruments, these regional agreements which African States have voluntarily adopted are strong evidence of their acknowledgement of the value of the work rural women perform and the need to create mechanisms whereby African women may enjoy the fruits of their labor.

### 3. *Constitutional Law*

Given that the African Union is made up of 53 States, I will focus on the constitutional law of the States discussed in Section I: Ghana, Malawi and Kenya. Fortunately, many members of the African Union have similar constitutional provisions. Given the unstable existence many women in these countries face, the constitutional law of Ghana, Malawi and Kenya, respectively, have attempted to deal with this gender crisis. In particular, the constitutional laws of all three States attempt to place women on equal footing with men with respect to individual rights. Listed below are relevant constitutional texts.

Articles 17 (1) and (2) of the Ghanaian constitution state: "(1) [a]ll persons shall be equal before the law. (2) A person shall not be discriminated against on grounds of *gender*, race, colour, ethnic origin, religion, creed or social or economic status."<sup>110</sup> Chapter 4(20) of the Malawian constitution states: "[d]iscrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, *sex*, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status."<sup>111</sup> Chapter 4(24) states: "[w]omen have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status . . ."<sup>112</sup> Chapter 4(22)(1) and (2) of the Malawian constitution state: "(1)[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or *exploitation*."<sup>113</sup> Chapter 5 (82)(2) and (3) of the Kenyan constitution state: "(2) . . . no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the

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<sup>110</sup> CONSTITUTION, Art. 17 (1992) (Ghana), available at [http://www.parliament.gh/const\\_constitution.php](http://www.parliament.gh/const_constitution.php). (Emphasis added).

<sup>111</sup> CONSTITUTION, Art. 20 (1994) (Malawi), available at <http://www.sdn.org.mw/constitute/dtlindx.html>. (Emphasis added).

<sup>112</sup> *Id.* at Art. 24.

<sup>113</sup> *Id.* (Emphasis added).

performance of the functions of a public office or a public authority. (3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or *sex* . . .”<sup>114</sup>

Although these provisions address the public sphere and thus do not implicate the private, familial sphere, their language regarding gender rights is broad enough to make an argument for the commodification of women’s work within a constitutional framework. Moreover, the Zimbabwean Administration of Estates Act and the Uganda Domestic Relations bill provide concrete examples of African States’ commodification of women’s work in national law.

#### 4. *Case Studies: Zimbabwe and Uganda*

When the facts of *Magaya v. Magaya*<sup>115</sup> came before the Zimbabwe Supreme Court, the Zimbabwe legislature realized that something must be done with respect to succession procedures of customary law and the consequent adverse treatment of women.<sup>116</sup> As a result, the Zimbabwe legislature adopted the Administration of Estates Act in 1997. In *Magaya*, the eldest daughter of Lennon Magaya’s first wife, who had taken care of her elderly parents and was promised by her father her succession to his property upon his death, sought to claim title to her father’s home upon his death when it was denied to her.<sup>117</sup> Her younger brother objected on the basis that such an act would violate patrilineal provisions of customary law.<sup>118</sup> Venia Magaya’s brother prevailed on this claim, igniting a firestorm of women’s rights and human rights activity.

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<sup>114</sup> CONSTITUTION, Art. 82 (2000) (Kenya), *available at* <http://www.lawafrica.com/constitution/index.asp>. (Emphasis added).

<sup>115</sup> *Magaya v. Magaya*, S.C. No. 210-98 (Zimbabwe, Feb. 16, 1999). *See generally* Bigge and von Briesen, *supra* note 88; Griffiths, *supra* note 1 (discussing the hurdles confronted by Botswana women in divorce and inheritance proceedings); Mwenda et al., *supra* note 57.

<sup>116</sup> HUMAN RIGHTS WATCH, FAST TRACK LAND REFORM IN ZIMBABWE (2000). *available at* <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-03.htm> (last visited Feb. 25, 2006).

<sup>117</sup> VENIA MAGAYA’S SACRIFICE: A CASE OF CUSTOM GONE AWRY WOMEN (Women in Law in Southern Africa – Malawi et al. eds., 2001) at 33 (on file with the author).

<sup>118</sup> *Id.* at 10.

The relevant provisions of the Zimbabwean Administration of Estates Act are provided below. First, Article 68E(3)(b)(3)(b)(i) and (iii)(A) and (B) states:

Where the deceased person was a man and is survived by two or more wives and had one or more children one-third of the net estate should be divided between the surviving wives in the proportion two shares to the first or senior wife and one share to the other wife or each of the other wives, as the case may be; and the remainder of the estate should devolve upon this child or his children in equal shares.<sup>119</sup>

Article 68E(c)(i) and (ii):

Where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled under paragraph (b) where they live in separate houses, each wife should get ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased persons' death, together with all the household goods in that house; where the wives lived together in one house at the time of the deceased person's death, they should get joint ownership of or, if that is impracticable, a joint usufruct over, the house and the household goods in that house.<sup>120</sup>

Article 68E(g)(i)(A) and (B):

Where the deceased person is survived only by one spouse but no children the surviving spouse should get ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person's death, together with all the household goods in that house and half the remainder of the net estate.<sup>121</sup>

Although the Administration of Estates Act attempts to take steps in the right direction, it has been criticized on several fronts. In polygamous marriages, for instance, each wife keeps the home she was living in at the time of the husband's death and the household contents. The wives then

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<sup>119</sup> Zimbabwean Administration of Estates Act, Art. 68E(3)(b)(3)(b)(i) and (iii)(A) and (B) (on file with the author).

<sup>120</sup> *Id.* at Art. 68E(c)(i) and (ii).

<sup>121</sup> *Id.* at Art. 68E(g)(i)(A) and (B).

share a third of the remaining estate, with the senior wife getting the largest share. One fundamental problem with this structure is that it does not recognize the respective work each wife puts into the family property, neither does it address circumstances in which there is not enough property to go around. This has prompted critics to suggest that “the most valuable property [should] be administered to the benefit of all.”<sup>122</sup> Additionally, the act provides that if the deceased died without children, his siblings and parents have a share of the estate. Unquestionably, this raises the risk of property grabbing by family members to the detriment of wives. Lastly, the act provides that if the deceased had a civil law marriage the customary law marriage would have to have taken place prior to the civil law marriage and be registered in order for the wife or wives under customary law to be afforded any protection under the act. Consequently, if a man previously married under customary law but the marriage was not registered and he subsequently married under civil law, the wife under customary law would not benefit from the protections of the act.

Steps similar to the Zimbabwean Administration of Estates Act have been taken in Uganda with respect to women’s rights under divorce law, where relevant provisions provide:

Article 93(1) and (2):

Where a decree has been granted terminating the marriage, the court may proceed to divide any matrimonial property between the parties to the dissolved marriage subject to any ante or post nuptial agreements the parties may have made relating to division of property. The court may, instead of dividing the matrimonial property between the parties, require one party to compensate the other party for the value of that party’s interest in the matrimonial property.<sup>123</sup>

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<sup>122</sup> U.N. Office of the Coordination of Humanitarian Affairs, *Zimbabwe: Calls for Review of Inheritance Laws*, [http://www.irinnews.org/report.asp?ReportID=43985&SelectRegion=southern\\_Africa&SelectCountry=ZIMBABWE](http://www.irinnews.org/report.asp?ReportID=43985&SelectRegion=southern_Africa&SelectCountry=ZIMBABWE) (last visited Feb. 25, 2006). See generally Mwenda et al., *supra* note 57.

<sup>123</sup> Ugandan Domestic Relations Bill, Art. 93(1) and (2) (on file with the author). See also Wendy L. Patten and J. Andrew Ward, *Recent Developments: Empowering Women to Stop AIDS in Cote D’Ivoire and Uganda*, 6 HARV. HUM. RTS. J. 210, n. 24 (1993) (“Under the Divorce Act (Cap. 215, Laws of Uganda, 1964), wives must prove not only adultery on the part of their husbands but also a second ground, such as cruelty.”) The article discusses the current status of Ugandan divorce law; Leslie Kurshan, *Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties*, 8 AM. U.J. GENDER SOC. POL’Y & L. 353, n. 37 (2002) (“ . . . in Uganda, the law

Article 94 (1) and (2):

In determining the beneficial interest of each spouse in the matrimonial home, a court shall have regard to the monetary and non-monetary contributions of each spouse to the family pool. The court shall determine the value of the non-monetary contribution and place a monetary value on it.<sup>124</sup>

Article 95(a) and (b):

Where a divorce has been granted, a court may order one party to continue maintaining the other party; or compensate the other party for any contribution made by that party towards the maintenance of the family.<sup>125</sup>

The Ugandan Domestic Relations bill is quite progressive in substance. Although the bill does not explicitly commodify the work of women in the home, Articles 94(1) and (2) advocate for the recognition of women's monetary and non-monetary work when deciding divorce settlements. This is certainly a step in the right direction and can be employed to advocate for continued change in this area. Unfortunately, however, the bill has languished in the Ugandan parliament for more than a decade and it remains uncertain whether its provisions will ever be put into law.<sup>126</sup>

Although neither the Zimbabwean Administration of Estates Act nor the Ugandan Domestic Relations bill addresses the full range of deprivations facing African rural women, their acknowledgment and valuing of the work such women provide is surely a step in the right direction. Pressure should continue to be exerted on legislators of both States to ensure that women's needs are adequately addressed in these legal measures and, in particular, pressure should be exerted to ensure that the Ugandan Domestic Relations bill is finally enacted.

These laws (even in their arguably inadequate states), alongside international, regional and constitutional law, can be used by women's rights

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does not consider women's domestic work to be a contribution toward her husband's accumulation of property. Therefore, a wife will not receive a share of the marital property upon distribution unless she can show that she made some monetary contribution towards its purchase").

<sup>124</sup> Ugandan Domestic Relations Bill, *supra* note 123, at Art. 94(1) and (2).

<sup>125</sup> *Id.* at Art. 95(a) and (b).

<sup>126</sup> Human Rights Watch, *Uganda: Domestic Relations Bill Would Save Lives* (May 31, 2005), available at <http://hrw.org/english/docs/2005/05/31/uganda11051.htm> (last visited Feb. 25, 2006).



activists throughout Africa to advocate for similar, if not more robust, changes to the laws of other African States. By employing international and regional agreements, national constitutional law, the Zimbabwean Administration of Estates Act, and the Ugandan Domestic Relations bill, along with similar legal tools, women's rights activists have an arsenal of weaponry to deploy in the fight for the full recognition and valuing of the crucial work rural women provide to the family unit throughout Africa. If successful, such a victory would revolutionize our understanding and appreciation of rural women's work and place them in positions of economic power – a status they have yet to enjoy.

#### CONCLUSION

When discussing the rule of law in Africa under colonization and the continent's attempt to free itself of the vestiges of its colonial past through progressive constitutional and domestic law development, the role of African women in this legal development and the apparent tensions between African custom and contemporary understandings of gender justice are often debated. Additionally, the role of women in Africa's economic development can not be understated when one considers Africa's most recent attempts at economic sustainability through collective initiatives such as NEPAD, and the significance of Africa's development to the larger international economic and political communities. This article attempts to tie these themes together and address an issue which implicates them all: the commodification of women's work in Africa. Moreover, this article attempts to reconcile modernity and African custom and culture. Appeals to commodify women's work and adopt contractarian approaches when dealing with the dissolution of rural African marriages are not proposed as a panacea for the various types of marginalizations facing rural African women. Issues of property rights, reproductive rights, choices in marriage partners, and so on, must also be addressed. Instead, this article is intended as a baseline in approaching these issues.

It is my hope that the arguments set forth in this piece inspire us to begin considering new approaches to old problems. Hopefully, by shifting the theoretical lens through which we have traditionally viewed African marriage and the dissolution thereof, we will begin to develop new frameworks to address the harsh realities many women face. Hopefully, too, we will begin to address the plight of those women living in one of the most difficult circumstances in our world community – rural African women.