

THE RECOGNITION OF THE HUMAN RIGHTS OF AFRICAN WOMEN

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ABSTRACT

This paper gave an overview of recent trends in international human rights law with a view to knowing how the rights of women in Africa are balanced against State and customary laws. Women's rights to self-determination are embedded in several international treaties, such as the International Convention on Elimination of All Forms of Discrimination Against Women, and the Dakar Declaration. The right encompasses the right for recognition and opportunities to challenge existing laws so as to bring meaningful change to women's lives.

Keywords: Recognition, human right, African woman

INTRODUCTION

Recognition is seen as a requirement of international law. The difficulty of this view is that some states may recognise the human rights of African women while other may not view recognition as a necessarily requirement. The other issue is that some states do not support the recognition of rights because of inadequate laws. Recognition is a political act by which the recognising state indicates the willingness to take effective measures towards 'reforming' its legal system.

The declaratory theory is the view adopted by most human rights writers that the granting of recognition of rights is a 'constitutive' and a 'declaratory act', it brings legal existence to a system that did not exist before. It's suggested that recognition is simply evidence that international law requirements are met. In some countries, the principle laws are based on religion or custom¹. They take the view that the recognition of rights is 'purely declaratory' in effect. In this context the declaratory views relates to the recognition of the human rights of African women. Why has it been slow to develop? The recognition of women's rights requires the definition of what in some African cultures perceive as the human rights of women. Do they have the potential or capacity to avail itself of all the rights and to be subject to all the duties known to the international system?

States today have the competence to perform acts, given the plethora of human rights instruments available and human rights machinery groups regionally and nationally. States are not subject to compulsory international process, jurisdiction or settlement unless they consent. The human rights of women remain an exhaustively challenging aspect of international human rights law. Some African Islamic states have considered minimum standard for the provision of women's human rights but reservation remains.

By the term 'recognition' or non-recognition may be meant an indication of willingness or unwillingness to establish the mechanism for such provisions. Where there has been a long period of discourse for greater recognition of women's rights in Africa, states may speak of their willingness to 'normalise' this. While in most cases recognition of laws will lead to the establishment of cohesive legal instruments, this is not necessarily so as the establishment of bilateral or multilateral would require consent of committed parties. It should be noted that 'recognition' itself says nothing about the nature, for example the extent, to which states agree to comply with international obligations. While there is a presumption that recognising women's rights indicates the readiness to reach a mutual consensus, for example with states, however this is not the case.

Recognition usually means that there is possibility for legal reform, and the willingness of states to enter into official dialogue. Inevitably, states will impose conditions if legal reform mean that it may conflict with existing laws, particularly countries practising Islamic law. While some human rights theorist have used the recognition of women's rights to define 'de facto' rights 'de jure' rights 'legal or legitimate rights. The use of these terms has become a defining formula of the term recognition indicating a certain nature of 'legal justification' stipulating 'the rights and guarantees enumerated in the Women's Convention². Women's rights may exist in fact, that is to say, it may be described as a 'de facto' rights unless the state indicates the willingness to enter into official agreement to reform existing laws within its capacity.

The term 'recognition or non-recognition' may also mean a manifestation of the recognising state's opinion on the legal status of the government in question. It must be emphasised that recognition does not objectively establish the legal status of women or analogue but that it simply constitute a subjective statement on

that status. In the former, recognition occurs if a given set of facts have occurred, and the latter, whereby recognition depends on whether or not the state is going to act in accordance to the principles of international law. Recognition or non-recognition of women's rights may also manifest or not, in the opinion of a secular society, that is to say they may be strong opposition deep in the rural communities and among secular groups unwilling to comply with the criteria prescribed by international law³, for the rights of African women to be recognised. Arguably, the lack of recognition of African women's rights' seems to suggest the reasons that lie behind the failure of women's rights to have greater impact in certain African countries.

The human rights movement in Angola has not developed as it may have been expected since OMA and similar women's organisations became the core voices for women's emancipation. The struggle clearly lies with the ageing leadership of the state, which is still living in the past as far as the human rights are concerned⁴. The devastation of the civil war and reported human rights abuses against civilians in various regions of Angola are proving to be an increasing losing battle for human rights activists. In general, governments may not be drawn to undertake such legal challenge; firstly it would mean scrutinising existing legal systems and what lies behind the decline or absence of women's rights movement. This type of thinking suggests that it may be better to avoid recognition altogether. Rejecting the rights of women it allows states to pass on illegitimacy in the law, and encouraging patriarchal communities to deny women of their rights.

Today, the recognition of African women's rights seems to have gained a large following. Notwithstanding fundamental violations of women's rights are still widespread in the continent. Until the recognition of African women's rights remains outside the scope of debate and political interest, the women's rights movement will stagnate.

There are many reasons why the recognition of women's rights is not being legally enforced in national laws in various part of Africa. What would be appropriate move for governments is to foster a number of legal reforms. For example in the northern part of Nigeria, religious leaders have been criticised by the international community for not doing enough against the increase abuses against women. Such 'government' may be composed of disgruntled individuals opposing legislative reform, whilst seeking to add credence to some form of public review or indeed the international community.

Can governments perform international obligations in respect of legal transactions such as making or concluding treaties, sign, ratify, or accede to multilateral treaties?

'Assuming that a state recognises its obligation to change some customary norms and practices, its motivation to bring about that change will depend on that change's relation to other state objectives and on the depth to the socio-cultural roots of the practices. Indeed, the state might not possess the necessary influence or power to proceed. Authority may be divided between the central government and regional or ethnic leaders. The supervision and enforcement of some customary laws may rest not with the state but with another body, such as a religious court official'⁵

However, the CEDAW provisions stipulate that a state's constitutional authority through a decision in a parliament is required before a government that has the competence to create and administer an adequate system of law enforcement, and civil and criminal justice⁶. It should also encompass under Article 6 of the CEDAW 'a state party to regulate specific non-government activity'. The CEDAW has provisions for such scenarios where treaties entered into but are not fully recognised. Basically, this seems to devalue the recognition of women's rights, as it does not have legal value. Despite CEDAW'S recommendations, states may only comply on exceptional cases (on issues of general importance).

There are many states that make proclamations of

recognising African women's rights. However, reports submitted to the CEDAW, indicate that such proclamations by these states, do not constitute the free and genuine expression of the will of their people. To summarise, the recognition of African women's rights, may be recognised (through binding treaty). Most often states resist being dictated on the human rights through lending instruments. Most African states consider the formal recognition of local customs as oppose to 'general principles of law' recognised by the CEDAW. The rights of women may be strengthened through addressing the corrosive impact of inequality. This can only be done by states, if they adhere to its obligation, respects and perform certain functions in accordance to CEDAW convention. This should include the collaboration of local governments, authorities, religious leaders, community chiefs and human rights activists who being representative of the national, should participate in the process of legal reform

In general, in the context of international human rights, legal reform will mean radically modifying existing traditional system of sovereign states and the nature of customary law, which does not help to create credible institutions. As mentioned in the opening of this discourse, recognition is an on-going process for people, organisations and other authorities. Whereas recognition as of women's rights or as "people" may be the ultimate goal, evolving through other processes of recognition specific to the situation the parties are in and the objectives of the parties are important to observe. In context of the CEDAW convention, was a process of requiring the performance of various legal steps towards legitimacy and recognition.

The Beijing conference (1995) was in part to deal with the agenda of women's empowerment and accelerate the implementation of the Nairobi Forward-Looking Strategy. One of the first acts of the conference was to call upon governments to report on their actions to implement the Platform for Action in the

12 critical areas of concern⁷. Now an act adopted by the African Union, the Protocol for the rights of women in Africa as it stands now.

After much acrimonious debate during the whole duration of the conference as to the desirability and feasibility of governments articulating their agendas, some governments were compelled by the need to end impunity on the violation of African women's human rights through the provision of the African Union's Charter (Article 18) and human rights guarantees in the legally binding UN International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which have not interpreted to include such acts as female genital mutilation, women's inheritance rights and other forms of discrimination against women and girls.

There is no absolute identity between the notions of that people's rights to self-determination as understood in general international humanitarian law. In other words, not all people's movement fighting to uphold their right to self-determination will be recognised by their government.

PRACTICAL PROCEDURES

In order for the rules governing the legal status of African women, the authority and organisations representing the women in their struggle to self-determination must explore the changing nature of gender inequality in contemporary African society and focus in building a coalition to combat social justice and gender inequalities. African women's organisations must thus be an organised force under responsible command, demanding from their respective government's compliance with the CEDAW convention, including institutional capacity to carry out its undertaking to apply the Protocol and Convention.

PRACTICAL STEPS TOWARD RECOGNITION

The struggle for recognition of women's rights can be a long and arduous process for many groups, organisations and authorities. The author intends to review some of the practical steps taken by such organisations and ask whether such steps have enabled them to improve the legal status of women in Africa. These services include education and training in the fields of international and human rights law, democratic processes and institution building. At the same time practical steps towards recognition by such groups for example, in the area of conflict management and conflict prevention. There is also the force of the law in these legitimate jurisdictions to limit the free expression of peoples in that jurisdiction whom the jurisdiction feel, rightly or wrongly, are a threat to traditional legal systems. The issue here is that these conflicts within the legal system are often ignored.

THE POSITION OF AFRICAN WOMEN UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Since the Copenhagen conference (1993) there have been innumerable developments on international human rights instruments providing protection for women. Thus, calling upon state parties to comply with international obligations and put in place affirmative action to improve the legal status of women. Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been significantly important in providing international legal standards protecting the rights of women and monitoring governments who have ratified the convention to comply with the recommendations made by CEDAW and the UN. For the last 10 years, a number of positive jurisprudential and structural developments have been observed in the continent. Following the Rwanda 1994 genocide, the international tribunal statute and International Criminal Court's (ICC) known as the Rome Statue have developed precise legal

standards and have set jurisprudential benchmarks for the prosecution of war perpetrators directly involved in the gross massacres during the 1994 conflicts and future conflicts engendering violations.

The most significant part of this international legal text is that it recognises gender as an integral part of human rights theory. The CEDAW further calls upon states to show more on the rule of law, extended to women's rights and policies recommended by international human rights organisations and the compilation of work produced by national women's groups. The African Charter on Human and People's Rights presents good human rights instruments with the additional Protocol to the African Charter on women's rights, which came into force under the African Commission of Human and People's Rights. The appointment of the Special Rapporteur on the Rights of women in Africa is responsible for ensuring the promotion and protection of human and people's rights throughout the African continent, which is being monitored on adopted resolutions as well as presenting reports on the fact-findings on the status of women worldwide at the international conferences.

Thus far, there have been 179 ratifications - over ninety percent of the members of UN - are parties to the convention, accessions and successions, of which forty-six African countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Namibia, Mali, South Africa and Senegal currently the only Africa countries to ratify the Optional Protocol to CEDAW⁸ which presents the procedure for filing complaints to either the Human Rights Ombudsman or in cases of serious human rights violation, it can be presented to the International Treaty Committee. The Optional Protocol also welcomes individual complaints presented by the sub-commission working groups.

THE ACCULTURATION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS IN AFRICA

The positive response of states parties to the CEDAW convention has slowly promoted a call for change in the African continent particularly on issues of gender equality in the socio-economic spheres; much of this achievement has been possible due to the diligence of women's machinery groups and the support of international agencies. The complacency of certain states rejecting the recommendations of the CEDAW is startling. Some of the Islamic states approved the references made towards the Shari'a law (Islamic law). There were several reservations towards the recommendations made by CEDAW which some Islamic states believed that it could undermine Shari teachings.

The review of the Beijing Platform For Action (BPFA +5 and +10) had not only reminded state parties and stakeholders with the impetus and mandate to do much more in the process of mainstreaming the BPFA from national testing to providing a foundation for formulation of gender-sensitive policies and programmes.

In order to understand why sophisticated initiatives such as the BPFA are often undoable, it is necessary to consider less the political and more on why systematic roots of gender inequalities are is often equated to social and cultural norms and oppressive systematic structures. This would require an understanding of the different needs of men and women such as, resources, power, norms and values. They are further affected by policies in different ways and hence experience development differently. But all have the right to share in the benefits of development. Of key concern are the inequalities in the divisions of responsibilities, and access to and control over resources. Gender relations within the household are important in determining women's life outcomes, as are gender relations within other institutions such as the community and the

State. In addition, other aspects of social differentiation which cross-cut gender such as class, ethnicity and women's access to justice - cannot be ignored.

Therefore, this discourse on the recognition of the rights of women is conceptually a human rights discourse, in a political context, it becomes a political one per se. It is the political practice that has indoctrinated in the minds of the people and those who defend the ill-practices of traditional structures that more than often have a propensity to challenge the domestication process and enforcement of those rights into legal systems⁹. While no doubting the efforts of state parties to address such socio-economic inequalities determining women's knowledge and access to the law; lack of the ability to exercise full legal rights without fear of recrimination or intimidation from relatives and the community in general.

This, therefore, necessitates a thorough understanding of the relationship between existing legal systems which are also imperative if law reform it to be fruitful. Africa women are still largely affected by customary and religious laws. One such country that continues to call the attention of the international community is Sudan. There have been numerous attempts to explain why the catalogue of violence and human rights abuses towards the people of Darfur and other affected regions is unfathomable, and quite rightly a failure of the legal system. The incessant power struggle between the northern and southern government has only exacerbated the reported violence in the Sudan. The situation is critical, more so, as the country is nearing to the referendum which will determine the future for the southern government- the right to self-determination and equal control of the countries resources.

The hallmark of Shari' a law in the Sudan is the dominance of older male members over property and lives of their juniors and women. In looking at the legal status of women in the Sudan and

indeed in other parts of Africa, one has to look at both in the international and domestic dimensions. Patriarchal States often raise the status of customary practices in the hierarchy of applicable laws, and thus becomes part of the community norms which governs behaviour in a wide spectrum of sphere and codification and integration of laws.

Even where women's legal rights have been provided for, most African governments are still a long way from drafting bill of their Constitution and adopting most of the provisions (e.g. international instruments etc) that are favourable to women. In order to achieve this, governments must forensically comb through all their laws to align them to the constitution, as the constitution only provides the framework. These laws and others need to be revised along the lines of the draft bill. This is an enormous task that should involve a number of stakeholders, from the Gender Commission, Attorney-Generals Offices, human rights experts and civil society engagement.

CONCLUSION

The effectiveness of the laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. This requires broad-based campaigns to educate society on the benefits of gender equality and to diffuse tensions between the genders as well as legal education on the substantive rights and procedures to enforce the same.

NOTES

¹Gierycz, Dorota, Human Rights of Women at the Fiftieth Anniversary of the UN, Human Rights of Women, International Instruments and African Experiences, Zed Books, 2002.

²See case No.35 Ephrahim v Pastory and Kaizilege, High Court of Tanzania.

³It must be observed that the criteria of a certain status need not necessarily be prescribed by international law. For example the African Union have indeed been instrumental in raising awareness on the rights of African women, and developing a legal framework to ensure that there is a continuity of legal reform in respect of the rights of African women. Its preamble justifies the adoption of the Optional Protocol on the Rights of Women in Africa, precisely to promote and allow women to fully enjoy their rights. Theoretically, it may be viable, but certainly for any legal mechanism to take effect it ought to be administered by legal experts and by outside intervention.

⁴Sethni H., Smitu Kothari and, Rethinking Human Rights: Challenges for Theory and Action, The International Human Rights in Context, Henry J. Steiner and Philip Alston, Oxford University Press, 1996.

⁵Engle, Karen After the collapse of the Public/Private Distinction: Strategising Women's Rights, International Human Rights in Context, Oxford University Press, 1996.

⁶See CEDAW provisions. <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

⁷See the UN Division for the Advancement of Women, elaborating on the 12 critical areas of concern. <http://www.un.org/womenwatch/daw/beijing/>.

⁸See CEDAW provisions. <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

⁹See Aukot, Ekuru, The Constitutionalisation of Ethnicity: Protecting Ethnic Minority in Kenya, The University of Nairobi Law Journal, Vol.1, 2003.