

WIDOWS AS 'CULTURAL TOOLS': TRANSLATING WIDOWS' RIGHTS INTO LOCAL
REALITIES IN UGANDA AND NIGERIA

A Thesis Submitted to the
College of Graduate Studies and Research
In Partial Fulfilment of the Requirements
For the Degree of Master of Laws
In the College of Law
University of Saskatchewan
Saskatoon

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ABSTRACT

This thesis examines the persistent widespread discrimination against widows in Uganda and Nigeria that results from mandatory observance of harmful widowhood rituals, interpersonal violence, disinheritance, and forceful deprivation of property in marriage, in violation of and contrary to the provisions of international and regional human rights conventions and domestic laws. The thesis argues that international, regional, and domestic laws have not been effective to address the violation of widows' rights because the terms in which these laws are expressed are not meaningful at the grassroots level.

The thesis proposes social, cultural, economic, and legal measures to address the use of widows as cultural tools. In this thesis, I use the term 'cultural tools' to refer to the use of widows in Uganda and Nigeria, as in many other sub-Saharan African countries, as embodiments of cultural identity, especially in most parts of rural areas. Widows are used as tools to perpetuate traditional cultural customs such as widowhood rituals, levirate marriages, disinheritance, and widow cleansing.

Article 9 of the *Universal Declaration of Human Rights (UDHR)* proclaims that "all human beings are born free and equal in dignity and rights". This provision is complemented by various international and regional instruments on discrimination and gender equality. Using the Igbo tribe of the Eastern part of Nigeria and the Baganda tribe of Uganda as case studies, my thesis examines to what extent widowhood rites amount to an infringement of the human rights of the widows in most part of the sub-Saharan African countries.

The thesis examines the various international, regional, and domestic laws as they apply to or affect Nigerian and Ugandan widows either as a consequence of their status as widows or as members of the community. Thus, in light of the gap between international and state laws, on the one hand, and cultures and customary law on the other hand, this thesis draws insights from the concept of "vernacularization". This approach combines the views espoused in Sally Engle Merry's work and argues that to change the cultures and practices of customary law on the ground, initiatives must be taken at the grassroots level.

ACKNOWLEDGEMENT

First and foremost, to Almighty God who makes everything beautiful in his own time. His grace has kept me standing up till now. I also gratefully acknowledge the College of Law, University of Saskatchewan, for the financial support for the duration of my LL.M program. Sincerest gratitude to my supervisor, Professor Lucinda Vandervort, who supported me throughout with her motivation, patience, and immense knowledge whilst allowing me the room to work in my own way. One simply could not wish for a better or friendlier supervisor. I gratefully acknowledge other members of my Advisory Committee: Professor Ibronke Odumosu-Ayanu and Professor Isobel Findlay for their insightful comments, guidance, and hard questions.

I am forever grateful to my parents, by whose channel I came into this world. Thank you for your unending support and for giving up a lot for me. To my siblings, Folashade, Adedayo, and Adeyinka, thank you for believing in me.

I gratefully acknowledge the Law Foundation of Saskatchewan for funding my participation at the Law and Society Association in Minneapolis, USA. The experience and feedback positively influenced the outcome of my thesis. I also acknowledge my colleagues Benjamin, Violet, Mobolanle, Olufunmilola, and Ugochi for their moral support and encouragement.

Finally, many thanks to the Sajobis, Nifemi Falade, Ola Fagbodun, Olufisayo Lawal, the Adetakuns, the Popoolas, the Oyinlolas, and the Ugwus for their support and concern.

DEDICATION

This thesis is dedicated to over 245 million widows all over the world.

TABLE OF CONTENTS

Permission to Use	i
Abstract	ii
Acknowledgements	iii
Dedication	iv
Table of Contents	v
CHAPTER ONE- THE WORLD OF WIDOWS	1
1.0 Overview of the Work	4
1.1 Factual Background	10
1.2 Historical Background of the Federal Republic of Nigeria.	13
1.2.1 Federal Republic of Nigeria	13
1.2.2 Nigeria Legal System	14
1.3. Sources of Nigeria Laws	15
1.3.1 English Law	15
1.3.2 Nigerian Legislation	16
1.3.3 Customary Law	16
1.4 Historical Background of the Republic of Uganda	19
1.4.1 The Republic of Uganda	19
1.4.2 Uganda's Legal System	20
1.5 Widowhood Practices among the Igbos of Nigeria	21
1.6 Widowhood Practices among the Bagandas of Uganda	23
1.7 Problems Associated with Widowhood	24
1.8 Becoming a Widow	25
1.9 Conclusion	27
CHAPTER TWO - RIGHTS OF WIDOWS IN SUB-SAHARAN AFRICA IN THE CONTEXT OF INTERNATIONAL AND REGIONAL CONVENTIONS	29
2.0 Introduction	29
2.1 <i>The Universal Declaration of Human Rights (UDHR)</i>	30
2.2 <i>International Covenant on Civil and Political Rights (ICCPR) & International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	31

2.3	<i>Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)</i>	34
2.4	<i>Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women</i>	37
2.5	International Human Rights Conferences aimed at Promoting Women’s Rights	39
2.6	International Bodies Advancing the Causes of Women’s Rights	41
2.7	<i>The African Charter on Human and Peoples Rights</i>	42
2.8	<i>The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa</i>	47
2.9	<i>The African Commission on Human and People’s Rights</i>	52
	Conclusion	55
 CHAPTER THREE- RIGHTS OF WIDOWS IN SUB-SAHARAN AFRICA IN THE CONTEXT OF DOMESTIC LAWS		 57
3.0	Introduction	57
3.1	Customary Practices Applicable in Uganda & Nigeria	59
3.1.1	Property Disinheritance of Widows under Customary Law	59
3.1.2	Widow Inheritance / Levirate under Customary Law	61
3.1.3	Ritual Cleansing / Widow Cleansing under Customary Law	63
3.2	The Doctrine of Repugnancy Test	66
3.3	The Constitutional Position of Uganda & Nigeria on Widows	68
3.4	Family Laws in Uganda & Nigeria	70
3.4.1	The Status of Widows under Marriage Laws in Uganda & Nigeria	70
	3.4.2 The Status of Widows under Wills, Intestacy, Land & Succession Laws in Uganda & Nigeria	74
3.5	Judicial Gender Bias and the Status of Widows under Wills, Land, Intestacy, and Succession Laws in Uganda and Nigeria	76
3.6	Few Steps Forward: Court Interventions towards Equality and Non-Discrimination of Widows	78
3.7	Legislative Initiatives in Uganda and Nigeria Relating To Widows	79
	3.7.1 Other Nigeria and Uganda Legislative Initiatives Relating to Widow- hood, Sexual Violence, and other forms of Inter-personal Violence	81
	3.7.2 Uganda Land Alliance	84
3.8	Conclusion	84

CHAPTER FOUR- CONCLUSIONS AND RECOMMENDATIONS	87
4.0 Introduction	87
4.1 The Grassroots Approach	89
4.1.1 “Human Rights in the Vernacular”	89
4.1.2 Translating Widows Rights into Local Reality	90
4.2 Cultural Remedial Measures	92
4.2.0 Persuasion	92
4.2.1 Change in Societal Attitudes	93
4.2.2 Organising Gender Equality Training Programs	93
4.3 Socio-Economic Measures	96
4.3.0 The Role of Education	96
4.3.1 Economic Empowerment	97
4.4 Legal Measures	98
4.4.0 The Role of Judges	98
4.4.1 Strengthening Existing Enforcement Mechanisms & Developing New Ones	102
4.5 Other Remedial Measures	104
4.5.0 The Role of the Media and the Arts	104
4.5.1 The Role of Feminists, Legal Scholars/ Individuals	105
4.5.2 The Application of Gender Mainstreaming	105
4.5.3 Adequate Access to Justice	107
4.6 Conclusion	109
 BIBLIOGRAPHY	 111

CHAPTER ONE

A WORLD OF WIDOWS¹

This thesis examines the persistent widespread discrimination against widows in Uganda and Nigeria that results from mandatory observance of harmful widowhood rituals, interpersonal violence, disinheritance, and forceful deprivation of property in marriage, in violation of and contrary to the provisions of international and regional human rights conventions and domestic laws. The thesis argues that international, regional, and domestic laws have not been effective to address the violation of widows' rights because the terms in which these laws are expressed are not meaningful at the grass-roots level.

The thesis proposes social, cultural, economic, and legal measures to address the use of widows as cultural tools. In this thesis, I use the term 'cultural tools' to refer to the use of widows in sub-Saharan African countries as embodiments of cultural identity, especially in many parts of the rural areas. Widows are used as tools to perpetuate traditional cultural beliefs and customs, such as widowhood rituals, levirate marriages, disinheritance, widow cleansing, and other practices.

The thesis further argues that to ignore the rights of widows in sub-Saharan African countries is to condone the violation of the basic human rights of the most neglected of women. Article 9 of the *Universal Declaration of Human Rights (UDHR)* proclaims that "all human beings are born free and equal in dignity and rights."² This provision is complemented by various international and regional instruments that address discrimination, gender equality, and the

¹This title was adopted from Margaret Owen's book titled *A World of Widows*. In the book, the author recalls her adjustment to widowhood as being painful and traumatic despite the fact that she lives in the West where there ought to be no legal or institutional discrimination against widows. Her experience as a widow depicts the fact that widows, regardless of their status, suffer losses in society. See generally, Margaret Owen, *A World of Widows* (London & New Jersey: Zed Books, 1996) at vii [Owen].

²*Universal Declaration of Human Rights*, 10 December 1948, 213 UNTS 176, (entered into force 10 December 1948). [UDHR].

right to be free from every form of inhuman and degrading treatment or punishment.³ However the freedom, dignity, rights, and equality of most widows in sub-Saharan Africa countries continue to be compromised by the “interpretation of customary codes which impose traditional mourning and burial rites on widows that widowers are not required to perform, hence denying widows most of their universally recognised rights.”⁴ As a group, widows are vulnerable women whose numbers include about “245 million people in the world.”⁵ Many, but not all, are denied their right to own and inherit property, to education and adequate healthcare, to be free from violence in all its forms, and to equal opportunities in the workplace. They are often economically disempowered and lack sufficient means to survive let alone thrive.

Against this background, the thesis focuses on widowhood practices of the Igbo ethnic group in the Eastern part of Nigeria and the Baganda ethnic group of Uganda. These two tribes in sub-Saharan Africa are discussed in this thesis because they are representative of the practices and circumstances of other ethnic groups in some sub-Saharan African countries. The relevant circumstances include, firstly, the geographical location of their respective countries and the community practices, problems and effects associated with widowhood practices. Second, due to colonization, Nigeria and Uganda both have pluralistic legal systems that combine customary law with elements derived from the British legal system, and post-colonial legislation and jurisprudence. Although Uganda and Nigeria can be regarded as being “receptive to social changes, many customary practices have survived this transition. Widowhood rites and practices are among them.”⁶ One major cause of the lack of change in these widowhood practices may be the subjugation, oppression, and objectification of African

³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force on 23 March 1976)[*ICCPC*]; *UDHR*, *supra* note 2; *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200 (XXI), UNGAOR Supp No 16, UN Doc A/6316 (1966)[*ICESCR*].

⁴ “Reduce Widows Suffering by Raising Their Status in their Hour of Need,” *The United Nations SG/SM/13655 OBV/1008/ WOM/1865* (6 July 2011), online: United Nations < <http://www.un.org/News/Press/docs/2011/sgsm13655.doc.htm> >.

⁵ *Ibid.*

⁶ M. A Sossou, *Widowhood Practices in West Africa: The Silent Victims*” (2002) 11 *International Journal of Social Welfare* 203.

women by the men. As an anthropologist rightly asserted, “African women have been placed in a position and status that is in so many ways inferior to that of African men.”⁷

Apart from examining the mandatory observance of harmful widowhood rituals in Nigeria and Uganda, this thesis identifies other cultural issues affecting widows that are of great concern in spite of the laws put in place at the international, regional, and national levels.⁸ A major example is interpersonal violence. Interpersonal violence against women, regardless of the form it takes, affects the lives of women worldwide.⁹ Violence can be either physical, sexual, or psychological.¹⁰ It includes “but is not limited to domestic violence, assault, sexual abuse, rape, sexual harassment, sexual assault, women trafficking, dowry-related violence, honour crimes, disinheritance, property-grabbing, female genital mutilation (FGM) and other forms of harmful traditional practices.”¹¹ One major factor that contributes to interpersonal violence among women around the world is “women’s subordination to men as regards cultural and traditional practices.”¹² Although not a legally binding document, the *Declaration on the Elimination of Violence against Women (DEVAW)*¹³ states in its preamble that “violence against women is a manifestation of historically unequal power relations between men and women.”¹⁴ Hence, because “social constructions of gender often dictate

⁷ A. Imam, “The Presentations of African Women in Historical Writings” in S.J Kleinberg, ed., *Retrieving Women’s History* (New York: Berg Publishers, 1988) at 35.

⁸ Ebenezer Durojaye, “Women, but not Human’: Widowhood practices & Human Rights Violations in Nigeria” (2013) 27 *International Journal of Law, Policy and the Family* 176 at 177.

⁹ According to the World Health Organisation, between 15-71% of women experienced some form of violence inflicted by their partner. See generally, Violence & Injury Prevention, *Prevention of Intimate Partner & Sexual Violence (Domestic Violence)*, online: World Health Organisation < http://www.who.int/violence_injury_prevention/violence/sexual/en/>.

¹⁰ Patrizia Romito et al, “The Impact of Current and Past Interpersonal Violence on Women’s Mental Health” (2005) 60 *Social Sciences & Medicine* 1717 at 1718.

¹¹ Johanna Bond, “Violence against Women” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda, and Tanzania* (Durham: Carolina Academic Press, 2005) 75.

¹² *Ibid* at 76

¹³ *Declaration on the Elimination of Violence against Women*, G. A Res. 48/104, U.N.GAOR, 48th Sess., Supp. No. 49, at 217 (hereinafter called *DEVAW*).

¹⁴ See generally, the preamble of *DEVAW*.

that men enjoy more power and privilege than women in their families and communities, men sometimes use violence as a tool to ensure women's adherence to this construct."¹⁵

Uganda and Nigeria are parties to a number of international and regional conventions.¹⁶ In addition, the domestic laws of both countries contain many provisions addressing women's rights. For example, article 21(2) of the 1995 Ugandan constitution provides that "all people are equal before the law and that discrimination based on sex, race, social or economic standing, or disability is prohibited."¹⁷ Likewise, section 15(2) of the 1999 Nigerian constitution states that "national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic, or linguistic association or ties shall be prohibited."¹⁸ Other provisions applicable to women enshrined in the Nigerian and Ugandan constitutions include the right to own property individually or in association with others,¹⁹ the right to equality,²⁰ and the right not to be subjected to torture, or other cruel, inhuman, or degrading treatment or punishment.²¹

1.0 OVERVIEW OF THE WORK

This thesis is intended to "revisit the often-neglected subject of widows"²² that is of utmost concern in sub-Saharan African countries with particular emphasis on Nigeria and Uganda. Issues such as widowhood rituals, disinheritance, interpersonal violence, and customary practices such as widow cleansing and widow inheritance, illustrate women's inequality within the society and their fight and struggle for substantive gender equality. These issues are of fundamental importance for a number of reasons.

¹⁵ Bond, *supra* note 11 at 76.

¹⁶ See generally, *ICCPR*, *supra* note 3, *UDHR*, *supra* note 2; *ICESCR*, *supra* note 3.

¹⁷ The Government, *The Constitution*, The State House of Uganda, online: < <http://www.statehouse.go.ug/government/constitution>>. [*Ugandan Constitution*].¹⁸

The Nigeria 1999 Constitution, online: < <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>. [*Nigerian Constitution*]

¹⁹ *Ugandan Constitution*, section 26; *Nigerian Constitution*, section 43.

²⁰ *Ugandan Constitution*, section 21; *Nigerian Constitution*, section 42.

²¹ *Nigerian Constitution*, sections 34 & 35.

²² Sossou, *supra* note 6 at 201

First, “the study of women as a vital and autonomous social force, as well as the treatment of their wealth and woes, is an intrinsic part of the overall social dynamics of every society.”²³

Recognizing the rights of widows therefore improves every society’s productivity, income, and economic development, and contributes to a better quality of life, including a healthier and better nourished population.²⁴

Exploring and examining the conditions in which widows live in many different cultures and countries is necessary because widowhood leaves them largely unprotected, despite the various provisions enshrined in international/regional conventions. Statistics show that widows of all ages,²⁵ backgrounds, and cultures are subjected to multiple forms of discrimination, neglect, cultural, physical, emotional, and psychological oppression and abuse.²⁶ In addition, the treatment of widows as dependents, whose legal, economic, and social status is derived from their relationship to the family, denies them the right to personal ownership or inheritance of property.²⁷ In many patriarchal societies the widow herself is regarded as property to be inherited by her late husband’s relatives.²⁸

Second, this thesis asserts, yet again, that human rights are women’s rights and women’s rights are human rights,²⁹ and therefore it is important that widows are educated about human rights so that they can assert and “exercise their rights as women and human beings,” and understand that some cultural norms operate against their social well-being and

²³ *Ibid.*

²⁴ Jejeebhoy J. Shireen, *Women’s Education Autonomy, and Reproductive Behaviour: Experience from Developing Countries* (Oxford: Oxford University Press, 1995) at i.

²⁵ Shilpa Kannan, “India’s Abandoned Widows Struggle to survive,” *BBC News* (13 October 2013) online: BBC News < <http://www.bbc.com/news/business-24490252>>; Sossou, *supra* note 6 at 201.

²⁶ Sossou, *supra* note 6 at 201.

²⁷ Cynthia Grant Bowman & Akua Kuenyehia, *Women and Law in Sub-Saharan Africa* (Ghana: Sedco Publishing, 2003) 182.

²⁸ Katarina Tomasevsk, *Women and Human Rights* (London & New Jersey: Zed Books, 1993) at xiii [Tomasevsk].

²⁹ Phumzile Mlambo-Ngcuka, “Beijing +20: Empowering Women, Empowering Humanity: Picture it!,” *UN Women* (22 May 2014) online: UN Women < <http://beijing20.unwomen.org/en/news-and-events/stories/2014/5/phumzile-mlambo-ngcuka-un-women>

development.³⁰ Therefore, as widows, they should not willingly subject themselves to any form of interpersonal violence or to dehumanizing rituals in order to appease their dead husbands.

Third, this thesis reviews various international, regional, and domestic laws to determine in what respects those laws are inadequate to protect widows from (1) various widowhood rituals that affect their right to equality and non-discrimination, dignity, personal liberty, and the right to be free from inhuman and degrading treatment or punishment and (2) deprivation of their rights to own or inherit property, especially in the case of widows in the rural areas whose lives are largely governed by customary law.³¹

This thesis would not be complete without a critical analysis of the influence of culture and how it has limited the rights of widows. As aptly observed by Cerna and Wallace, “no discussion of the rights of widows is complete without an analysis of the influence of culture.”³² According to Cerna & Wallace, “Culture is the context within which society functions...culture defines our identity and determines who we are...Culture is the totality of the knowledge and practices and this includes values, customs, norms, beliefs, practices, and behavioral patterns”.³³ Thus, cultural traditions affect everything we do, how we act, communicate and most importantly, the rules and beliefs that governs our interactions.

It must be acknowledged that culture is not always an impediment to the promotion of women’s rights. Culture can be beneficial, especially in instances where “women find a support system within their particular community who share their burdens.”³⁴ But, in general, culture is a major obstacle to the realization of widow’s rights in Africa. It impedes the empowerment of widows and in most extreme cases, threatens their health and survival, especially for those living in the rural areas. As a feminist scholar noted, “no social group has

³⁰Sossou, *supra* note 6 at 202.

³¹Widows in the rural areas are the primary focus of this thesis. This is because widows living in rural areas are mostly affected by the interpretation and application of customary law.

³²Christina M. Cerna & Jennifer C Wallace, “Women and Culture” in Kelly D. Askin & Dorean M, eds., *Women and International Human Rights Law*, (New York: Transnational Publishers, Inc, 1999) 623 [*Cerna & Wallace*].

³³*Ibid* at 624.

³⁴*Ibid*.

suffered greater violation of its human rights in the name of culture than women, regardless of the particular forms it takes in different societies, the concept of culture in the modern state circumscribes women's lives in deeply symbolic as well as immediately real ways.”³⁵

This thesis acknowledges the existence of conflicting views about human rights, cultural relativism and cultural universalism as they affect widows in the society.³⁶ However, the thesis focuses on effective implementation of international human rights laws that apply to and should protect women, and most especially widows, in sub-Saharan African countries. The focus is on effects, outcomes, and finding a way forward towards improved well-being for widows, and their communities.

In this thesis, I argue that, as yet, the applicable international, regional, and domestic laws have not been effectively translated into many Nigerian and Ugandan cultures and communities. Most members of local communities do not appreciate that subjecting widows to demeaning widowhood rituals violates the most fundamental human rights---the right to dignity, the right not to be subjected to any inhuman or degrading treatment.

In light of the gap between international and state laws, on the one hand, and cultures and customary law on the other hand, this thesis draws insights from the concept of “vernacularization.” This approach combines the views espoused in Sally Engle Merry's work during the first decade of the 21st century,³⁷ and argues that to change the cultures and

³⁵ See generally, Cerna & Wallace, *supra* note 32 at 623; Arati Rao, “The Politics of Gender and Culture in International Human Rights Discourse” in Julia Peters & Andre Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (USA: Psychology Press, 1995) 156 at 169 [Rao].

³⁶ For a general discussion of the divergent views on (human) rights, cultural relativism, and cultural universalism: See Jack Donnelly, “The Relative Universality of Human Rights” (2007) 29 *Human Rights Quarterly* 281; Micheal Perry, “Are Human Rights Universal? The Relativist Challenge & Related Matters” (1997) 19 *Hum. Rts. Q.* 461; Charles Taylor, “Conditions of an Unforced Consensus on Human Rights” in Obrad Savic, ed., *The Politics of Human Rights* (London: Verso Press, 2002) at 2.

³⁷ Sally Merry Engle, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago & London: The University of Chicago Press, 2006) [Merry]; Sally Engle Merry, “*Transnational Human Rights and Local Activism: Mapping the Middle*” (2008) 108 *American Anthropologist* 38 at 39 [Sally Merry]; Sally Merry Engle & Peggy

practices of customary law on the ground initiatives must be taken at the grassroots level. To achieve that, there is need to vernacularize. “Vernacularization” is defined as:

the process of appropriation and local adaption of globally generated ideas and strategies. This process frames global norms in ways that make them resonant with local contexts and local ideas about justice and acceptable to local communities, while at the same time preserving their essence.³⁸

Sally Merry theorised this approach and argued that “in order for human rights ideas to be effective, they need to be translated into local terms and situated with the local contexts of power and meaning.”³⁹ Using Merry’s approach, this thesis argues that the introduction of ideas and strategies at the grassroots level in the form of campaigns, awareness, seminars, women’s movements, training, and newspapers advertisements is the best means to translate widows’ rights into local reality.

Inspired by her earlier theoretical framework on this approach, Sally Merry further opined that before

transnational ideas such as human rights approaches to violence against women become meaningful in local social settings or move across the gap between a cosmopolitan awareness of human rights and local socio cultural understandings of gender, family, and justice or are circulated to shape everyday lives and actions, it requires the people in the middle: The people in the middle are those who translate the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation. They are the intermediaries or translators working at various levels to negotiate between local, regional, national, and global systems of meaning. They refashion global rights agendas for local contexts and reframe local grievances in terms of global human rights principles and activities.⁴⁰

Levitt, “Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States” (2009) 9 *Global Networks* 441 [Merry & Peggy].³⁸ Merry & Peggy, *supra* note 37 at 441.

³⁹ Merry, *supra* note 37 at 1.

⁴⁰ Sally Merry, *supra* note 37 at 40.

Relying on Sally Merry's theory of vernacularization,⁴¹ I argue that socio-economic, cultural, and legal measures may be taken to implement and secure the rights of widows. One such measure anticipates a central role for NGOs that are likely to facilitate important discourse with traditional leaders and increase the visibility of widows' rights violations within the community.

Sally Merry argues that:

gender violence has formed the conceptual centerpiece of women's human rights. However, violence against women and girls is not considered a violation of universal human rights instead, it is an everyday problem embedded in local cultures of kinship, religion, warfare, and nationalism.⁴²

Merry examines how gender violence is “framed as a matter of international human rights law at the global level and how international discourses and practices are vernacularized, appropriated, translated, and localized by activists in India, Fiji, China, and Hong Kong.”⁴³ By contrast, I shall focus mainly on the widows' mandatory observance of harmful widowhood rituals and the effects of disinheritance, and examine how customary law has compromised the socio-economic rights of widows. Other related cultural issues and socio-legal problems that are also of utmost significance for the well-being of widows, such as interpersonal violence, assault, and sexual assault, are not my primary focus in this thesis.

This thesis is divided into four chapters. The present chapter, Chapter One, sets out the conceptual framework of the thesis and describes the factual background, including the historical background and overview of the legal systems of Uganda and Nigeria, the widowhood practices of both countries, and the effects of these practices on widows. Chapter Two introduces relevant international and regional human rights laws, organizational initiatives, and international development conferences. It analyses the lacunae in these laws as they apply to or affect Nigerian and Ugandan widows either as a consequence of their status as widows or as members of the community. Chapter Three examines the role of customary law and the customary practices that affect Nigerian and Ugandan widows.

⁴¹ *Ibid, supra* note 36.

⁴² Merry, *supra* note 37 at 2.

⁴³ Merry & Peggy, *supra* note 37 at 442.

Judicial use of the repugnancy doctrine to resolve conflicts is analyzed. In addition, this chapter explores recent initiatives that address issues relating to interpersonal violence, assault, and sexual assault. Chapter Four makes conclusions and recommendations. Adopting and applying Sally Merry's vernacularization theory, Chapter Four recommends legal, cultural, and socio-economic measures (including facilitating changes in societal attitudes, organizing gender equality and economic empowerment programs for women, and strengthening existing enforcement mechanisms) to support substantive gender equality in order to advance the socio-economic well-being, personal security and social status of widows in ways that will improve their lives and circumstances.

1.1 FACTUAL BACKGROUND

In the words of Owen, "Death is always shocking to those close to the dead person, whether it is sudden or the result of a long illness"⁴⁴. However for women in many parts of sub-Saharan Africa countries, the death of a husband represents not only the "loss of a partner, protector, provider, and breadwinner, but also her relegation to the margins of the society and her subjugation to discriminatory, oppressive, and humiliating widowhood rituals that are not imposed on widowers".⁴⁵ Widows in most sub-Saharan African countries continue to be subjected to such rituals and discriminatory cultural practices despite the promulgation of international and regional conventions that affirm non-discrimination, equality, right to dignity, and right to inherit amongst others.

Joyce Birabwa lived in a small city in Uganda with her husband and two children. Suddenly tragedy struck. Her husband was killed in a suicide bomb attack in Mogadishu and her whole world fell apart. Left to raise two children alone, "Birabwa barely had time to grieve before discovering her in-laws had plans that would leave her penniless."⁴⁶ First, they grabbed the lands, properties, and cows of her husband. Second, she was forced to go through widowhood rituals that included having her hair shaved, being forced to eat from a broken pot, and being denied all forms of personal hygiene. In 2010, a compensation for Joyce's husband was paid,

⁴⁴Owen, *supra* note 1 at 7.

⁴⁵*Ibid.*

⁴⁶Robyn Dixon, "Uganda Widow wins Compensation after fight," *Los Angeles Times* (29 April 2013) online: Los Angeles Times <<http://articles.latimes.com/2013/apr/29/world/la-fig-uganda-womens-rights-20130430>>.

but her brother-in-law claimed the entire \$50,000 payment and “she learned about it only when a relative heard him boasting about the money in a local bar.”⁴⁷

Similarly, when Tamara Zulu’s husband died, she was left as the sole breadwinner for herself and her children. She was required to submit to various widowhood rituals. Barely a month after her husband’s burial, relying on customs and traditions that bestow inheritance rights on men, Tamara’s in-laws took everything, including land, properties, and cows co-owned by Tamara and her husband.⁴⁸ She suddenly became a destitute person responsible for five children.

Nne Ada, a mother of two, tragically lost her husband in 2005. She was “accused of killing him. To prove her innocence, she was forced to drink the bathwater from the corpse, her hair was shaved completely, she was confined indoors and coerced into wearing black mourning attire for a month.” According to Nne Ada, “I was made to sit naked on the floor for a week without a bath with the corpse and was humiliated.”⁴⁹ Barely a week after the death of her husband, all Nne’s late husband’s properties were confiscated by her in-laws, including the jointly acquired properties. Nne was rendered hopeless, penniless, and homeless with two children.⁵⁰ These horrific stories depict the plight of many widows in sub-Saharan Africa countries.

Like Nne above, many women world-wide suffer widowhood rituals when their husbands die. This thesis explores legal, social, and cultural relationships and patterns that reflect the experiences of women as exemplified in Uganda and Nigeria. While it is true that mourning rites in Africa reflect important cultural values, “often the behaviour surrounding mourning is inherently gendered.”⁵¹ Generally, it is believed that:

⁴⁷ *Ibid.*

⁴⁸ Geraldine Sealey, “African Widows left destitute by Relatives Snatching Property,” *Fellows Springs Times* (5 June 2003) online: Fellow Springs Times _ <http://internationalreportingproject.org/stories/view/african-widows-left-destitute-by-relatives-snatching-property>>

⁴⁹ Joy Gabriel, “The Plight of Widows in Nigeria’s South East,” *Economic & Financial Times* (11 August 2014) online: Economic & Financial Times << <http://www.eftngr.com/opal/analysis/46-comment/3396-the-plight-of-widows-in-nigerias-south-east>>

⁵⁰ *Ibid.*

⁵¹ Owen, *supra* note 1 at 7.

the treatment of widows is an expression of the lack of value accorded to women, both by wider society, and also by the two families to whom they have close ties, for example her natal family and in-laws. Daughters often appear to be regarded as temporary members of their natal family, and wives are treated as secondary members of their husband's family. Hence, widows are more vulnerable to ill-treatment because of their comparatively lesser bargaining power in the society.⁵²

The ill-treatment of widows is thus an acute expression of the lack of substantive gender equality. Even with a proper and recognised marriage, a widow's right in her marital home is weak while she retains few rights in her natal kinship group.⁵³ As a result of this, "she is seen to be an easy prey"⁵⁴ who can be subjected to harmful widowhood rites, deprived of rights to inheritance, ownership of land and custody of her children, interpersonal violence, sexual assault, rape, and economic exploitation by families.

Violations of widows' rights are not exclusive to the African regions alone; they are global problems although the particulars of each violation may vary from region to region.⁵⁵ The situation of women/widows requires us to ask what real effect the United Nations (UN) system of rights has on the lives of women.⁵⁶ What can be done to bridge the gap between the rhetoric and the reality? Is there any hope of changes to come? We must recognise that human rights are not self-implementing; concrete steps must be taken to achieve changes. Therefore, using Sally Merry's approach, this thesis advocates translating globally generated ideas into local terms at the grassroots level to address the practical situations and realities of widows.

⁵² Kate Young, "Widows without Rights: Challenging Marginalization and Dispossession" (2006) 14 *Gender and Development* 199 at 202.

⁵³ *Ibid* at 202.

⁵⁴ *Ibid*.

⁵⁵ Nadia H. Youssef, "Women's Access to Productive Resources: The Need for Legal Instruments to Protect Women's Development Rights" in Julia Peters & Andrea Wolpher, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (London: Psychology Press, 1995) 270 at 279.

⁵⁶ Elizabeth Evatt, "Women & Human Rights" (2002) 28 *Monash U.L Rev* at 1.

1.2 HISTORICAL BACKGROUND OF THE FEDERAL REPUBLIC OF NIGERIA

1.2.1 Federal Republic of Nigeria

Nigeria, Africa's most populous country, is vast in both size and population. It is a country comprising over 250 different ethnic groups,⁵⁷ each with its own language(s), customs, and culture.⁵⁸ Prior to the colonialization of the region now known as Nigeria by the British, the region consisted of centralized kingdoms and empires. The Sokoto caliphate, Kanem-Borno Empire, Benin kingdom, and Oyo Empire, all had institutions of political power which, "however rudimentary they may have been, exhibited the elements of permanence and regularity which are the hallmarks of a political society."⁵⁹

In the late nineteenth century, the Lagos protectorate⁶⁰ was ceded to the British crown.⁶¹ As a result, subjugation and various fundamental transformations of political power took place.⁶² In the "Northern region for example, there was a demonstration of the superiority of the British forces over the warlike fulanis at that time, known, as conquerors."⁶³ In addition, indirect rule was introduced as an administrative arrangement. A system of warrant chiefs was put in place among the Igbos in the areas of "taxation, justice, and law."⁶⁴ In 1914, on the recommendation of the Lord Lugard report, the Northern and Southern protectorate were amalgamated.⁶⁵

⁵⁷ Dauda Abubakar, "Nigeria" in Herbert M. Kritzer, ed., *Legal Systems of the World- A Political Social and Cultural Encyclopedia Volume iii: M-R* (USA: ABC CLIO Inc, 2002) at 1175 [Abubakar].

⁵⁸ Oluwole Idowu Odumosu, *The Nigerian Constitution: History and Development* (London: Sweet & Maxwell Limited, 1963) at 16 [Odumosu].

⁵⁹ B. O Nwabueze, *Constitutional Law of the Nigerian Republic* (London: Butterworth & Co, 1964) at 2 [Nwabueze].

⁶⁰ The Lagos Protectorate came into place during the 19th century and was later named the protectorate of southern Nigeria. See generally, Akintunde Olusegun Obilade, *The Nigerian Legal System* (London: Sweet& Maxwell, 1979) at 18-20 [Obilade].

⁶¹ Toyin Falola & Matthew M. Heaton, *A History of Nigeria* (Cambridge: Cambridge University Press, 2008) at 17; Odumosu, *supra* note 58 at 17.

⁶² Cerna & Wallace, *supra* note 33 at 623.

⁶³ Rao, *supra* note 35 at 169.

⁶⁴ Nwabueze, *supra* note 59 at 7.

⁶⁵ See generally, Lugard and the Amalgamation of Nigeria: A Documentary Record; Being a Reprint of the Report by Sir F. D. Lugard on the Amalgamation of Northern and Southern

1.2.2 Nigeria's Legal System

The present complexity of Nigeria's legal system is the result of its historical connection with Great Britain.⁶⁶ After the 1914 amalgamation of the Northern and Southern parts of the country,⁶⁷ Nigeria was governed as a unitary state by the British colonial administration for 40 years. Nigeria then became a federation and then, in 1960, while still subject to a structure of "federalism," gained independence.

Nigerian independence automatically abolished the Colonial Laws Validity Act 1895, terminating British legislative power over Nigeria.⁶⁸ It also gave the Nigerian legislature power to repeal or amend the effect of any Act of the United Kingdom as it affected Nigeria.⁶⁹ Nigeria was restructured as a federation of four regions. Each of these historical political changes contributed to shaping Nigeria's present legal system. The result is that the Nigerian legal system includes English law, Nigerian legislation, Nigerian case law, and customary law.⁷⁰

As a consequence, the Nigerian legal system is pluralistic and complex. Nigerian laws are interpreted and applied uniformly, except customary law. Federal laws are enforced by the federal courts and state laws are enforced by the state courts.⁷¹ Customary law has been defined as "a custom, tradition or practice in relation to a particular African tribe."⁷² In any disputed case involving its application, the court applies either the customary law applicable to the said tribe or the law by which the parties have agreed, or are presumed to have agreed, to be governed.⁷³

Nigeria and Administration 1912-1919; Together with Supplementary Unpublished Amalgamation Reports, and Other Relevant Documents, (Nigeria: Routledge, 2004) at 150.

⁶⁶ Abubakar, *supra* note 57 at 1176.

⁶⁷ Obilade, *supra* note 60 at 22-25.

⁶⁸ G. Ezejiolor, "Sources of Nigerian Law" in C.O Okonkwo, eds., *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) at 3 [Ezejiolor].

⁶⁹ *Ibid* at 4.

⁷⁰ Ezejiolor, *supra* note 68 at 1.

⁷¹ Charles Mwalimu, *The Nigerian Legal System* (New York: Peter Lang Publishing Inc, 2005) at 19 [Mwalimu].

⁷² J. G Storry, *Customary Law in Practice* (Capetown: Juta & Company Limited, 1978) at 1.

⁷³ Mwalimu, *supra* note 71 at 33.

1.3.0 SOURCES OF NIGERIAN LAWS

1.3.1 English Law

English law in Nigeria includes the common law, doctrines of equity, statutes of general application which were in force in England on January 1, 1900, and statutes and subsidiary legislation on specified matters.⁷⁴ “Statutes of general application” refers to all statutes in force in England that are antecedent to the establishment of a local legislature in Nigeria.⁷⁵ Section 45 of Nigeria’s *Interpretation Act 1958* states:

Subject to the provisions of this section, and except in so far as other provision is made by any federal law, the common law of England and the doctrine of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900 shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the federation.⁷⁶

Nigeria’s current *Interpretation Act*⁷⁷ includes only minor changes from the *Interpretation Act, 1958*:

Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

⁷⁴ Abubakar, *supra* note 57 at 1177; Jadesola Lokulo-Sodipe, Oluwatoyin Akintola & Clement Adebawo, “Legal Basis for Research Ethics Governance in Nigeria” online: Training & Resources in Research Ethics <<http://elearning.trree.org/mod/page/view.php?id=142>>.

⁷⁵ Antony Allot, *New Essays in African Law* (London: Butterworths, 1970) at 320.

⁷⁶ See generally, *Interpretation Act, 1958*, C81 [*Interpretation Act*].

⁷⁷ *Interpretation Act*, LFN 1990, c 81, s 32(1).

English statutes determined by the courts to be statutes of general application include *Fraudulent Conveyances Act*,⁷⁸ *Conveyance Act 1881*,⁷⁹ *Land Transfer Act 1897*,⁸⁰ *Partition Act 1868*,⁸¹ *Statute of Frauds 1677*,⁸² *Wills Act 1837*,⁸³ and *Sale of Goods Act 1893*.⁸⁴

Various tests have been considered when deciding whether or not a statute is of general application. For example, in the famous Nigerian case of *Attorney-General v. John Holt & Co*,⁸⁵ the court set guidelines for determining whether a statute is of general application. Although the test has been regarded as a “rough but not infallible test for a statute to be regarded as of general application, two preliminary questions must be answered. First, by what courts is the statute applied in England, second, to what classes of the community in England does it apply”?⁸⁶

1.3.2 Nigerian Legislation

Nigerian legislation is one of the most important sources of Nigerian law and has been a useful tool in the social and economic development of the country. Nigerian legislation consists of “statutes and subsidiary legislations,” including Ordinances, Acts, Rules, Orders, Laws and Decrees.⁸⁷ However most edicts, decrees, and ordinances have now been abolished as a result of changes in the Nigeria legal system in 1960 when Nigeria gained her independence.

1.3.3 Customary Law

As explained above, pluralism is part of the fabric of legal systems of most, if not all, African countries. Over the years, “customary law adapted to significant changes brought by colonial rule and then decolonization.”⁸⁸ In addition to customary law, most sub-Saharan African

⁷⁸ *Braithwaite v Folarin* [1938] 4 WACA at para 76.

⁷⁹ *Sanusi v Daniel* [1956] 1 FSC 93.

⁸⁰ *Young v Abina* [1940] 6 WACA 180.

⁸¹ *Sule v Ajisegiri* [1937] 13 NLR 146.

⁸² *Malomo v Olusola* [1954] 21 NLR 1.

⁸³ *Thomas v De Souza* [1929] 9 NLR 81.

⁸⁴ *Khami v McCaul & Co. Ltd* [1956] LLR 32.

⁸⁵ [1910] 2 NLR at para.21.

⁸⁶ C.O Okonkwo, *Introduction to Nigeria Law* (London: Sweet & Maxwell, 1980) at 5; Obilade, *supra* note 60 at 72.

⁸⁷ Obilade, *supra* note 60 at 64.

⁸⁸ Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins, *The Future of Customary Law* (Cambridge: Cambridge University Press, 2011)1 [Fenrich, Galizzi & Higgins].

countries are now bound by domestic constitutional law, statutory law, common law, and international and regional human rights treaties. Although some domestic constitutions now enshrine the right to culture, this issue remains subject to constitutional and statutory laws.⁸⁹

In order to understand the meaning of customary law, it is necessary to distinguish between a custom and a customary law.

Customs are defined as rules of conduct; when such rules of conduct attain a binding or obligatory character, they become customary law. It is the assent of the particular community involved that gives a rule of conduct its obligatory nature supported by a sanction and enforceable. Customary sanction takes the form of ostracism, compensation, propitiation, restoration, or apology. It is this element of sanction that distinguishes a custom from customary law.⁹⁰

In Nigeria, customary law has been defined as those customs generally accepted by a particular community as binding, the breach of which is supported by customary sanction.⁹¹ Customary law derives its strength from its acceptance by the members of the community as obligatory.⁹² Therefore there are as many customary laws as there are communities in Nigeria.⁹³ In Nigeria there are over 250 languages⁹⁴ while in Africa as a whole, there are more than 800 languages. Each group has its own customary laws and traditions.⁹⁵ Thus,

⁸⁹ See generally, Section 31(1) of the 1996 South African Constitution – “Persons belonging to a cultural, religious or linguistic community may not be denied the right with other members of that community: (a) to enjoy their culture, practise their religion, and use their language.” Section 211(3) of the 1996 South African Constitution states that “the courts must apply customary laws when that law is applicable subject to the constitution and any legislation that specifically deals with customary law.”

⁹⁰ Remigius N. Nwabueze, “The Dynamics & Genius of Nigeria’s Indigenous Legal Order” (2002) 2 *Indigenous Law Journal* at 158 [Nwabueze].

⁹¹ *Ibid* at 159.

⁹² See generally, *Eshugbayi Eleko v. Government of Nigeria* [1931] AC 662 at 663.

⁹³ Ezejiolor, *supra* note 68 at 41.

⁹⁴ The World Fact book, *Africa-Nigeria*, online: Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>>.

⁹⁵ Vincent B. Khapoya, *The African Experience: An Introduction* (Prentice: Hall Inc Press, 1998) at 14-15.

there is no single uniform set of customs in most tribes.⁹⁶ Despite the diversity of African customary laws,⁹⁷ several scholars have been able to identify some distinctive features. “First, customary law tends to be expressed communally. Second, customary law is more concrete than abstract, and finally it involves the supernatural.”⁹⁸ Customary law has also been defined as “a native custom in relation to a particular tribe which must not be repugnant to morality, humanity, and natural justice or injurious to the welfare of the natives.”⁹⁹

Customary law deals with personal issues involving families and the communities. As a result, matters related to seduction/adultery, custody or guardianship of children, the status of women, land, divorce, the devolution otherwise than by will of movable property, marriage consideration such as “lobola,” also known as “dowry/ bride price,” and marriage contracted under customary law, are usually considered to be subject to customary law in many Africa societies.¹⁰⁰ However, before customary law can be established before the courts, it must be proven¹⁰¹ or the court must take judicial notice of the customary law of a particular area.¹⁰² Presently, all courts in Nigeria are vested with jurisdiction to hear and decide matters arising from customary law. The exception is Sharia courts in the northern part of the country that exercise exclusive jurisdiction over the administration of Sharia law, also known as “Islamic law.”¹⁰³

⁹⁶ Allott, *supra* note 75 at 65.

⁹⁷ Eugene Cotran & Neville N. Rubin, *Introduction in Readings in African Law xviii- xix* (Cambridge: Cambridge University Press, 2011) at 34.

⁹⁸ John F. Holleman, “An Anthropological Approach to Bantu Law With Special Reference to Shona Law” (1949) 10 Rhodes-Livingstone Journal at 51-56; J.H Driberg, “The African Conception of Law” (1955) 34 J. Afr. Soc’y 230, 239-240.

⁹⁹ See generally, Thomas W. Bennett, *Human Rights and African Customary Law Under the South African Constitution* (Capetown: Juta & Co Limited, 1995) at 2; Thomas W. Bennett, *Customary Law in South Africa* (Capetown: Juta & Co Limited, 1994) at 23.

¹⁰⁰ Ben Kiromba Twinomugisha, “ Africa Customary Law and Women’s Human Rights in Uganda in Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins, eds., *The Future of Customary Law* (Cambridge: Cambridge University Press, 2011) 452.

¹⁰¹ J. Olabosipo Anifalaje, “Judicial Development of Customary Law in Nigeria” (1988) 9 Journal of Legal History 40 at 41.

¹⁰² See generally, *Evidence Act, LFN 1990*, s13-15; Obilade, *supra* note 60 at 84; Allott, *supra* note 75 at 47-53; Okonkwo, *supra* note 86 at 51.

¹⁰³ Mwalimu, *supra* note 71 at 31.

1.4 HISTORICAL BACKGROUND OF THE REPUBLIC OF UGANDA

1.4.1 The Republic of Uganda

Uganda, like many other African countries, is an amalgamation of different tribes and religions.¹⁰⁴ Uganda has several broad linguistic groups with 56 tribes and nine indigenous communities¹⁰⁵ that subscribe to a wide range of customary laws and practices.¹⁰⁶ They are largely divided into the Bantu-speakers, who live in the central, southern, and western parts of the country and non-Bantu speakers who occupy the eastern, northern, and north western parts of the country.¹⁰⁷ This thesis considers the socio-legal circumstances of widows among the Baganda, the largest ethnic group in Uganda.

The colonial history of Uganda began in 1877 with the British contact with the kingdom of Buganda.¹⁰⁸ One effect of British contact was to help to improve Buganda's economic and social policies. "The kingdom of Buganda asserted authority through the hierarchy of administrative chiefs. The replication of this administrative and judicial structure throughout Uganda served as the cornerstone of England's colonial policies."¹⁰⁹ This form of "administrative and judicial structure maximizes limited resources by relying on local chiefs to maintain order, collect taxes, mobilize labour for public works projects, and administer justice where need arises."¹¹⁰ It was through reliance on local chiefs' courts that the British cemented customary law as the foundation of Uganda's legal system, a legacy that continues today. The British Order in-Council of 1902 declared the English common law, the doctrines of equity, "statutes of general application in force in England, and customary law, as long as

¹⁰⁴ See generally, Phares Mukasa Mutibwa, *Uganda Since Independence: A Story of Unfulfilled Hopes* (New York: African World Press, 1992) at 1; James Tumisiime, *Uganda 30 years, 1962-1992* (New York: Fountain Publishers, 1992) at 1; Jan Jelmert Jergensen, *Uganda: A Modern History* (Uganda: Croom Helm, 1981) at 2.

¹⁰⁵ Otiso Kefa, *Culture and Customs of Uganda* (USA: Greenword Press, 2006) 4-6 [*Kefa*].

¹⁰⁶ Dr Ben Kiromba Twinomugisha, "African Customary Law and Women's Human Rights in Uganda" in Jeanmarie Fenrich, eds., *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011) at 449.

¹⁰⁷ Kefa, *supra* note 105 at 4-6.

¹⁰⁸ Presently, Bagandas are the largest single ethnic group in Uganda, representing 16.7% of the total Uganda population.

¹⁰⁹ Herbert M. Kritzer, *Legal Systems of the World: A Political, Social and Cultural Encyclopaedia: Volume iv: S-Z* (Santa Barbara: California, 2002) at 1675.

¹¹⁰ *Ibid.*

it was not repugnant to natural justice, equity, good conscience, or in conflict with written laws in Uganda.”¹¹¹

1.4.2 Uganda’s Legal System

Like other African countries, Uganda was colonized. The basic policy of the colonizing powers was to introduce their own metropolitan law and also their system of courts while retaining as much of customary law and the African judicial process as they deemed to be consistent with basic justice and morality.¹¹² As a result, Uganda employs multiple sources of law, including statutory law, case law, customary law and religious law (Islamic law and Hindu law).¹¹³ Under customary law, the repugnancy test is applied to determine whether a custom is consistent with the principles of equity, justice, and morality. In the words of Hallward Driemeier & Tazeen the repugnancy test is a “legal doctrine that dates back from the British colonial era which appears in the statutes of several Anglophone countries in Africa. Its purpose was to provide colonial administrators and courts with the ability to challenge and refuse to enforce customs and practices.”¹¹⁴ The Ugandan case of *R v Amkeyo* is an example.¹¹⁵ In that case, the question was whether a woman married under African customary law was a “wife” for the purpose of common law spousal privilege in the law of evidence. Justice Harlan decided that because the African practice of “wife purchase” was repugnant to justice and morality, it could not produce the privileged legal status of “wife.”¹¹⁶

It is imperative to reiterate that both Nigeria and Uganda have “pluralistic legal systems in which multiplicity of laws operate simultaneously.”¹¹⁷ The “interplay between statutory and customary law stems from colonial occupation during which the colonial powers, mainly

¹¹¹ *Ibid* at 1676.

¹¹² E.Cotran & N.N Rubin, *Readings in African Law* (New York: Africana Publishing Corporation, 1970) at xx.

¹¹³ For the purposes of this chapter, Islamic law and Hindu law will not be discussed in details.

¹¹⁴ Mary Hallward Driemeier & Tazeen Hasan, *Empowering Women: Legal Rights & Economic Opportunities in Africa* (Washington: World Bank Publications, 2012) at 112.

¹¹⁵ [1917] 7 EALR 14.

¹¹⁶ *Ibid*.

¹¹⁷ Anne Daughtery Leiter, “Overview of History and Legal Systems: Ghana, Tanzania, and Uganda” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda & Tanzania* (Durham: Carolina Press, 2005) xv [Leiter].

Great Britain in the case of these two countries, imported common law into their system.”¹¹⁸ Although customary law has changed since the colonial era, issues related to family law are still largely governed by customs and traditions, hence affecting “community’s perception of women and by extension, the community’s interpretation of customary law.”¹¹⁹ As Sylvia Tamale aptly observed, “colonialists worked hand in hand with the African patriarchs to develop inflexible customary laws which evolved into new structures and forms of domination of women.”¹²⁰ Although it is difficult to generalize across all African countries, customary law and religious laws often offer women less protection for their rights than statutory law.¹²¹ Customary law is discussed in subsequent chapters.

1.5 WIDOWHOOD PRACTICES AMONG THE IGBOS OF NIGERIA

The Igbos of the Eastern part of Nigeria were formerly known as Ibos and widely recognised as one of the most populous and politically influential ethnic groups in Nigeria.¹²² When an Igbo woman loses her husband, rites and rituals are performed to mourn the dead. Among the Igbos, the widow’s ordeal starts as soon as her husband passes away. The first action taken is to demand that she hand over all late husband’s property and belongings. The widow is forced to swear an oath, pledging not to take any of her late husband’s property.¹²³ Then a demand is made by her late husband’s family for “four kolanuts, one head of tobacco, two jars of palm wine, and a white goat from her.”¹²⁴ This is “followed by rituals that must be conducted by daughters in the community known as “umuadas.” To the villagers, the widow is “unclean.” The death of her husband is a sign of ill-luck or a bad omen and therefore she is expected not to touch herself, her children, or anyone else to avoid defiling them.¹²⁵ If she must scratch her body, she must use a stick. This act shows she is in a state of ritual impurity

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Sylvia Tamale, *When Hens Begin to Grow: Gender and Parliamentary Politics in Uganda* (Boulder, Westview Press, 1999) 9.

¹²¹ Leiter, *supra* note 117 at xvi.

¹²² Central Intelligence Agency, *Central Intelligence Agency Report on Nigeria*, online: Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>>.

¹²³ B.N Onyekuru, “Obnoxious Cultural Practises Associated with Bereavement Among People of South East Geopolitical Zone of Nigeria” (2011) 2 *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* at 356 [*Onyekuru*].

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

and needs to protect herself from further defilement; this can last for days, weeks or several months.¹²⁶

During the period she observes the mourning rites, she is stripped naked, her hair, pubic hair, eyebrows, and armpits shaved by the “umuadas.” Symbolically, the shaving represents the removal of all links between the widow and her deceased spouse. She is isolated, expected to wail loudly every morning (this is taken as a sign of agony and deep pain at the demise of her late husband), is not allowed to perform any household chores, must be fed and served from an old pot, denied the right to sleep, and she must hold “bitter kola in her mouth nuts as a sign that she knows the bitterness of her husband’s death.”¹²⁷ She is dressed in black attire and denied every form of hygiene. The mourning attire of the widow is deliberately designed to make her appear distasteful and repulsive to the spirit of her deceased husband who, it is believed, would still want to perform “his marital and conjugal duties with her.”¹²⁸ She “becomes a focus of collective repudiation, seen as a bearer of bad luck, unclean, polluting and dangerous. She has to undergo rituals, many of them humiliating, and some life-threatening in these times of HIV/AIDS, to symbolically ‘cleanse’ her, in order to safeguard the community from her impurity.”¹²⁹

If a widow is found to have fought with her husband before his death, she may be placed on stricter rituals. For example, she may be kept in a room with the corpse of her late husband or even forced to lie on a bed with her late husband’s corpse.¹³⁰ Other widowhood rituals practised amongst the Igbos include having to “drink from the water used to wash the deceased’s body to prove her innocence in her late husband’s death, forced sexual intercourse with the dead body, or crawling over her husband’s corpse this is called *ige fe ukwu ozu* in Igboland.”¹³¹

¹²⁶ *Ibid*

¹²⁷ *Ibid.*

¹²⁸ *Ibid*; Sossou, *supra* note 6 at 205.

¹²⁹ Kate Young, “Widows without Rights: Challenging Marginalization and Dispossession” (2006) 14 *Gender and Development* 199 at 200.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

Although, these rituals are a sign of respect for the deceased and symbol of mourning for the widow,¹³² “far more restrictions are placed on a widow than a widower, for it is the widow who is subjected to humiliating rituals”¹³³ and used as a *cultural tool*¹³⁴ within her community. The fate of a widower is quite different from that of a widow even though both lost a partner. At the loss of his wife, a widower is pitied and pampered because of loneliness and boredom. “Widowers are free to socialise, their movements are not restricted by taboos or rituals, and they are often pacified by suggestions that they take a new wife.”¹³⁵

1.6 WIDOWHOOD PRACTICES AMONG THE BAGANDA OF UGANDA

Uganda’s ethnic groups include the Baganda Banyakoles, Basogas, Bakigas, Itesos, Bagisu, and the Lugbaras.¹³⁶ The Bagandas represent the largest ethnic groups in Uganda with a population of 5.5 million people who are mainly Christians.¹³⁷ They are called the non-Bantu speaking Baganda people and occupy the central part of Uganda. The Baganda tribe is patrilineal and patrilocal in setting.¹³⁸ As in most sub-Saharan countries, when a person dies, customs and tradition determine the treatment and disposal of the body and prescribe a period of mourning for the widow(s).¹³⁹

¹³²Sossou, *supra* note 6 at 202.

¹³³Owen, *supra* note 1 at 9.

¹³⁴I use the term ‘cultural tool’ to signify that widows in most sub-Saharan African countries are used to embody and reinforce cultural identity, beliefs and traditions. The treatment of widows is used as a tool or instrument to perpetuate various customs and cultural beliefs and traditional practices. These include widowhood rituals, levirate marriage, and widow cleansing amongst others. The subjugation of widows to reinforce cultural beliefs and perpetuate cultural practices is a global phenomenon that affects women who live in patriarchal societies all around the world.

¹³⁵Owen, *supra* note 1 at 9.

¹³⁶Uganda, *Ethnic Groups*, online: African Studies Center < <http://www.africa.upenn.edu/NEH/u-ethn.html>>; Matt Blake, “Worlds Apart: Uganda tops list of Most Ethnically Diverse Countries on Earth while South Korea comes Bottom,” *Mail online* (17 May 2013) online: Mail online < <http://www.dailymail.co.uk/news/article-2326136/Worlds-apart-Uganda-tops-list-ethnically-diverse-countries-Earth-South-Korea-comes-bottom.html>>.

¹³⁷*Ibid.*

¹³⁸John Roscoe, *The Baganda: An Account of their Native Customs and Beliefs* (Cambridge: Cambridge University Press, 1911) at 131.

¹³⁹Milton Cohen, “Death Rituals: Anthropologists Perspective” in P.A Pecorino, ed., *Perspectives on Death & Dying* (New York: Department of Social Sciences, Queens Borough

Among the Baganda tribe of Uganda, when a woman loses her husband the period of mourning to the final burial is marked by a series of rites, taboos, and observances for the widow.¹⁴⁰ The widow is denied her personal hygiene, refrains from taking a bath, and must sleep on dry banana leaves. She must bare her shoulders and tie a special belt made from banana stems around her waist while publicly wailing and audibly lamenting her losses.¹⁴¹

1.7 PROBLEMS ASSOCIATED WITH WIDOWHOOD

As noted above, widowhood practices are not unique to regions in Uganda and Nigeria but are adhered to in most sub-Saharan African countries. The question remains: why are widows subjected to these humiliating rituals? Is it a sign of respect for the dead? Most scholars argue that the problems associated with widowhood stem instead from the belief that a woman is the property of her husband. Therefore, on the death of her husband, “she is at the mercy of her late husband’s family who determine her fate and treat her as they wish, especially when there has been accusation of witchcraft.”¹⁴² Another reason is that because most African countries are polygamous, the widow may be believed to have killed her husband out of jealousy.¹⁴³ Widowhood practices are often observed to determine the innocence or guilt of a woman for the death of her husband. It is believed that a man could not have died of a natural cause,¹⁴⁴ and it is necessary to ascertain the cause of his death. Unfortunately, the wife of the deceased is often the prime suspect who undergoes excruciating rituals to prove her innocence. As a result of the humiliating treatment widows to which are subjected, they suffer a variety of forms of psychological, mental, and physical illness.¹⁴⁵

Community College, online: < http://www2.sunysuffolk.edu/pecorip/scccweb/etexts/deathand_dying_text/table_of_contents.htm>.

¹⁴⁰Stella Nyansi, Margaret Emodu-Walakira & Wilberforce Serwaniko, “The Widow, the Will and Widow- Inheritance in Kampala: Revisiting Victimisation Argument” (2009) 43 *Canadian Journal of African Studies* 18 at 22.

¹⁴¹*Ibid.*

¹⁴²Sarah Oloko, “A Panoramic View of Widowhood in Nigeria” in Bolaji Owasanoye & Babatunde Ahonsi, eds., *Widowhood in Nigeria, Issues, Problems, and Prospects* (Lagos: Friedrich Ebert Foundation and Human Development Initiatives, 1997) at 6.

¹⁴³*Ibid* at 7.

¹⁴⁴Oyeniya, A & Ayodeji, I, “Widowhood practices among the Yorubas of South West Nigeria: Are there Differences in What Women Experience due to their Status” (2010) 8 *Gender & Behaviour* 8 at 3167.

¹⁴⁵*Ibid.*

1.8 BECOMING A WIDOW

As discussed earlier, the loss of a breadwinner heralds a radical change for every member of the family but most especially for the widow. For most widows in sub-Saharan African countries, the loss of a husband is one of the most stressful life changes that they experience.

¹⁴⁶ While both widows and widowers have lost loved ones, the effect is different. A widower can easily remarry but most widows lead life as a “single and self-sufficient adult.” ¹⁴⁷ To widows, “the psychological effect of widowhood is double”. ¹⁴⁸ First, apart from the initial emotional reaction, expressed in wailing and outbursts of cries and grief, she is faced with various inhuman and humiliating widowhood practices. Second, she is worried about the “financial consequences the loss of her husband will cause.” ¹⁴⁹

The enormous effect of these losses is compounded by discrimination under both customary and religious laws and the engrained attitude of the community leaders towards the widow or widows, as the case may be. ¹⁵⁰ However, “disorientation tends to impact far more traumatically” on most widows; ¹⁵¹ widowhood alters the way a woman is viewed by her

¹⁴⁶ Sara Wilcox et al, “The Effects of Widowhood on Physical and Mental Health, Health Behaviour and Health Outcomes: The Women’s Health Initiative” (2003) 22 *Health Psychology* at 513.

¹⁴⁷ Robert C. Atchley, “Dimensions of Widowhood in Later Life” (1975) 15 *Gerontologist Journal* 176.

¹⁴⁸ Kehinde O. Saba, “The Psychological Effects of Widowhood on Women and Children: Findings From A Pilot Study in Lagos” in Bolaji Owasanoye & Babatunde Ahonsi, eds., *Widowhood in Nigeria: Issues, Problems and Prospects* (Lagos: Friedrich Ebert Foundation and Human Development Initiatives, 1997) at 54; Kate M. Bennett, “Psychological Wellbeing in Later Life: The Longitudinal Effects of Marriage, Widowhood and Marital Status Change” (2005) 20 *Int’l Journal of Geriatr Psychiatry* 283; Nancy E. Avis et al, “The Effect of Widowhood on Health: A Prospective Analysis from the Massachusetts Women’s Health Study”(1991) 33 *Social Science & Medicine* 1064; Carolyn Balkwell, “Transition to Widowhood: A Review of the Literature”(1981) 30 *Family Relations* 117; Nancy B. Miller, “Women’s Adjustments to Widowhood: Does Social Support Matter” (2001) 16 *Journal of Women & Aging* 151; Elwert Felix, “The Effect of Widowhood on Mortality by the Causes of Death of Both Spouses” (2008) 98 *American Journal of Public Health* 2092.

¹⁴⁹ Miller, *supra* note 147 at 151.

¹⁵⁰ Onyekuru, *supra* note 123 at 355.

¹⁵¹ Owen, *supra* note 1 at 8.

community. Becoming a widow often means loneliness, extreme poverty, loss of status, reduced income or none at all, fear of the future, and depression.¹⁵²

In most cases, a widow suffers from the cruelty and greed of her husband's relatives. At the death of her husband, she loses properties to her late husband's relatives. In most cases, it is his brothers who seize the property or evict the widow from her home under the pretext that they are the rightful heirs under the customary law of the community.¹⁵³ When this happens, she is left hopeless and homeless.

Becoming a widow also exposes a woman to the risk of contracting Acquired Immune Deficiency Syndrome (AIDS) and other sexually transmitted diseases.¹⁵⁴ For example, some widowhood rituals require the widow to go through a ritual cleansing. "This ritual cleansing involves an observance of series of rituals and ceremonies meant to signify the spiritual separation of the deceased from his surviving spouse and in most cases, it is done through sex,¹⁵⁵ often with a relative of her late husband, a total stranger, or even a group of male relatives"¹⁵⁶ as the case may be.¹⁵⁷ This ritual cleansing is rooted in the belief that a woman who loses her husband and is not cleansed, may be haunted by her husband's spirit. Furthermore, it is believed that a "widow who has not been cleansed may cause the whole community to be haunted."¹⁵⁸ Far more deadly consequences of widow cleansing include the spread of HIV/AIDS. A widow who is HIV-negative faces the risk of contracting the virus from the man who cleanses or inherits her. In other instances, a widow who has contracted

¹⁵² *Ibid.*

¹⁵³ *Ibid* at 59.

¹⁵⁴ Acquired Immune Deficiency Syndrome can be contracted through sexual contact, injection drug use, occupational exposure, blood transfusion amongst others. See generally, AIDS Gov., online: < <http://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/>>.

¹⁵⁵ Ethel E Idialu, "The Inhuman treatment of widows in African Communities"(2012) 4 Current Research Journal of Social Sciences 8.

¹⁵⁶ *Ibid* at 13.

¹⁵⁷ Women's Rights: *Women & HIV/AIDS; Confronting the Crisis. A Joint Report by UNAIDS/UNFPA/UNIFEM*, online: United Nations Population Fund < <https://www.unfpa.org/hiv/women/report/chapter7.html>>.

¹⁵⁸ Sharon LaFraniere, "AIDS now compels Africa to Challenge Widow's Cleansing," (May 11 2005) *The New York Times* online: http://www.nytimes.com/2005/05/11/international/africa/11malawi.html?_r=0

HIV from her late husband, who may have died from an AIDS-related illness, may transmit the disease to the man or men with whom she is forced to have sex.¹⁵⁹

1.9. CONCLUSION

The “situations and experiences of widows, not only in African countries but also in other patriarchal societies, is greatly influenced on all socio-economic levels by patriarchal ideology that revolves around unequal power distribution and domination by men.”¹⁶⁰ Land inheritance in most African societies is culturally and symbolically associated with men because they are patrilineal in nature. Among the Igbos of Eastern Nigeria, the customary law of inheritance gives the heir (either the eldest son or if the son predeceased his father, the oldest male relative) the right to inherit his late father’s or late brother’s property, as the case may be.¹⁶¹

In Uganda

“inheritance of the deceased husband’s property by widows is also problematic. Traditionally, while a widow has no formal inheritance rights, she could remain in her family homestead, and continue farming and grazing livestock after her husband's death for the remainder of her life, in her capacity as guardian of their children. Widows could also depend on the protection of their sons, once they grew up. These practices have gradually been eroded, and increasing numbers of widows are facing evictions and property grabbing after their husbands die.”¹⁶²

Young widows who do not have children, and “who are likely to form new relationships with other men when their husbands die, are often forced to return to their natal homes.” Older widows are in a stronger position to stay in the marital home because of their well established social networks and relations.¹⁶³ Widows without sons tend to be more vulnerable to eviction

¹⁵⁹ *Ibid.*

¹⁶⁰ Sossou, *supra* note 6 at 208.

¹⁶¹ *Ibid.*

¹⁶² Kaori Izumi, “Gender-based Violence & Property-Grabbing in Africa: A Denial of Women’s Liberty & Security,” (2007) 15 *Gender & Development* 14 [*Izumi*].

¹⁶³ Michael Aliber et al, *The Impact of HIV/AIDS on Land Rights: Case Studies from Kenya* (Capetown, HSRC Press, 2004) at 32.

and dispossession than those who have male children.¹⁶⁴ Many widows are reduced to poverty when they are evicted from their matrimonial homes by their late husband's relatives.¹⁶⁵

All of these practices are in clear violation of various international and regional conventions that both Nigeria and Uganda have ratified, yet these oppressive and discriminatory widowhood practices continue. To secure widows' rights, transformative approaches, both individual and collective, are necessary. This can be accomplished by using strategies based on Sally Merry's theory to vernacularize globally generated norms into the cultures of the local community. That requires advocating gender-sensitive legislation, organising gender equality programs, and networking locally, nationally, regionally, and internationally with other women's groups. The following chapters address these issues and others identified in this chapter.

¹⁶⁴Izumi, *supra* note 161 at 14; Owen, *supra* note 1 at 52-69.

¹⁶⁵Sossou, *supra* note 6 at 206; Owen, *supra* note 1 at 53.

CHAPTER TWO

RIGHTS OF WIDOWS IN SUB-SAHARAN AFRICA IN THE CONTEXT OF INTERNATIONAL AND REGIONAL CONVENTIONS

*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.*¹

*For many, we women are “half the sky” but we also want to be half the earth with equal rights and opportunities free from all forms of discrimination and violence.*²

INTRODUCTION

The human rights of widows in sub-Saharan African countries are violated by degrading and life-threatening mourning and burial rites they are forced to go through at the death of their husbands. Although one of the most important international women’s rights documents, the *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, defines in detail what constitutes discrimination against women, incorporating the principle of gender equality, and setting up agendas for national action to end discrimination and gender inequality, “international and regional human rights conventions have not been applied effectively to redress the disadvantages and injustices experienced by women.”³ The purpose of this chapter is to examine the rights of widows in the light of international and regional legal instruments and international conferences. I argue that although many

¹ *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* September 1981, 1249 UNTS 13, art 5, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, 19 ILM 33 (entered into force 3 September 1981).

² H.E Dilma Rousseff, “Brazil” (Opening Statement of the General Debate of the 66th Session of the United Nations General Assembly, New York, 21 September 2011), [unpublished].

³ Rebecca J. Cook, “Women’s International Human Rights Law: The Way Forward” in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) at 3.

applicable laws are in place, these laws do not adequately protect widows' rights. In most sub-Saharan African countries the laws do not resonate at the local level and this lack of resonance impedes effective implementation. For human rights laws to be effective, their content must become part of all cultures and communities within the society.

2.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The *Universal Declaration of Human Rights*, (*UDHR*) was adopted by the UN General Assembly on 10 December 1948.⁴ The *Declaration* is described by some scholars as “a potent document, the initial burst of enthusiasm and idealism, terser, more general and grander than most treaties, in some sense, it is the single most invoked human rights instrument”⁵. The *UDHR* provides for the elimination of every form of distinction between men and women in the pursuit of their civil, social, economic, and political rights.⁶ This is why the term “sex” was explicitly included in the definition of prohibited discrimination.⁷ The foundation of contemporary discourse on women's rights, feminism, and gender equality is the 1945 *Charter of the United Nations*.⁸ The Preamble of the *Universal Declaration of Human Rights* (*UDHR*) states that “members reaffirm [the] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small as well as the institution’s goal to promote social progress and better standards of life in larger freedom.”⁹

Thus the *UDHR* is highly relevant to the protection of the rights of women. The *UDHR* undertakes to ensure adequate universal respect of both sexes.¹⁰ In spite of this promising beginning, women continue to suffer widespread human rights violations. Since the drafting of the *UDHR*, “women’s human rights activists have battled to assert women's rights within

⁴ *Universal Declaration of Human Rights*, GA Res 217(111), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1945) [*UDHR*].

⁵ Henry Steiner, Philip Aston & Ryan Goodman, *International Human Rights in Context: Law, Politics & Morals* (USA: Oxford University Press, 2007) at 120.

⁶ Johanna Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations” (2003) 52 *Emory L.J* 71 at 82 [*Bond*].

⁷ *UDHR*, Article 2.

⁸ *Charter of the United Nations*, 26 June 1945, CAN TS 1945 No 7.

⁹ *UDHR*, Article 2.

¹⁰ Makau Mutau, “Savages, Victims & Saviours: The Metaphor of Human Rights” (2001) 42 *Harvard International Law Journal* 201 at 209.

the UN human rights framework.”¹¹ Accordingly, the quest for the protection of the human rights of women cannot be discussed without mentioning the standards and norms set out in the *UDHR*.¹²

2.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The *International Covenant on Civil and Political Rights (ICCPR)*,¹³ which was adopted in December 1966 and came into force in March 1975, is one of the most comprehensive and widely accepted international human rights instruments.¹⁴ The *International Covenant on Economic, Social and Cultural Rights (ICESCR)*¹⁵ is the primary international instrument dealing with economic, social, and cultural rights,¹⁶ often called “positive rights.”¹⁷ These two covenants spell out specific rights in accordance with the common standard elaborated in the *UDHR*.¹⁸ The goals of equality and non-discrimination were reiterated in both covenants.¹⁹ The *ICESCR* and *ICCPR* also contain other important provisions, including the

¹¹ Bond, *supra* note 6 at 82.

¹² E. Eleazar Otiocha, *International Human Rights: The Protection of the Rights of Women and Female Child in Africa: Theory and Practice* (USA: Vanderplas Publishing, 2011) at 113 [Eleazar].

¹³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976) [*ICCPR*].

¹⁴ The *International Covenant on Civil and Political Rights* has been ratified by 167 States (including Nigeria and Uganda) who are presently parties to the Convention. Altogether, 48 African states are parties to the *ICCPR*. See generally, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>

¹⁵ *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*, GA Res 2200A(XXI), 21 UNGAOR, 1966, Supp No 16, UN Doc A/6316 3 at 11.[*ICESCR*]

¹⁶ The *International Covenant on Economic, Social and Cultural Rights* has been ratified by 167 States (including Nigeria and Uganda) that are presently parties to the Convention. Altogether, 48 African states are parties to the *ICESCR*. <<http://www.ohchr.org/en/professionalinterest/pages/icescr.aspx>>.

¹⁷ Asbjorn Eide & Allan Rosas, “Economic, Social, and Cultural Rights as Human Rights: A Universal Challenge in Economic, Social, and Cultural Rights” in Asbjorn Eide, Catarina Krause & Allan Rosas, eds., *Universal Human Rights in Theory* (Martinus, Nijhoff Publishers, 2001) at 43.

¹⁸ Winston Langley, “The Rights of Women, the *African Charter* & the Economic Development of Africa” (1987) 7 B.C Third World Law Journal 215 at 216.

¹⁹ *ICESCR*, Article 2 & 3; *ICCPR*, Article 2 & 3.

right to life,²⁰ the right to adequate food, nutrition, clothing and housing,²¹ the right to be free from all forms of torture, slavery and genocide,²² and rights to non-discrimination on the basis of race, gender, language, religion, culture, family, and ethnicity.²³

Although the “principle of equality between sexes forms part of the basic human rights instruments, in practice the interpretation and implementation of these instruments has fallen far short of ensuring their full applicability to women as an oppressed and vulnerable social group.”²⁴ The struggle for women to be adequately protected from all forms of discriminatory practices has left them in a disadvantaged position, especially in relation to widowhood rituals, property disinheritance, custody of children, sexual assault, interpersonal violence, widow inheritance, and widow cleansing. These discriminatory practices are not “usually analyzed or handled as violations of the human rights and fundamental freedoms of women in terms of existing international instruments.”²⁵ The inadequacy of international enforcement mechanisms to protect and implement women’s rights persists even though many countries are not only State parties to international laws but have also incorporated international law obligations into their domestic laws.

Although, no specific provision was set aside for widows, the general comments of the Human Rights Committee of *ICCPR* suggest a framework to guide State parties in reforming personal laws that perpetuate discrimination and inequality for women. For example, Article 40 of the Human Rights Committee of *ICCPR* states, inter alia:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. State parties should

²⁰ *ICCPR*, Article 6.

²¹ *ICESCR*, Article 13.

²² *ICCPR*, Article 8.

²³ Berta Esperanza Hernandez-Truyol, “Human Rights through a Gendered Lens: Emergence, Evolution, Revolution” in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law* (New York: Transnational Publishers, 1999) at 26 [*Truyol*].

²⁴ Laura Reanda, “Human Rights & Women’s Rights: The United Nations Approach” (1981) 3 *Human Rights Quarterly* 11 at 12. [*Reanda*]

²⁵ *Ibid.*

ensure that traditional, historical, religious, or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all covenant rights. State parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize compliance with Article 3, and indicate what measures they have taken or intend to take to overcome such factors.²⁶

The *ICESCR* is also unique in its acknowledgement of attempts to alleviate the injustice and inequality suffered by women. For instance, the drafters of *ICESCR* unanimously voted to include Article 3, requiring States to ensure that women enjoy economic and social rights at levels compared to men.²⁷ Thus, the *ICESCR* does address equal rights for men and women.²⁸

In spite of the *ICCPR* and the *ICESCR*, Ugandan and Nigerian widows still struggle towards the full attainment of their civil, social cultural, political, and economic rights. They are subjected to a variety of degrading practices under the guise of customs and to intolerable forms of violence. They are routinely deprived of their rights of inheritance despite existing "paper rights"²⁹ under domestic law. Widows who married under customary law are even worse off, especially with respect to issues related to inheritance, ownership of land, and the custody of children. In addition, because cultural rights are believed to be "private," those who want change in order to ensure adequate protection for women's legal rights in the society must usually struggle with those who want to assert the legitimacy of the power they hold within the status quo.³⁰ It is now widely understood that "economic, social, civil, and

²⁶United Nations General Comments adopted by the Human Rights Committee under Article 40, Paragraph 4 of the *International Covenant on Civil and Political Rights*: General Comments No 28: (Equality of Rights between Men and Women, Article 3): 03/29/2000/ICCPR /C/21/Rev.1/Add.10.

²⁷*ICESCR*, Article 3.

²⁸Yvonne Klerk, "Working Paper in Article 2(2) and Article 3 of the *International Covenant on Economic, Social, and Cultural Rights*" (1987) 9 *Human Rights Quarterly* 250 at 251.

²⁹Truyol, *supra* note 23 at 37.

³⁰Kate Nash, "Human Rights for Women: An Argument for Deconstructive Equality" (2011) 31 *Economy & Society* 414 at 418. [*Nash*].

cultural rights are crucial for widows; thus, ineffective implementation and enforcement of these rights is directly related to the on-going neglect and subordination of widows.”³¹

2.3 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*³² is also known as the *Women’s Convention*.³³ It was adopted by the United Nations General Assembly on December 18, 1979, and entered into force as an international treaty on September 3, 1981, following the twentieth ratification.³⁴ *CEDAW* is regarded as the most “definitive international legal instrument requiring respect for and observance of the

³¹ Barbara Stark, “The *International Covenant on Economic, Social and Cultural Rights* as a Resource for Women” in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law, International Courts, Instruments, and Organisations and Select Regional Issues Affecting Women* (New York: Transnational Publishers, 2000) at 243.

³² *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, September 1979, 1249 UNTS 13, G.A res . A/RES/34/180, U.N. GAOR, 34th Session, Agenda Item 75, U.N. Doc. A/RES/34/180 (1979), online: <<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>>.[*CEDAW*].

³³ See generally, Rebecca Cook, “Reservations to the *Convention on the Elimination of All Forms of Discrimination against Women*” (1989) 30 Va. J. Int'l L. at 643; A number of other conventions deal with women's rights in specific areas. See generally, *ICCPR*, art. 26, providing, *inter alia*, that “all persons are equal before the law,” and that ‘the law shall prohibit any discrimination...on any ground such as race, colour, [or] sex’; *Convention on the Political Rights of Women*, Mar. 31, 1953, arts. 1-3, 27 U.S.T. 1909, 1911, 193 U.N.T.S. 135, 136-38 (providing that [w]omen shall be entitled to vote in all elections on equal terms with men,’ that ‘Women shall be eligible for election to all publicly elected bodies . . . on equal terms with men,’ and that they ‘shall be entitled to hold public functions..., on equal terms with men’); *Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, June 29, 1951, 165 U.N.T.S. 303, 306, art. 2, (requiring members to “ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”).

³⁴ Silvia Cartwright, “The Committee on the Elimination of Discrimination Against Women” in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law: International Courts, Instruments, and Organisations and Select Regional Issues Affecting Women* (New York: Transnational Publishers Inc, 2000) at 165 [Cartwright].

human rights of women,”³⁵ affirming that women, like the rest of the human race, have an inalienable and indivisible right to be free of every form of discrimination.³⁶ CEDAW is “not the most comprehensive international charter of human rights but it is the only major international instrument that is concerned with the rights of women.”³⁷ Unfortunately to date, “the document’s practical effects have not been equal to its contents and ideals behind it.”³⁸

CEDAW has been used to argue “against discrimination against women in human rights declarations themselves, challenging the androcentric exclusion of women from the humanity they construct.”³⁹ In addition, it has far-reaching implications for gender relations. For example the meaning of “discrimination against women as employed in the Convention prohibits any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.”⁴⁰

Like other international documents, CEDAW treats culture as an impediment to the full realization of the protection and promotion of women’s rights. This is the reason two provisions in CEDAW are particularly worth noting in the context of the present discussion.⁴¹ Article 5 places on States “the responsibility of taking measures to modify social and cultural

³⁵ Julie A. Minor, “Analysis of Structural Weaknesses in the *Convention on the Elimination of all Forms of Discrimination against Women*” (1994) Ga. J. Int’l & Comp. L. 24 at 137 [Minor].

³⁶ Harold Hongju Koh, “Why America Should Ratify the Women’s Rights Treaty (CEDAW)” (2002) 34 Case Western Reserve Journal of International Law 263 at 266.

³⁷ Cartwright, *supra* note 34 at 167.

³⁸ Minor, *supra* note 35 at 137.

³⁹ Nash, *supra* note 30 at 419.

⁴⁰ CEDAW, Article 1.

⁴¹ The substantive provisions of the Convention cover a broad range of subjects, specifically enumerating forms of discrimination that States Parties agree to eradicate. These include provisions dealing with health and social services, mortgages and other forms of credit, recreation, marriage, nationality, legal status, education, employment, political rights, traffic in women and prostitution, and the problems of rural women, ensure to women, on equal terms with men the right to vote, to hold public office, to participate in the formulation of governmental policy, and to participate in non-governmental organizations and associations concerned with the public and political life of the country. See generally, CEDAW, Articles 7-17.

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.”⁴² Article 16 places a “duty on the State to act against discrimination against women within marriage and the family, and to ensure that men and women have equal rights within marriage and the family.”⁴³ These provisions are unambiguous and in principle require States (including Uganda and Nigeria) to eliminate all aspects of social, economic and cultural life that contribute to women’s inequality. Even though many scholars have observed that *CEDAW* lacks some substantial provisions, such as the right to be free from violence, *CEDAW* still provides a platform that protects the rights, security, dignity, and integrity of women.

CEDAW makes no specific provisions for widows. However, in 2013 the Human Rights Committee of *CEDAW* expressed concerns “that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women, and that the lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination.”⁴⁴ The Committee stated further:

Many States parties, by law or custom, deny widows equality with widowers as to inheritance, leaving them vulnerable economically upon the death of a spouse . . . in some [S]tates parties, widows are subject to “property dispossession” or “property grabbing”, in which relatives of a deceased husband, claiming customary rights, dispossess the widow and her children from property accumulated during the marriage, including property that is not held according to custom. They remove the widow from the family home and claim all the chattels, then ignore their concomitant customary responsibility to support the widow and children. In some States parties, widows are marginalized or banished to a different community.⁴⁵

⁴² *CEDAW*, Article 5.

⁴³ *CEDAW*, Article 6.

⁴⁴ UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *CEDAW* General Recommendations Nos. 29, adopted at the Fifth- fourth Session, 2013 (contained in Document *CEDAW /C/GC/29*, Paragraph 14 online: < <http://www2.ohchr.org/english/bodies/CEDAW/comments.htm> >.

⁴⁵ *Ibid*, Paras 49 & 50.

Notwithstanding the provisions of *CEDAW*, traditional customs and values in sub-Saharan Africa associate different roles with women and men; equality in a strict legal sense collides with the customary fact of deep-seated difference and inequality. *De jure* stipulations exist on paper; but in the reality of rural settings, *de facto* inequality prevails. In most rural areas of sub-Saharan Africa, widows face serious challenges due to traditional land tenure systems, inter-personal violence, inheritance practices, and degrading widowhood rituals. However, this does not mean that we should overlook the potential significance of these international conventions as one of the means to reverse the inequalities and discrimination that have characterized the lives of African widows. Rather we should focus on how to make these laws part of everyone's lives and how human rights can be translated into practical and meaningful progress for widows at the grassroots level. To allow for and promote the rights of widows, there is a need to create local expressions of globally generated human rights norms. This is why Sally Merry's work⁴⁶ is of great importance to this thesis. Only by vernacularizing human rights at the local level can violations of widows be effectively addressed.

2.4 THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* has significantly strengthened the protection mechanisms for women's rights at the international level.⁴⁷ The *Optional Protocol* was adopted by the General Assembly through Resolution 54/4 on October 6, 1999 and entered into force on December 22, 2000.⁴⁸ The *Optional Protocol* to *CEDAW* arose out of discussions by some State parties about the advisability of including individual complaints within the framework of the Convention. State parties identified the need for a procedure that would allow individual women in ratifying

⁴⁶ Peggy Levitt & Sally Merry, "Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India, and the United States" (2009) 9 *Global Network* at 441; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago & London: The University of Chicago Press, 2006) at 135.

⁴⁷ Felipe Gomez Isa, "The *Optional Protocol for the Convention on the Elimination of all Forms of Discrimination Against Women*: Strengthening the Protection Mechanism on Women's Human Rights" (2003) 20 *Ariz. J. Int'l & Comp. L.* at 291.

⁴⁸ *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.asp>>.

States to communicate with the Committee directly.⁴⁹ The mechanism that was adopted allows individuals to file a complaint of an alleged violation of a provision of the Convention with the *UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee)*⁵⁰ The *Optional Protocol* includes both inquiry and individual complaints procedures.⁵¹ The complaints mechanism permits women from countries that are signatories to *CEDAW* and the *Protocol* to make Complaints to *CEDAW* Committee, when all other remedies have been exhausted. The inquiry procedure enables the Committee to investigate serious and systematic abuses of women's human rights in countries that are State Parties.⁵² The “complaint and inquiry mechanisms make *CEDAW* accessible to women who would otherwise be unable to access the Committee’s procedures.”⁵³

⁴⁹ Silvia Cartwright, “Rights & Remedies: The Drafting of an *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women*” (2000) 9 *Otago Law Review* 239 at 241.

⁵⁰ Rebecca Cook, “Women’s International Human Rights Law: The Way Forward” (1993) 15 *Human Rights Quarterly*, 230 at 305.

⁵¹ Andrews Byrnes & Eleanor Bath, “Violence Against Women, the Obligation of Due Diligence and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*—Recent Development” (2008) 8 *Human Rights Law Review* at 517-533 [*Byrnes & Bath*].

⁵² Division For The Advancement For Women, Department of Social and Economic Affairs, UN Human Rights Watch, online: <
<http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.html>>.

⁵³ *Ibid.* One report/complaint received by the Committee was the case of *Fatma Yildirim (deceased) v Austria*, 6/2005. *Fatma Yildirim (deceased)* was an Austrian national of Turkish origin and a former client of the Vienna Intervention Centre against Domestic Violence. The deceased was allegedly killed by her husband and found to be a victim of a violation by the State party of Articles 1, 2, 3 and 5 of the *Convention on the Elimination of All Forms of Discrimination against Women*, read in the light of the Committee’s practice, especially General Recommendations Nos.12, 19 and 21. Another report received by the committee was the case of *Goecke v. Austria. Sahide Goecke*, an Austrian national of Turkish descent, was subjected to physical violence and threats of violence over a period of at least three years, culminating in her fatal shooting by her husband, Mustafa Goecke. The communication alleged violations of Articles 1, 2, 3 and 5 of the Convention, arguing that the State Party had “failed to take all appropriate measures to protect Sahide Goecke’s right to personal security and life.” Finding the convention had been violated, the Committee recommended a range of measures intended to address the systemic problems which it saw as leading to the consequences in this particular case. It recommended that Austria: (a) strengthen implementation of its existing legislation by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so; (b) prosecute perpetrators of domestic violence effectively to convey the message that

The *Optional Protocol* is a powerful tool that provides opportunities for women to assert their rights against any form of discriminatory practices, gender inequality, inter-personal violence and harmful traditional practices.⁵⁴ However, the *Optional Protocol* does not mark the elimination of discrimination against women. Until changes occur at the grassroots level to deeply rooted patriarchal attitudes, not much can be achieved.⁵⁵ Changes such as “defining gender issues, creating an agenda for action, making explicit connections between local organising efforts and national politics, nurturing women’s social networks as the context for motivating, empowering, and sustaining women in their work for social change and building coalitions among groups of women”⁵⁶ are needed at the grassroots level to ensure effective recognition of widows’ rights.⁵⁷

2.5 INTERNATIONAL HUMAN RIGHTS CONFERENCES AIMED AT PROMOTING WOMEN’S RIGHTS

A number of international human rights conferences have devoted attention to issues relating to women. Some initiatives have gained enormous momentum and have galvanized activists around the world. These initiatives include: (a) adoption of the Declaration and World Plan of Action for Implementation of the Objectives of International Women's Year (Mexico City,

“society condemns domestic violence as well as to ensure the use of criminal and civil remedies where the perpetrator poses a dangerous threat to the victim”; and also ensure that “in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity”; (c) “ensure better coordination among law enforcement officials and the cooperation of officials in the criminal justice system with non-governmental organisations that work with women subjected to gender-based violence; and (d) strengthen training programmes and education on domestic violence for those involved in the legal system.” See generally, UN Women Watch, Division for the Advancement of Women: Department of Economic & Social Affairs, online:

< <http://www.un.org/womenwatch/daw/CEDAW/protocol/dec-views.htm> >.

⁵⁴ Kwong Leung Tang, “The Leadership Role of International Law in Enforcing Women’s Rights: The Optional Protocol to the Women’s Convention” (2000) 8 *Gender & Development* 65 at 71.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Kerri L. Ritz, “Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the *Convention of the Elimination of all Forms of Discrimination against Women*” (2002) 25 *Suffolk Transnational Review* 191 at 216.

1975);⁵⁸ (b) development of the Programme of Action for the Second Half of the UNDW (Copenhagen, 1980);⁵⁹ (c) establishment by the United Nations General Assembly in June

⁵⁸ In 1985, delegations from 157 countries came together and produced the Nairobi Forward-Looking Strategies for the Advancement of Women (known as the Nairobi Strategies). One of the main objectives at the conference was to address differences in approaches to feminism at the theoretical or ideological levels and differences among women from different social, cultural, historical, and geographical locations. In addition, the forward-looking strategies for the advancement of women explain how more subtle forms of exploitation are correlated with cultural, religious, and family conditions that have constrained the advancement of women and intensified every form of marginalization and oppression of women. For further discussions on the Nairobi strategies, see generally, Martha Alter Chen, “Engendering World Conferences: The International Women’s Movement and the United Nations” 2010) 16 *Third World Quarterly* 477-497; Report of the World Conference of the International Women’s Year, U.N. Doc. E/ CONF.66/34 (1975); Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, U.N. Doc. A/CONF.94/35 (1980); Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, U.N. Doc. A/ CONF.116/28 (1985); Andrea E. Stumpf, “Re-examining the UN *Convention on the Elimination of all Forms of Discrimination against Women*: The UN Decade for Women Conference in Nairobi” (1985) 10 *Yale J. Int’l* 375 at 384; The Nairobi Forward-Looking Strategies for the Advancement of Women, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, UNESCO, 1985, U.N. Doc. A/ CONF. 116/28, para 1.

⁵⁹ The 1993 Vienna Declaration pushed the issue of violence against women to the forefront of the struggle for women’s human rights. The conference significantly expanded the international human rights agenda to include gender-specific violations in its final conference document, which is the Vienna Declaration and Programme of Action (PFA). The PFA identifies particular examples of gender-specific abuses as human rights violations and calls for integration of women’s human rights throughout United Nations activities, legal and extra-legal measures to stem violence against women, encouraging governments to focus on education and to adopt steps to modify cultural and social patterns that perpetuate violence against women. The conference was also a significant step towards clarifying the human rights norms applicable to violence against women. For further readings on the Vienna Declaration, see generally, World Conference on Human Rights, 14-25 June 1993 *Vienna Austria---United Nations Human Rights*, online: < <http://www.orchr.org>>; Penelope Andrews, *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women’s Human Rights* (USA: Ashgate Publishing, 2012) at 54; Donna J. Sullivan, “Women’s Human Rights & the 1993 World Conference on Human Rights” (1994) 88 *American Journal of International Law* at 152; Christina M. Cerna, “Universality of Human Rights & Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts” (1994) 16 *Hum. Rts.Q.*740 at 74; Donna J. Sullivan, “Women’s Human Rights & the 1993 World Conference on Human Rights” (1994) 88 *American Journal of International Law* at 152.

2012 of UN Women; (d) establishment of the Platform for Action (PFA) (Beijing, 1995);⁶⁰ (e) naming 1976-85 as the UN Decade for Women (UNDW) (adopted by the General Assembly in Resolution 3520, 1975; and (f) issuing the Forward-looking Strategies for the Advancement of Women (FLS) for the period 1985-2000 (Nairobi, 1985), amongst several others.⁶¹

All these actions to promote women's rights reflect recognition that it is necessary to take priority action to empower women and advance their rights and interests. However, none of these international human rights initiatives specifically addresses the impact of widowhood on women's lives. Efforts could be made by women's movements to highlight gender cultural practices, such as widowhood rituals and property disinheritance, as factors that affect widows' rights. That would exert pressure, not only on the international community but also at the regional and national levels, to intensify efforts to achieve change.

2.6 INTERNATIONAL BODIES ADVANCING WOMEN'S RIGHTS

With the help of the United Nations (UN), many internationally recognised bodies have been active in promoting women's issues and establishing international legal standards on

⁶⁰ In 1995, the Beijing conference was held to provide a comprehensive action plan to enhance women's social, economic, and political pursuit of women's rights and gender equality. A Platform for Action (PFA) was adopted and this identifies twelve critical areas of concern which includes; poverty, education and training, health, violence, peace, economic structures and policies, decision making, mechanisms to promote the advancement of women, human rights of women, media, environment and the girl child. Other 6 components of the PFA are mission statement, global framework, and critical areas of concern, institutional arrangement, strategies objectives & actions, and financial arrangement. For readings on the Beijing Conference, see generally, Barbara Roberts, "Beijing Fourth World Conference on Women" (1996) 21 *Canadian Journal of Sociology* at 237; Rita Maran, "After the Beijing Women's Conference: What will be done?" (1996) 23 *Social Justice* at 352; UN-Habitat-*United Nations Human Settlement Programme* "Appendix 3: The Beijing Declaration & its Platform for Action (PTA), online: United Nations < <http://www2.unhabitat.org/programmes/genderpolicy/beijing.asp>>; Priscilla Singh, "United Nations 23rd General Assembly Special Session (Beijing +5)", *Women Magazine* (December 2000) 12; United Nations Fourth World Conference on Women, Beijing China held on 4-15 September 1995A/CONF.177/20, online: < <http://www.un.org/documents/ga/conf177/aconf177-20add1en.htm>>.

⁶¹ Claude E. Welch, Jr, "Human Rights & African Women: A Comparison of Protection under Two Major Treaties" (1993) 15 *Human Rights Quarterly* 549 at 550.

women's equality. Both the Commission on the Status of Women (CSW)⁶² and The Mexico City Conference (Declaration and World Plan of Action for Implementation of the Objectives of International Women's year) have made contributions. The latter led to the establishment of the United Nations Development Fund for Women (UNIFEM)⁶³ and the International Research and Training Institute for the Advancement of Women (INSTRAW), both international bodies that help to advance the cause of women's rights. These bodies advocated for recognition and promotion of women's rights, addressing inter-personal violence within the home and the society, women's equal access to economic resources including land, and gender equality.

2.7 THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

The *African Charter on Human and Peoples Rights (African Charter)*⁶⁴ came into force on October 21, 1986,⁶⁵ three months after the Secretary-General received the instrument of

⁶²The Commission on the Status of Women (CSW) was established by the United Nations Economic and Social Council (ECOSOC) with its primary focus of monitoring and encouraging implementation of international law on women's rights in political, economic, social, civil and educational matters. Issues of violence against women have also been addressed by the CSW. For further discussions on CSW, see generally; Commission on the Status of Women, *overview*, online: United Nations Entity for Gender Equality & the Empowerment of Women < <http://www.un.org/womenwatch/daw/csw>>; UN Women, *A Brief History of the CSW*, United Nations online:

< <http://unwomen.org.en.csw/brief-history>>; Commission on the Status of Women, *47th Session*, online: United Nations Entity for Gender Equality and the Empowerment of Women, < <http://www.un.org/womenwatch/daw/csw/47sess.htm>>; Commission on the Status of Women, *42nd Session*, online: United Nations Entity for Gender Equality & the Empowerment of Women, < <http://www.un.org/womenwatch/daw/csw/42sess.htm>>.

⁶³United Nations Development Fund for Women (UNIFEM) was put in place to improve the living standards of women in developing countries, address critical concerns on national, regional, and global agendas, to reduce feminized poverty, violence against women, achieve gender equality in democratic governance and foster women's empowerment and gender equality. For discussions on UNIFEM, see generally, Helen Hintjens, *UNIFEM, CEDAW and the Human Rights Based Approach* (Oxford: Blackwell Publishing, 2008) at 1181; United Nations Population Information Network, *UN Development Fund for Women*, online: United Nations Population Information Network < <http://www.un.org/popin/programmes/unifem.html>>; UN Women, *About UNIFEM*, online: United Nations < <http://www.unifem.org/about>>.

⁶⁴See for example, Gino J. Naldi, "Future Trends in Human Rights in Africa: The Increased Role of the OAU" in Malcolm D. Evans & Rachael Murray, eds., *The African Charter on Human & People's Rights-The System in Practice, 1986-2000* (Cambridge: Cambridge

ratification or adherence to the *Charter* of the twenty-sixth member-state of the Organization of African Unity (OAU).⁶⁶ The “*African Charter* remains a testament to the collective recognition of the indivisibility of human rights and dignity”⁶⁷ and the importance of development issues in the African context.⁶⁸ The *African Charter* focuses on the significance of human rights issues to African women. The *Charter* is especially relevant to this thesis in light of the fact that both Uganda and Nigeria are parties to the *Charter*.

The *Charter* is unique in that it emphasises an African conception of human rights,⁶⁹ taking cognizance of African cultures but at the same time incorporating human rights norms.⁷⁰ The:

African Charter differs from European and American international conventions. First, its principles rely heavily upon African documents and traditions rather than on United Nations declarations and covenants. Second, while individuals enjoy certain rights under the *Charter*, they also are obligated to fulfil certain duties toward other individuals as well as toward the State of their citizenship.⁷¹

In many regional human rights instruments the concept of “duties” refers only to the obligation of a State toward its citizens or toward citizens of another State coming within its

University Press, 2002) at 5 on the history of the *African Charter on Human and Peoples’ Rights*.

⁶⁵ Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights [Africa Charter]*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

⁶⁶ *African Charter*, Article 63(3). The Charter entered into force upon ratification by a simple majority, or twenty-six of the fifty African member States of the OAU. Several countries attempted to raise the requirement to two-thirds of the member States, but the Council of Ministers rejected this standard as being unnecessarily high; Christof Heyns, “The African Regional Human Rights System: The *African Charter*” (2004) 108 Penn St. L. Rev 679 at 682 [Heyns].

⁶⁷ Shedrack C. Agbakwa, “Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights” (2002) 5 Yale. Hum. Rts. & Dev. L. J 177 at 184.

⁶⁸ Heyns, *supra* note 66 at 690.

⁶⁹ B. Obinna Okere, “The Protection of Human Rights in Africa & the *African Charter on Human and Peoples Rights: A Comparative Analysis with the European & American Systems*” (1984) 6 Human Rights Quarterly 141 at 145 [Okere].

⁷⁰ Ebow Bondzie-Simpson, “A Critique of the *African Charter on Human and Peoples Rights*” (1986) 31 Howard L.J 643 at 646 [Bondzie-Simpson].

⁷¹ Richard Gittleman, “The *African Charter on Human and People’s Rights: A Legal Analysis*” (1982) 22 Va.J.Int’L 667 at 678 [Gittleman].

jurisdiction. In the *African Charter*, references are made to the individual's responsibility to the community.⁷² As Kristina Bentley explains,

[the] *African Charter* retains all the standard basic human rights clauses, but it also has a distinctly 'liberationist' flavour in that it emphasises the struggle against colonialism and apartheid in its preamble. It is also mindful of the more collective conception of rights which is often associated with non-western cultural traditions in that it includes the rights of 'peoples' (as collectives) as well as the rights of 'humans' (as individuals).⁷³

The *African Charter* addresses the "issue of non-discrimination against individuals on the one hand, and emphasises family relations, protection of cultural values, and duties of persons to the state, on the other."⁷⁴ Nonetheless, in keeping with both the *Charter's* emphasis on African values and other international human rights documents, the duty of promotion and protection of morals and traditional values falls to the state. For example, Article 18 states that "the natural unit and basis of society ... shall be protected by the State."⁷⁵ Article 18(1) further states that "[t]he family ... is the custodian of morals and traditional values recognized by the community."⁷⁶ In addition, Article 29 provides that individuals have the duty "to preserve the harmonious development of the family and to work for the cohesion and respect

⁷² The American Convention does mention the individual's obligation to his family, community, and mankind. See generally, *Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969*, online: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>.; The *Universal Declaration of Human Rights* also provides that "Everyone has duties to the community in which alone the free and full development of his personality is possible." *UDHR*, Article 29(1). It is an open question, however as to whether "community" equals "state"; E.A Ankumah, *The African Commission Human and People's Rights* (Hague: Kluwer, 1996) at 4-8 [Ankumah].

⁷³ Kristina Bentley, "Women's Human Rights & the Feminization of Poverty in South Africa" (2002) 31 *Review of African Political Economy* 247 at 252.

⁷⁴ Welch, *supra* note 61 at 555.

⁷⁵ *African Charter*, Article 18.

⁷⁶ *Ibid*, Article 18(1).

of the family.”⁷⁷ Further, each person has the duty “to preserve and strengthen positive African cultural values in his [sic] relations with other members of the society.”⁷⁸

Though some of these provisions are derived from the *UDHR*, others reflect African values deliberately injected into the *African Charter*. Wolfgang Benedak & Heinz described the *African Charter* as:

characterized by a dualism of norms regarding women's rights, a contradiction between modernism and traditionalism as well as between universalism and regionalism ... The *African Charter* ha[s] placed the rights of women in a ‘legal coma.’⁷⁹

Notably, only Article 18 contains a specific reference to women, and even then it is “contained in an omnibus clause that covers both family and upholds tradition, thereby reproducing the essential tension that plagues the realization of the human rights of women.”⁸⁰

The *African Charter* has been ratified by most African countries, including Uganda and Nigeria. However, discrimination on the basis of sex still affects African widows and the resulting inequalities can be found in every aspect of their lives. Widows continue to be in a disadvantaged position less because of formal legal impediments but because their status continues to be negatively affected by customary law, tradition, and culture.⁸¹ Being a State party to international or regional instruments ought to improve the lives of widows.⁸² Sadly, “[i]f ratification is used as a yardstick by which adherence and implementation of the

⁷⁷ *Ibid*, Article 29.

⁷⁸ *Ibid*, Article 29(7).

⁷⁹ Wolfgang Benedek & Wolfgang Heinz, *Regional Systems of Human Rights Protection in Africa, America and Europe: Proceedings of the Conference* (Brussels: Friedrich Naumann Foundation, 1992) at 17 [*Benedak & Heinz*].

⁸⁰ J. Oloka-Onyango, “Human Rights & Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizons” (2000) 6 *Buffalo Human Rights Law Review* 39 at 62 [*Oloka-Onyango*].

⁸¹ Welch, *supra* note 61 at 566.

⁸² Linda M Keller, “The Impact of States Parties Reservation to the *Convention on the Elimination of all Forms of Discrimination against Women*” (2014) 309 *Michigan State Law Review* 309 at 325.

principles within an instrument were to be judged, then the African human rights situation ought to be considerably less troubled than it is.”⁸³ For example, one of the initial *CEDAW* reports on Nigeria states:

In Nigeria, there is a persistence of patriarchal attitudes and deep rooted stereotypes concerning women’s roles and responsibilities that discriminate against women and perpetuate their subordination with the family and the society . . . there are still persistence of entrenched harmful traditional and cultural norms and practices including widowhood rites and practices . . . thus, there is absence of national legislation prohibiting this harmful traditional practices . . . women are still subjected to widespread poverty in particular rural women and women heads of households . . . households, as well as poor socio-economic conditions are among the causes of the violation of women’s human rights and discrimination against women. It notes with concern that discriminatory practices with regard to land ownership, administration of property and inheritance, limit women’s access to economic resources, as well as credit and loan facilities.⁸⁴

These observations are discouraging. Ensuring radical changes in the lives of the widows at the grassroots level is the real struggle. There is a need for action on these issues by the non-governmental organizations (NGOs) that are involved in community development. The activity of NGOs at the community level is potentially a “key factor in the protection and promotion of human rights.”⁸⁵ Theories like those developed by Sally Merry are needed to guide work at the community level. Discrimination against widows is deeply rooted in African societies. It will only be reduced by long-term social and economic change and development.⁸⁶ Like all other international conventions, the *African Charter* is as much a

⁸³ Oloka-Onyango, *supra* note 80 at 66.

⁸⁴ Status of submission and consideration of reports submitted by States parties under Article 18 of the *Convention on the Elimination of All Forms of Discrimination against Women*, as at 31 August 2006, Excerpt taken from the Report of the Committee on the Elimination of Discrimination against Women (A/61/38) paragraph 322-324, online:<
<http://www.un.org/en/>>.

⁸⁵ Obiora Chinedu Okafor, *Legitimizing Human Rights NGOs: Lessons from Nigeria* (London: African Press, 2006) 3.

⁸⁶ Welch, *supra* note 61 at 573.

political document as it is a legal one.⁸⁷ The *African Charter* is a significant step forward in the promotion of human rights in Africa,⁸⁸ a milestone in the development of human rights on the continent, its imperfections notwithstanding.⁸⁹

To date, the *African Charter* has not significantly improved the plight of widows in African countries. More effective monitoring of the violations of widows' rights, vigorous review of local laws that legalize the subjugation of widows, and more effective enforcement of claims to human dignity and well-being at all levels are needed.

2.8 THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

*The Protocol to the African Charter on Human and Peoples Rights (ACHPR) on the Rights of Women in Africa (African Women's Protocol)*⁹⁰ was adopted in Maputo in July 2003.⁹¹

Benedek notes that the *African Women's Protocol*:

emphasizes the basic rights of African women. It transcends cultural boundaries and deals with all aspects of social functioning, particularly gender equality. While the *African Charter* gave recognition to women's rights in general terms, many African women's rights activists and feminists believed that the

⁸⁷ Gittleman, *supra* note 71 at 713.

⁸⁸ Okere, *supra* note 69 at 159.

⁸⁹ U.O Umozurike, *The African Charter on Human and People's Rights*" (1983) 77 *The American Journal of International Law* 902 at 912.

⁹⁰ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, OAU Doc. CAB/LEG/66.6 (2003), online:<[http:// www.achpr.org/english/info/women en.html](http://www.achpr.org/english/info/women_en.html)>. [Hereinafter *African Women Protocol*].

⁹¹ For further discussions on the *African Charter on Human and Peoples Rights on the Rights of Women in Africa*, see generally, Melinda Adams, "Regional Advocacy Networks & The Protocol on the Rights of Women in Africa (2007) 3 *Politics & Gender*, 451 at 453; Koffi Kounte, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (Togo: Aldus Press, 2005) at 1; Dejo Olowu, "A Critique of the Rhetoric, Ambivalence, and Promise in the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*" (2006) 4 *Human Rights Review* 78 at 82.

commitment of the *African Charter* was fettered by its overwhelming emphasis on African traditional values and concepts.⁹²

The *African Women's Protocol* seeks to obliterate gender-biased and repressive traditional values and “all forms of discrimination particular to Africa,”⁹³ taking into consideration that economic, cultural, and social rights are important for the protection of women’s rights.⁹⁴

Borrowing from the provisions enshrined in *CEDAW*, the *Protocol* seeks to strengthen African women's control over their role as child bearers and their role in their communities as a whole. However, in seeking to loosen the constraints that custom often imposes on women, the *Protocol* takes an approach that seems focused more on “filling the gaps” in the *African Charter* (and, in some ways, within *CEDAW*) than on addressing the complexities that affect the economic position of women.⁹⁵

In Article 2, the *Protocol* enjoins African States to combat discrimination by a variety of means, including amending constitutions and legislative instruments to guarantee equality, mainstreaming, prohibition, and taking corrective and positive action in those areas where discrimination against women continues to manifest.⁹⁶ Recognition that “women experience discrimination not only as a result of law but also social practice”⁹⁷ is why the wording of Article 2(2) of the *African Protocol* was adopted from Articles 2(f) and 5(a) of *CEDAW* to provide that

States parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public information, education and

⁹² Wolfgang Benedek, “The Role of International in the Protection and Promotion of Human Rights of Women in Africa” (1995) 5 *Rev. Afr. Comm. Hum & People’s Rts* at 28; Rachel Murray, “A Feminist Perspective on Reform of the African Human Rights System” (2001) 1 *African Human Rights Journal* at 205.

⁹³ Kristin Davis, “The Emperor is Still Naked: Why the *Protocol on the Rights of Women in Africa* leaves Women exposed to More Discrimination” (2009) 42 *Vanderbilt Journal Transnational Law* 949 at 952.

⁹⁴ Rachael Rebouche, “Labour, Land, & Women’s Rights in Africa: Challenge for the New Protocol on the Rights of Women” (2006) 19 *Harvard Human Rights Journal* 235 at 236.

⁹⁵ *Ibid* at 237.

⁹⁶ *African Women’s Protocol*, Article 2.

⁹⁷ Farenda Banda, “Blazing a Trail: The African Protocol on Women’s Rights Comes into Force” (2006) 50 *Journal of African Law* 72 at 75 [*Banda*].

communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices 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 women and men.⁹⁸

In contrast to *CEDAW* and the *African Charter*, the *Protocol* represents a more contemporary view that values both the positive aspect of culture and the equality rights of women.⁹⁹ In a bid to address the negative impact of widowhood practices on women, Articles 20 & 21 of the *African Women's Protocol* state:

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions; that widows are not subjected to inhuman, humiliating or degrading treatment; a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children ... A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. Women and men shall have the right to inherit, in equitable shares, their parents' properties.¹⁰⁰

This provision is intended to protect African women, especially widows, from cultural practices that deny them of their right to inherit property, their right to the use, control, and ownership of land, and their right not to be subjected to any form of inhuman treatment (by way of widow inheritance or widow cleansing).¹⁰¹ In most African countries, “under customary law and laws particular to tribal affiliations, women are effectively prevented from

⁹⁸ *African Women's Protocol*, Article 2(2).

⁹⁹ Celina Romany, “Black Women and Gender Equality in a South Africa: Human Rights Law and the Intersection of Race and Gender” (1996) 21 *Brooklyn J. Int'l L.* 857 at 860.

¹⁰⁰ *African Women's Protocol*, Articles 20 & 21.

¹⁰¹ Ebenezer Durojaye, “Woman, But not Human: Widowhood Practices & Human Rights Violations in Nigeria” (2013) 27 *International Journal of Law, Policy, and the Family* 176 at 187.

owning land.”¹⁰² Women's freedom to use land is further restricted by customary or tribal laws dictating what crops may be planted. Upon divorce or separation from their husbands, or upon the death of their husbands, women can be denied rights to land and matrimonial home. In addition, a patrilineal system of inheritance in which property is passed to the deceased's male children rather than to his wife is evident in African cultures. Thus, if the deceased does not have any male children, the deceased's property is largely treated as if it belonged to an unmarried man. A woman, who works and uses the land for herself and her family's livelihood can be deprived of ownership and, ultimately, control of the land at the death of her husband.¹⁰³

Under the *African Women's Protocol*,¹⁰⁴ a woman's right to be free from all forms of violence is enunciated in Article 3 which states that “State parties must ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”¹⁰⁵ In most African societies, violence takes the form of sexual assault, rape, harassment in the workplace, and assault.¹⁰⁶ Even though the *Protocol* provides a holistic way of protecting women from all forms of violence,¹⁰⁷ “gender-based violence still lies in patriarchal nature of many African society, and ideals of

¹⁰² Adrien Katherine Wing & Tyler Murray Smith, “The New African Union and Women's Rights” (2003) 13 *Transnational L. & Contemporary Problems*, 33 at 58.

¹⁰³ See chapter 3 of this thesis for details on the rules of inheritance and succession in most patrilineal societies.

¹⁰⁴ The *Protocol* also includes other substantive provisions such as rights to dignity, life, integrity and security of the person, marriage, separation, divorce and annulment of marriage, access to justice, equal protection before the law, participation in the political and decision making process, peace, protection of women in armed conflicts, education and training, economic and social welfare rights, health and reproductive rights, food security, adequate housing, positive cultural context, a healthy and sustainable environment, sustainable development, special protection of elderly women, special protection of women with disabilities, and special protection of women with distress. See generally, Articles 3- 24 of the *African Women's Protocol*.

¹⁰⁵ *African Women's Protocol*, Article 3.

¹⁰⁶ Kulsum Wakabi, “Domestic Violence: Strategies for Combating Wife Battery in Uganda” in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda & Tanzania* (Durham: Carolina Academic Press, 2006) 134- 145.

¹⁰⁷ *African Women's Protocol*, Article 5(c).

masculinity that are based on control of women and that celebrate male strength and toughness.”¹⁰⁸

In addressing the issue of culture, the *African Women’s Protocol* offers new hope and significant promise for promoting women’s rights in Africa. There are three important ways in which the *Protocol* promotes that hope for African women.¹⁰⁹ Johanna Bond observed:

First, the Protocol offers credibility within the region. African women played a large role in drafting and promoting the Protocol such as it provides a convincing response to charges of western imperialism. As Rosemary Mukassr remarks, [t]he Protocol is a home grown instrument developed by Africans for African women. It legitimates the fight against gender oppression as an African struggle. No longer can detractors claim that women’s rights are transplants from the western world with no roots in African values and norms. Second, the Protocol has strong substantive provisions for the protection of women’s rights in the region. In the words of Professor Alpha Oumar Konara, the Chairperson of African Union Commission, [t]he Protocol is arguably one of the progressive and visionary rights instruments for gender equality not just in Africa but internationally. Third, the Protocol provides intriguing, but infrequently discussed procedural rights that, if properly operationalized, could lay the foundation for an engaging grassroots discourse that promoted women’s voices in the ongoing process of cultural definition and articulation of customary norms. By procedural rights, I am referring not to formal due process rights but rather to a right to be a part of a more informal process of defining and articulating cultural norms. The Protocol’s procedural provisions open the door for systematic engagement with traditional

¹⁰⁸ Rachael K. Jewkes et al, “Intimate Partner Violence, Relationship Power Inequity & Incidence of HIV Infection in Young Women in South Africa: A Cohort Study” (2010) 376 *The Lancet* at 41.

¹⁰⁹ Johanna E. Bond, “Women’s Rights, Customary Law, and the Promise of the Protocol on the Rights of Women in Africa” in Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins, eds., *The Future of African Customary Law* (USA: Cambridge University Press, 2011) at 475 [*Bond*].

leaders concerning implementation of women's human rights at the local, community level.¹¹⁰

The *Protocol* may not have fully comprehended the problems associated with African States and among African women, but it is a step in the right direction. Compared to *CEDAW*, the *Protocol* addresses issues that are of particular concern to African women and locates the *CEDAW* in African reality.¹¹¹ The *Protocol* also provides specificity where vagueness prevailed in the past, as, for example, when it states that “positive African values are those based on ‘the principles of democracy, peace, freedom, justice, dignity, solidarity and equality.’”¹¹² The lacunae left by the *African Charter* and *CEDAW* were filled by the *Protocol*, “striking an appropriate balance between issues arising from culture and equality that may conflict, and by recognising the positive aspects of culture while rejecting adherence to customs that are harmful to women.”¹¹³

In the light of the above analysis, it is evident that the *African Women's Protocol* is comprehensive enough to cover the loopholes the *African Charter* failed to fix. However, widows in most African countries are still struggling to ensure adequate protection for their rights. In the face of all these obstacles, Banda suggests that, “the vision of a discrimination-free life for the African woman is still remote.”¹¹⁴ Not only do the States need to strengthen enforcement mechanisms but the NGOs also need to develop strategies to ensure appropriate modes of resistance to unjust and oppressive cultural practices that act as impediments to the enjoyment of the widows' rights. To this end, Sally Engle Merry's work is useful.

2.9 THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

In 1987, the *African Charter* established the African Commission on Human and People's Rights (ACHPR) as a quasi-judicial body comprised of eleven experts¹¹⁵ charged with

¹¹⁰ *Ibid* at 476 [Footnotes omitted].

¹¹¹ Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2012) at 255 [Viljoen].

¹¹² The preamble of *African Women's Protocol*, para 10.

¹¹³ Bond, *supra* note 109 at 492.

¹¹⁴ Banda, *supra* note 97 at 84.

¹¹⁵ Micheal K. Addo, *The Legal Nature of International Human Rights* (Boston: Martinus Nijhoff Publishers, 2010) at 382.

promoting, protecting, and interpreting the rights in the *Charter*.¹¹⁶ It does its promotional work in various ways, including organising seminars and conferences on human rights.¹¹⁷ One of the major roles of the African Commission is to ensure the equality of women and men. The African Commission is also required to direct “special attention to certain categories of women such as rural women, women caught in internal conflict and refugee women.”¹¹⁸ The African Commission’s mandate is divided into “protective” and “promotional” roles.¹¹⁹ The “protective” mandate consists mainly of the consideration of complaints and communications, while the promotional mandate involves examination of State reports. In the exercise of its mandate, the Commission’s decisions are formally non-binding.¹²⁰ The African Commission draws inspiration from international human rights and a variety of international conventions.¹²¹

¹¹⁶ See generally, *African Charter*, Articles 30, 31 and 45; Rachael Murray, *The African Commission on Human and People’s Rights and International Law* (Oxford-Portland, Oregon: Hart Publishing, 2000) at 11; Ref World “African Commission on Human and People’s Rights” online: The Ref World <<http://www.refworld.org/publisher,ACHPR,CASELAW,AGO,..0.html>>.

¹¹⁷ See generally, *African Charter*, Articles 30–46.

¹¹⁸ Chaloka Beyani, “Towards a More Effective Guarantee of Women’s Rights in the African Human Rights System” in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 301 [Beyani].

¹¹⁹ For further discussions on ACHPR’s roles, see E. A. Ankumah, *The African Commission: Practice and Procedures* (The Hague: Martinus Nijhoff, 2006) at 45; U. O Umzurike, *The African Charter on Human and People’s Rights* (The Hague: Kluwer Law International, 1997) at 32; C.A. Odinkalu, “The Individual Complaints Procedures of the African Commission on Human and People’s Rights: A Preliminary Assessment” (1998) 8 *Transnational L. & Contemporary Problems* at 359; F. Ouguerouz, *The African Charter on Human and People’s Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff, 2003) at 13; Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007) at 45; Jeremy Sakin, “The African Commission on Human and People’s Rights and the Future African Court of Justice & Human Rights: Comparative Lessons from the European Courts of Human Rights” (2011) 18 *South African Journal of International Affairs* 281 at 283.

¹²⁰ Obiora Chinedu Okafor, “The African Commission on Human and People’s Rights as a Collective Human Security Resource: Promise, Performance and Prospects” in Ademola Abass, eds., *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) at 314 [Okafor].

¹²¹ Beyani, *supra* note 118 at 301.

As part of its protective role, the African Commission may receive communications on any alleged violation of human rights, including those affecting women. The complaints received by the African Commission can be used to protect the rights of women against all forms of abuse. However, the African Commission can only address matters submitted to it. As yet, there have been no communications from either Nigeria or Uganda regarding widows.¹²² In essence, the protective role of the African Commission is dormant unless communications are received. Only when that occurs, can the African Commission promote the rights of widows by urging State parties to pay more attention to their plight.

The African Commission has helped to promote human rights, especially women's rights, by holding seminars and conferences that focus on particular aspects of human rights in Africa.¹²³ Through these conferences and seminars,¹²⁴ the African Commission tries to create awareness of the African regional system amongst Africans. Most of the seminars have been held in conjunction with various NGOs and Women in Law and Development in Africa (WILDAF).

Although the African Commission has done little in relation to widows in Africa, the Commission has shown itself to be progressive in encouraging all State parties to abolish customary laws that undermine the right of widows. For example, at the African Commission's 54th Ordinary Session, held in Banjul, Gambia from 22 October to 5 November 2013, the Commission "encouraged State Parties to repeal discriminatory laws and adopt legislative measures to sanction customary practices that limit or have a negative impact on women's access to, use of and control over land and other productive

¹²² African Commission on Human and Peoples Rights, *Communications*, online: African Commission on Human and People's Rights: < <http://www.achpr.org/communications/>>.

¹²³ Julia Harrington, "The African Commission on Human and People's Rights" in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Laws* (New York: Transnational Publishers, 2001) at 463.

¹²⁴ Examples of such seminars and conferences as organized by the African Commission include: Seminar on National Implementation of the *African Charter* in Internal Legal Systems of Africa, held in Oct 26-30 1992 in Banjul; Seminar on Human Rights Education in South Africa held Sept 24- 27 1994 in Durban; Seminar on Impunity in Africa, held March 22-23, 1996 in Ouagadougou; Seminar on Prison Conditions in Africa held Sept 19.21 1996 in Kampala. See generally, African Commission on Human and People's Rights, online: < <http://www.achpr.org/>>.

resources.”¹²⁵ In addition, the Commission urged “State Parties to ensure widows’ right to inheritance, including the right to inherit the movable and immovable property of their husbands, as well as their right, irrespective of the matrimonial regime, to continue to live in the matrimonial house.”¹²⁶ It may be hoped that as the Commission gains experience and the confidence of various agents and actors in the African regional human rights system, many other issues affecting widows in Africa will also be addressed.

CONCLUSION

Despite the diverse initiatives discussed in this chapter, at present, millions of widows in sub-Saharan African countries continue to be victims of gender-based violence, widow cleansing, levirate, and customs that limit their rights to own, inherit, manage, and dispose of property. Widows live under constant attack from customs, traditions, laws, and individuals. A woman’s access to property usually hinges on her relationships with men, including her father, son, husband, brother, uncle, or cousin. When her relationship with her husband ends, a woman stands a good chance of losing her home, land, livestock, household goods, money, vehicles, and other property. These violations have the intent and effect of perpetuating women’s dependence on men and undermining women’s social and economic status. The consequences are absolutely devastating. Without effective protection of their legal rights or legal aid, widows struggle to survive. How can international human rights law tackle the oppressed position of widows?

International instruments are in place, but the question that remains unanswered is: how effective have these international and regional instruments been in redressing the disadvantages and injustices experienced by widows in Africa countries, including the many widows in Uganda and Nigeria? Most of these international provisions still need to be interpreted in a gender-sensitive way that is responsive to the reality of widows’ lived experiences. As recently as 2011, to highlight the situations and plights of widows, the UN

¹²⁵ The African Commission on Human and Peoples’ Rights, meeting at its 54th Ordinary Session held in Banjul, The Gambia, from 22 October to 5 November 2013; 262: Resolution on Women’s Rights to Land & Productive Resources online: <<http://www.achpr.org/sessions/54th/resolutions/262/>>.

¹²⁶ *Ibid.*

declared June 23 as International Widows' Day, to be celebrated annually.¹²⁷ In the words of Ban Ki Moon, "[n]o woman should lose her status, livelihood or property when her husband dies, yet millions of widows in our world face persistent abuse, discrimination, disinheritance and destitution."¹²⁸ There is a lot to be done. To ensure full implementation of these provisions, a critical re-characterization of international human rights is needed so that widows' distinctive human rights cease to be marginalized and implementation of their rights becomes a part of the central agenda of human rights work.¹²⁹ This can be promoted and implemented by translating and reframing globally generated ideas to fit into the cultures of the widows. Rights that "focus on specific harms sustained by widows need to be identified and developed and the plight of widows must find a public audience."¹³⁰

It is necessary to recognise that States also have a significant part to play in the promotion of human rights. Every State has the responsibility to remove any inconsistency between international human rights law by which it is bound, and religious and customary law operating within the territory of that State.¹³¹ The next chapter examines customary law and practices that affect Nigerian and Ugandan widows. The next chapter will also discuss the legal doctrine of repugnancy and show how the repugnancy test has been used to resolve conflicts between customary law and statute law.

¹²⁷ United Nations, *International Widows Day: June 23*, online: United Nations: < <http://www.un.org/en/events/widowsday/>>.

¹²⁸ *Ibid.*

¹²⁹ Rebecca J. Cook, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) at 10.

¹³⁰ Hilary Charlesworth, "What are Women's International Human Rights"?, in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 76.

¹³¹ Abdullahi Ahmed An-Na'im, "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) at 3.

CHAPTER THREE
THE RIGHTS OF WIDOWS IN SUB-SAHARAN AFRICA IN THE CONTEXT OF
DOMESTIC LAWS

3.0 INTRODUCTION

In the words of Sheleff, “the extent to which recognition is accorded to African customary law and to the basic rights of communities is a consequence of many factors, none of which is determinative and all of which have an effect to some degree or another. One of the primary factors is a test known as the repugnancy clause. This clause/ test sets the parameters within which a particular custom may continue to be practised”¹ within a community. The test is aptly described by Nwokedi JSC:

The doctrine of repugnancy in my view affords the court the opportunity of fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws...when however customary law is confronted by a novel situation, the courts have to consider its applicability under the existing social environment.²

The repugnancy test has been used for more than a hundred years to determine which customs ought to be accepted and which should not. In Uganda and Nigeria, most widows are faced with widespread violation of their legal rights by widowhood rituals, sexual assault, property violations, assault, inter-personal violence, and customary practices such as widow inheritance and widow cleansing. This reality persists even though these practices violate the provisions of Nigerian and Ugandan domestic laws. Often these customary practices cause widows grave harm. Widow cleansing for example, has led to the infection of widows with HIV/AIDS through unprotected sex with a member of the extended family or a village cleanser.³

¹ Leon Shaskolsky Sheleff, *The Future of Tradition: Customary Law, Common Law, & Legal Pluralism* (London: Routledge, 2013) at 122 [Sheleff].

² *Agbai v Okagbue* [1991] 7 NWLR 204 at 417.

³ Brian Perry et al, “Widow Cleansing & Inheritance among the Luo in Kenya: The Need for Additional Women-Centered HIV Prevention Options” (2014) 17 *Journal of the International AIDS Society* 1 [Perry].

Using Nigeria and Uganda as case studies, this chapter briefly describes the customary law and practices that affect Nigerian and Ugandan widows, the judicial use of repugnancy doctrine to resolve conflicts between customary and statutory laws, and the rights (if any) of widows under each country's domestic and legislative initiatives as they relate to widowhood rituals, property disinheritance, inter-personal violence, assault and sexual assault. Constitutional provisions are examined to determine whether these countries have legal frameworks that provide for gender equality and non-discrimination.⁴ Other provisions or policies that impact on women's rights, in particular their rights to property and land, are also subjected to scrutiny. Land policies are reviewed for any special provisions regarding women's land ownership. Marriage and Maintenance Acts are examined because they often determine marital property regimes that affect a widow's right to inherit from her husband. Administration of estate laws, wills, and succession and inheritance laws are also analysed. Occasional references are made to other sub-Saharan African countries for comparative purposes.

In most sub-Saharan African countries, customary law forms part of the legal system. It has been argued that customary laws often conflict with human rights norms guaranteeing equality between men and women.⁵ "These traditional practices emanate from the deeply entrenched discriminatory views and beliefs about the role and position of women in society."⁶ Society tends to maintain the subordinate, unequal, and disadvantaged status of women in a way that legitimizes and perpetuates gender-based violence against women. The traditional/cultural practices in question, as identified by the UN, include female genital mutilation, widowhood rituals, property disinheritance, traditional birth practices, levirate, widow cleansing.⁷ This thesis examines only those traditional practices (defined as longstanding, resistant to change, and embedded within the cultural fabric of a community)

⁴The Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa* (Switzerland: Netherlands, 2004) at 6.

⁵Christiana M. Cerna & Jennifer C. Wallace, "Women and Culture" in Kelly D. Askin & Dorean M. Koeing, eds., *Women and International Human Rights Law Volume 1* (New York: Transnational Publishers, 1999) at 630.

⁶Newman Wadesango et al, "Violation of Women's Rights by Harmful Traditional Practices" (2011) 13 *Anthropologist* 121.

⁷Harmful Traditional Practices Affecting the Health of Women and Children, United Nations Factsheet, No 23 at 3. Online: OHCHR.

that are discriminatory in nature, undermine the dignity of women, and are used to justify the treatment of women as second class citizens within the society. These include property disinheritance, property grabbing, widow cleansing, and levirate (widow inheritance).

3.1 CUSTOMARY PRACTICES APPLICABLE IN UGANDA AND NIGERIA

3.1.1 Property Disinheritance of Widows under Customary Law

In many sub-Saharan African countries, women are prohibited from land or property ownership⁸ under most customary regimes. When women do have legal rights to inherit property these rights are often never exercised. For example, in Uganda, the constitution guarantees right to own and inherit property regardless of sex,⁹ yet customary and inheritance laws makes it difficult for Ugandan women to own land despite the fact that “they provide 70-80% of agricultural and food production labor”¹⁰ in the Ugandan economy. Similarly, in Nigeria, although the *Land Use Act* codifying the system of land ownership does not exclude women, the patriarchal system under customary law tends to bar women from claiming land ownership.¹¹

Under customary law in most areas of sub-Saharan Africa, the eldest male relative of a deceased man inherits all the property (this includes the land and matrimonial home) and then holds the property in a representative or administrative capacity for the beneficiaries. If the deceased has male children, the eldest son inherits.¹² Women are treated as outsiders because marriage requires them to move from the original home of their blood relations to a new family. The person who inherits a widow’s late husband’s estate may be her son or one of the eldest male relatives. Thereafter, her right to have her material needs provided for depends on her good behaviour and her willingness to be economically dependent on either the heir or

⁸ Leilani Farha, “Women and Housing” in Kelly D Askin & Dorean M. Koeing, eds., *Women and International Human Rights Law* (New York: Transnational Publishers Inc, 2000) at 511 [Farha].

⁹ The 1995 Ugandan Constitution, Article 26(1) & 2.

¹⁰ Philippa Lewis, “Uganda: The Fight for Women’s Land Rights” Global Policy Forum (20 November 2012), online: Global Policy Forum

¹¹ Farha, *supra* note 8 at 512.

¹² Naome Kabanda, “Women’s Access to and Control over Land in Uganda: A Tool for Economic Empowerment” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda, and Tanzania* (North Carolina: Carolina Academic Press, 2005) at 343 [Kabanda].

her late husband's relatives.¹³ In addition, she is often denied the right to keep any property solely for her own use even if the property was jointly acquired.¹⁴

Among the Bagandas of Uganda, a widow is often treated as an outcast and denied the custody of her children. This practice stems from the belief that a wife does not belong to her late husband's clan and is viewed as an outsider who is not entitled to own or inherit any property.¹⁵ Even "when a widow has an opportunity to acquire...property, her chances of controlling or managing the property are minimal."¹⁶ If she challenges her in-laws' actions, she is more likely to be physically abused. Thus, many widows find the hurdles they would have to leap to assert their property rights so thorny that they abandon their claims, leaving everything to the relatives.¹⁷

Property disinheritance of widows is closely related to the practice known as "property grabbing," which is one of the most common ways by which widows are deprived of their properties. Currently, most women in Uganda, especially widows, are "largely at the mercy of customary practices and traditional legal systems that look to men as sole owners of property – including land and this is enforced through what is known as property-grabbing."

¹⁸ As Kaori notes, "property grabbing is a form of gendered violence against women in most parts of Africa especially in the southern and eastern parts of Africa."¹⁹ It is often accompanied by other acts of extreme violence against the woman including physical abuse, harassment and intimidation, all violations of women's human rights."²⁰

¹³ *Ibid.*

¹⁴ Cynthia Grant Bowman & Akua Kuenyehia, *Women and Law in sub-Saharan Africa* (Ghana: Sedco Publishing, 2003) 174.

¹⁵ Valerie Bennett et al, "Inheritance Law in Uganda: The Plight of Widows and Children" (2006) 7 *Geo. J. Gender & L.* 451 at 452 [*Bennett*].

¹⁶ Margaret Oguli Oumo, "Property in Marriage Relations- Its Legal Implications for Women in Uganda" in Johanna Bond, ed., *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (North Carolina: Carolina Academic Press, 2005) at 243.

¹⁷ *Ibid.*

¹⁸ Uganda: *Women's Land Rights- The Gap Between Policy and Practice: COHRE-Centre on Housing Rights & Evictions*, online: Centre on Housing Rights & Evictions < <http://www.peacewomen.org/content/uganda-womens-land-rights-%E2%80%93-gap-between-policy-and-practice> >.

¹⁹ Kaori Izumi, "Gender-based Violence and Property Grabbing in Africa: A Denial of Women's Liberty and Security" (2007) 15 *Gender & Development* at 11.

²⁰ *Ibid.*

Property grabbing occurs when a widow is forcibly evicted from her home by her late husband's family members, traditional leaders or neighbours. In most cases, she is unable to take her possessions with her.²¹ While property grabbing constitutes gender-based violence against women, this does not mean that perpetrators are always men. For instance, in matrilineal societies,²² like those in the "Northern part of Namibia & Zambia, sisters-in-law are said to be the main perpetrators of this act, although, it may be male relatives who physically remove property from widows and force them out of their homes."²³

Young widows without children or without sons are faced with the most precarious situations as a result of being evicted and dispossessed. Regardless of who the victims are, however, property grabbing violates a widow's right to inherit and hampers her right to be economically empowered.

3.1.2 Widow Inheritance/ Levirate under Customary Law

Widow inheritance forms part of widowhood rituals in most sub-Saharan African countries.²⁴ A fertile wife, for whom the bride price has been paid, may continue to belong to her husband's lineage. After his death, his brother(s) will help to honour him by making his widow pregnant. This process in most parts of sub-Saharan Africa is called levirate or widow inheritance.²⁵ According to Owen,²⁶

Levirate is the process by which a widow is taken in marriage by her husband's brother, the levir, or heir nominated by the family. Traditionally, this involved full-time re-direction of conjugal rights and wifely services to the levirate (inheritor), but this has gradually evolved into one-time consummation, to fulfil customary prescription, followed by relative independence from the levirate.²⁷

²¹ *Ibid* at 12.

²² Matrilineal society is a type of social lineage that traces its descendants via the mother's family tree instead of the father's family tree. In Africa, the Aka tribe of Ghana, the Central African Republic, and Republic of Congo are few examples of matrilineal societies.

²³ Martin Adams & Stephen Turner, "Legal Dualism & Land Policy in Eastern & Southern Africa" (2005) 6 *Land Rights for African Development* at 18.

²⁴ Perry et al, *supra* note 3 at 1.

²⁵ Margaret Owen, *The World of Widows* (London: Zed Books, 1994) 15.

²⁶ *Ibid* at 108.

²⁷ *Ibid* at 109.

Under Igbo customary law, wives do not have inheritance rights. They are considered “property” of the late husband's estate and, as a result, are considered an “object of inheritance themselves.”²⁸ According to a 2005 newspaper article,²⁹ at the death of a married man in an Igbo setting, the widow is expected to choose a levir from her late husband’s relatives. As Betty Potash notes,

most widows accept the levirate relationship because the children’s ties must remain in their father’s community as a means to insulate the sanctity of kinship and guarantee the remnant family's social legitimacy within their wider familial system.”³⁰

Also significant is the fact that most widows have no right to return to their natal home, relatives may refuse to shelter a separated widow,³¹ and, should a widow insist on leaving, her bride price paid must be returned by her family.

Some scholars describe

levirate as a continuation of the lineage and regard the consort as the husband’s successor. This is because it is also seen as an institution designed not only to tie

²⁸ Immigration and Refugee Board of Canada, *Nigeria: Levirate marriage practices among the Yoruba, Igbo and Hausa-Fulani; consequences for a man or woman who refuses to participate in the marriage; availability of state protection* online: The Immigration and Refugee Board of Canada, <<http://www.refworld.org/docid/45f1478811.html>>; Bamgbose Oluyemisi, “Customary Law Practices and Violence against Women: The Position under the Nigerian Legal System”(Paper delivered at 8th International Interdisciplinary Congress on Women hosted by Department of Women and Gender Studies, University of Makerere Uganda July 2002), [unpublished].

²⁹ Chinyere E. Nwosa, “Social Changes in Widowhood across Cultures,” *The Daily Champion Newspaper* (8 November 2005) online: Daily Champion News <[www. http://allafrica.com/stories/200511080141.html](http://allafrica.com/stories/200511080141.html)>.

³⁰ Betty Potash, *Widows in African Societies: Choices and Constraints* (Stanford, California: Stanford University Press, 1986) at 46.

³¹ *Ibid.*

a woman and her children to her dead husband's family but also designed to provide for the widow and her children.³²

However, leviratic relationships are of secondary importance in the lives of widows.³³ In most cases the "levir" is a married man who lives in his own house; his responsibilities and interests are directed primarily to his wives and legal sons who form his personal line of descent. These sons will inherit from him and carry on his name.³⁴ By contrast, the widow's children, including natural offspring sired by the "levir" belong to the deceased husband's line and will inherit accordingly. Invariably this means that the widow has no domestic responsibilities to the levir and the levir has no responsibility for support or socialization.³⁵

3.1.3 Ritual Cleansing/Widow Cleansing under Customary Law

Closely related to widow inheritance or levirate is widow cleansing, also known as "ritual or sexual cleansing," a practice followed in parts of Uganda and Nigeria. The act of widow cleansing, called "isiku" by the Igbos,³⁶ permits a man from the widow's village or her husband's family (usually a brother or close male relative of her late husband) who is regarded as a widow cleanser, to force the widow to have sex with him. The ostensible objective of the ritual is to allow her husband's spirit to roam free in the afterlife.³⁷ The

³² Regina Smith Oboler, "Nandi Widows" in Betty Potash, ed., *Widows in African Societies: Choices and Constraints* (Stanford California: Stanford University Press, 1986) at 83; Owen, *supra* note 26 at 109.

³³ Betty Potash, "Wives of the Grave: Widows in a Rural Luo Community" in Betty Potash, ed., *Widows in African Societies: Choices and Constraints* (Stanford California: Stanford University Press, 1986) at 45.

³⁴ *Ibid.*

³⁵ *Ibid* at 44.

³⁶ Immigration and Refugee Board of Canada, *Nigeria: A ritual by the name of "isiku" that a widow is subjected to upon the death of her husband*, online: Immigration and Refugee Board of Canada, < <http://www.refworld.org/docid/3ae6ad702c.html>>; Ebum Sessou & Florence Amagiya, "How Widows and Children Suffer Hardship in the Name of Tradition," *The Vanguard* (18 March 2013) online: The Vanguard < <http://www.vanguardngr.com/2013/03/how-widows-children-suffer-hardship-in-the-name-of-tradition/>>; "Being A Widow" This Day Live (27 July 2013) online: This Day Live < <http://www.thisdaylive.com/articles/being-a-widow/154543>>.

³⁷ J.R.S Malungo, "Sexual Cleansing (Kusalazya) and Levirate Marriage (Kunjilila Mung'ands) in the Era of AIDS changes in Perception and Practices in Zambia" (1999) 44 *Social Science & Medicine* 431 at 437.

sexual encounter can either occur for a short term or once.³⁸ In most parts of Tanzania, “a widow is cleansed twice. First, a widower cleanses the widow sexually four days after her husband’s burial. Two to three months later, the widow has to be cleansed by having sexual intercourse with a stranger.”³⁹ In addition, a widow must be cleansed not only by a stranger, but also in a village where she is not known.⁴⁰ These practices may expose widows to HIV/AIDS and other sexually transmitted diseases⁴¹ from their cleansers. The cleanser is sometimes referred to as a “doctor” who dictates the conditions of when and how the sexual act is carried out.⁴² Traditional beliefs also hold that a widow who has not been cleansed can cause the whole community or her “inheritor” to be haunted by the dead man’s spirit. In many instances, a widow must undergo the ritual before she can be inherited. If the cleansing ritual is omitted, the anger of the spirit of the dead person may make sexual intercourse with any other person dangerous.

Property disinheritance, property grabbing, widow cleansing, and wife inheritance (levirate) exemplify the rights violations to which many widows in Uganda and Nigeria are subjected.

⁴³ Yet various international and regional conventions prohibit such practices. For example, the 1995 Beijing convention included discussion of what constitutes “harmful traditional

³⁸ E. Eleazer Otiochar, *International Human Rights: The Protection of the Rights of Women and Female Child in Africa, Theory, and Practice* (USA: Vandepias Publishing, 2011) at 144 [Eleazer].

³⁹ Maria Tungaraza, “Women’s Rights and the AIDS Epidemic in Tanzania” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda, and Tanzania* (North Carolina: Carolina Academic Press, 2005) at 304.

⁴⁰ *Ibid.*

⁴¹ Emma Ssali Namuli, “Women and HIV/ AIDS in Uganda” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Uganda, Ghana, and Tanzania* (North Carolina: Carolina Academic Press, 2004) at 289.

⁴² Julia Bergenholtz, “Tanzania: Rosemary refused Widow Cleansing,” *Diakonia News* (1 September 2013) online: Diakonia News < <http://www.diakonia.se/en/Results-Stories-of-change/Stories-of-change/Tanzania-Rosemary-widow-cleansing/>>.

⁴³ Canada: Immigration and Refugee Board of Canada, *Nigeria: Whether Yoruba and Ibo cleansing rituals for women in their thirties include circumcision in the states of Ogun, Niger, Anambra, and Adamawa; whether women who have been accused of killing a family member through witchcraft would be circumcised during a cleansing ritual (2012-April 2013)*, 29 April 2013, < <http://www.refworld.org/docid/52a826a54.html>>. ; The Republic of Uganda, “World Elder Abuse Awareness Day” (2012) International Network for the Prevention of Elder Abuse (INPEA) and The UN’s World Health Organization Working Paper No 66/127.

practices.”⁴⁴ Even taking into account the provisions of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* and other international human rights law that widows can “rely upon on their struggle against systemic violence,”⁴⁵ there is still a gap between the law in theory and the law in practice. However, substantial changes are in progress. For example, in 2014⁴⁶ “two UN Human Rights Committees came up with a comprehensive interpretation of the obligations of states to prevent and eliminate harmful practices inflicted on women and girls, such as female genital mutilation, crimes committed in the name of so-called honour, forced and child marriage, and polygamy.”⁴⁷ In addition, the *Committee on the Elimination of Discrimination against Women (CEDAW)* and the *Committee on the Rights of the Child (CRC)* added virginity testing, binding, widowhood practices, infanticide, and body modifications, including fattening, neck elongation, and breast ironing, as examples of harmful practices that constitute human rights violations.⁴⁸

It is not enough that additional legal frameworks to protect widows are being put in place. Until the international community strengthens and tightens the relatively weak and largely ineffectual instruments and mechanisms which have been established to defend against the violation of women’s rights, not much can be done. International norms of equality together with progressive interpretations of principles related to what is fair, just, and of good conscience, should be invoked to reform the personal laws to which widows are subjected. States should take positive steps to ensure that personal laws are restructured and enforced to increase gender equality. If such steps are taken, widows should be less likely to be levirated, cleansed, or denied ownership or inheritance rights. As Gunning asserts, “harmful traditional

⁴⁴ See the 1995 Beijing conference, paras 112- 118.

⁴⁵ Anne Gallagher, “Contemporary Forms of Female Slavery” in Kelly D. Askin & Dorean M. Koeing, eds., *Women and International Human Rights Volume 2* (New York: Transnational Publishers, 2000) 522.

⁴⁶ Joint General Recommendation No 31 of the *Committee on the Elimination of Discrimination Against Women* / General Comment No 18 of the *Committee on the Rights of the Child* on Harmful Practices [CEDAW/C/GC/31-CRC/C/GC/18] [14 November 2014].

⁴⁷ UN News Centre, *UN rights panels outline States' obligation to prevent harmful practices on women, girls*, online: United Nations <
<http://www.un.org/apps/news/story.asp?NewsID=49254#.VQYOHeFcAIA>

⁴⁸ *Ibid.*

practices, regardless of their cultural origins, must be rejected or modified in favour of practices that enrich the culture without degrading or harming persons within the society.”⁴⁹

3.2 THE DOCTRINE OF REPUGNANCY

The repugnancy test determines whether native laws and customs are in conformity with the rules of good conscience, natural justice, and morality. What may be repugnant at one time may not be at another time and vice versa. Even within the same ethnic community, what is repugnant to one generation may not be to a later generation. According to Sheleff “repugnancy describes a situation of distastefulness, disgust, and revulsion.” Where a native law and custom is deemed to be repugnant as measured by the litmus test, it is refused recognition.⁵⁰ Some scholars have interpreted natural justice, equity and good conscience to mean fair, just, and conscionable.⁵¹ In the Nigerian context, what is viewed as repugnant is unclear, although historically the “position has been that repugnancy is not measured against the standard of British conduct, but against standards internal to Nigeria.”⁵²

The repugnancy doctrine has a long history and has been discussed and applied in several African court cases.⁵³ In the 1908 Nigerian case of *Lewis v Bankole*, for example, the court held that “...wherein native law or custom is found to be repugnant to the fundamental rules or equity, it is absolutely the duty of the court to ignore it.”⁵⁴ In 1949 in the *Estate of*

⁴⁹ Isabelle R. Gunning, “Women and Traditional Practices: Female Genital Surgery” in Kelly D. Askin & Dorean M. Koeing, eds., *Women and International Human Rights Volume 2* (New York: Transnational Publishers, 2000) 682.

⁵⁰ Sheleff, *supra* note 1 at 125.

⁵¹ C.O Okonkwo, *Introduction to Nigerian Law* (London: Sweet & Maxwell, 1980) at 43.

⁵² Vanessa Emery, *Women’s Inheritance Rights in Nigeria: Transformative Practices* (University of Toronto: Faculty of Law; Toronto, 2005) at 23 [Emery].

⁵³ See generally, *Edet v Essien* [1932] 11 NLR at para.47; *Egba N.A v Adeyanju* [1936]13 NLR at 77; *Chime v Elikwu* [1965] NM.R at para. 71; *Cole v. Akinyele* [1960] 5 FSC at para. 84; *Gwao bin Kilimo v Kisunda bin Ifuti* [1938] 1 TLR at para.403; *Lolkilite ole Ndinoni v Netwale ole Nebele* [1952] 19 EACA at para. 1; *Kodieh v Affram* [1930]1 WACA at para 12; *Gani v Hadejia Native Authority* [1959] 4 FSC 44; *Re Whyte* [1946] 18 NLR 70; *Chakawa v Goro*[1950] R& N at 188; *Rufai v Igbirra* [1957] NRNLR at para 178; *Mariyama v Sadiku Ejo* [1961] NRNLR at 81 on African cases determining what constitute the “repugnancy test.”

⁵⁴ [1908]1 NLR 82 at para 84.

*Agboruja*⁵⁵ the court held that “widow inheritance is unfair or inequitable and as such is repugnant to natural justice, equity, and good conscience.”⁵⁶ In 1930 in *Re Effiong Okon Ata*,⁵⁷ the court “held that a custom wherein the former owner of a slave is entitled to administer the personal property of a slave after the slave’s demise failed the repugnancy test.”⁵⁸ There “the courts took the view that the rights claimed were those of slave owners and that since slavery had been abolished, the rights asserted could not be upheld.”⁵⁹ In these cases it is noteworthy that judges do not stop at simply determining what the rule is. They go beyond this. In deciding whether to uphold a customary rule, they seem to be influenced more by the effect that application of the rule would have than the bare fact that the customary rule exists and is accepted by the community.⁶⁰

With respect to use of international human rights norms in interpretation by the courts in the above-mentioned cases, it is clear that the courts have been most willing to strike down discriminatory laws, customs, practices, and traditions such as widowhood rituals, property disinheritance, and inter-personal violence as illustrated by the *Agboruja*’s case that impede the protection and promotion of women’s rights. Uganda and Nigeria are both State parties to multiple international and regional instruments and have entrenched principles of gender equality and non-discrimination on the basis of sex, among others, in their constitutions. However, customary laws and practices have posed difficulties for most sub-Saharan African countries. It has been argued that the “claw-back”⁶¹ provisions in most sub-Saharan African legal instruments provide justifying reasons that explain why state laws are still in conflict with the international human rights norms and laws, and why it is still extremely challenging for States to ensure that customary laws do not violate human rights standards. Ndashe & Sacco opined:

⁵⁵ [1949] 19 LR 45.

⁵⁶ *Ibid* at para 38.

⁵⁷ [1930]10 NLR 65.

⁵⁸ E.W Park, *The Sources of Nigerian Law* (Lagos: African Universities Press, 1963) at 71.

⁵⁹ C. Ogwurike, “Sources and Authority of African Customary Law” (1966) 3 U. Ghana L. J 11 at 16 [*Ogwurike*].

⁶⁰ *Ibid*.

⁶¹ Priti Patel, “For Women in Botswana: Victory against a Claw-back Clause,” *Open Society Foundation* (27 September 2013) online: < <http://www.opensocietyfoundations.org/voices/women-botswana-victory-against-clawback-clause>>.

The constitutions of Zimbabwe, Kenya, Gambia, and Lesotho are among those that retain the “claw-back” clause. These clauses exempt customary law and personal law from inquiry into the discriminatory impact of customary law and consequently they prevent the prohibition of discrimination provisions under the constitution from taking effect. Equality before the law and equal protection of the law become a meaningless gesture in the face of such “claw-back” clauses. When one recognises that the majority of women’s human rights violations occur in the private sphere, particularly in the family law setting, to exclude this branch of law from being subjected to the discrimination test guaranteed by the constitutional right to non-discrimination is an acceptance of discrimination.⁶²

The use of repugnancy doctrine by the courts to determine whether specific customs, traditions, and practices are repugnant to natural justice, equity, and good conscience should be carried out in a manner that ensures that international human rights standards are expressly incorporated. For example, in the case of the central themes of this thesis—widowhood rituals and property disinheritance—by holding that such practices violate the rights of widows and conflict with international human rights norms, the judiciary would be following and reinforcing a pattern which was used in most of the above-mentioned cases. Noteworthy is the fact that domestic courts can serve as a bridge between the promulgation, realization, protection, and promotion of international human rights norms that effectively strengthens both international and domestic laws. Courts can assume a role in ensuring that customs, customary laws, domestic constitutions, and laws are not in conflict with international laws.

3.3 THE CONSTITUTIONAL POSITION OF UGANDA AND NIGERIA ON WIDOWS

In Nigeria and Uganda, the constitution is the supreme law of the state.⁶³ Each constitution addresses the issue of non-discrimination on the basis of sex.⁶⁴ Although the *Nigerian Constitution* makes no provision for widows per se, the *Ugandan Constitution* contains

⁶² Sibongue Ndashe & Solomon Sacco, “Watch the Courts: Litigating the Right to Non-Discrimination on the Ground of Sex” (2009) 4 *The Equal Rights Review* 28.

⁶³ See generally, *The 1999 Nigerian Constitution*, [*Nigerian Constitution*]; The Government, *The Constitution*, The State House of Uganda, online: <http://www.statehouse.go.ug/government/constitution> [*Ugandan Constitution*].

⁶⁴ *Ugandan Constitution*, article 21; *Nigerian Constitution*, section 15(2).

several provisions that are of great importance to Ugandan women including widows. For example, Article 26 of the *Ugandan Constitution* guarantees the fundamental right of each person to own property, either individually or in association with others, in addition to protecting the right of every person not to be deprived of personal property without compensation.⁶⁵ The guarantee is not contingent on gender or marital status; all persons are equal before and under the law as stated in Articles 21(1) and 21(2) of the *Ugandan Constitution*.

Both constitutions have a “fundamental rights” chapter that guarantees a number of key rights. For example, Chapter 4 of the *1999 Nigerian Constitution* entrenches fundamental human rights, and sections 34⁶⁶ and 35 of the *Nigeria Constitution* provide for rights to personal dignity, equal treatment and non-discrimination. Similarly, section 42 of the *Nigeria Constitution* guarantees all individuals equal rights and freedoms and proscribes discrimination on grounds of sex. Article 33(6) of the *Ugandan Constitution* prohibits laws, customs, and traditions that undermine the dignity, welfare or status of women. Therefore there should be no discrimination against women regarding land or property due to any custom or tradition, nor should widows be subjected to any practices, such as widow cleansing, that undermine their right to equality.

In addition, Articles 22 and 29 of the *Ugandan Constitution* give women the right to liberty and freedom of movement. Any cultural rite or tradition that confines a widow to a house for unnecessary lengths of time for the purpose of mourning the dead is an infringement on her rights. Admittedly, there are no express provisions in the constitution dealing with rights to health but this can be inferred from section 39 which provides that “every Ugandan has a right to a clean and healthy environment.”⁶⁷ However, most widowhood rituals and cleansing ceremonies, such as wife inheritance or levirate, expose widows to health hazards including HIV/AIDS. For example, 2005 statistics show that “in at least one-third of the country's provinces” sexual cleansing of widows persists, while HIV/AIDS has spread to 25 million

⁶⁵ *Ugandan Constitution*, article 26(1) & 2.

⁶⁶ *Nigerian Constitution*, Section 34.

⁶⁷ *Ugandan Constitution*, article 39.

sub-Saharan Africans and killed 2.3 million widows.”⁶⁸ Other provisions in the *Ugandan Constitution* include equal rights during marriage and its dissolution, with respect to welfare and custody of children, both legitimate and illegitimate,⁶⁹ and the equal rights of widows and widowers to inherit the property of their deceased spouses.⁷⁰ In spite of these provisions, many widows in Nigeria and Uganda benefit from few, if any, of these rights following the deaths of their husbands.

As State Parties to most international and regional human rights instruments, Uganda and Nigeria have duties to ensure that widows’ rights are protected, that widows are free from discrimination, and that widows are not used as cultural tools to maintain patriarchal social structures. The obstacles to achieving meaningful compliance with international women’s rights norms are formidable, however, and the task ahead will not be easy.

3.4 FAMILY LAWS IN UGANDA AND NIGERIA

As previously explained, Uganda and Nigeria have pluralistic legal systems that include customary law. In Uganda and Nigeria, personal legal relationships are mostly regulated by customary laws; this includes marriage and divorce, maintenance, guardianship, adoption, custody of a child, wills, intestacy, and succession. For the purpose of this thesis, all these issues are broadly characterized as aspects of family law.

3.4.1 The Status of Widows under Marriage Laws in Uganda and Nigeria

In many sub-Saharan African countries, statutory laws are in place expressly to guarantee equal rights for women and to prohibit discrimination on the grounds of sex. Nonetheless, several domestic laws clearly violate these principles, especially marriage laws in Uganda

⁶⁸ Sharon Lafraniere, “AIDS now Compels African to Challenge Widows Cleansing,” *The New York Times* (11 May 2005) online: <http://www.nytimes.com/2005/05/11/international/africa/11malawi.html?_r=1&>
See also, In Sub-Saharan Africa, AIDS Widows Strive to Regain their Rights after Husbands are Gone- UN Women- United Nations Entity for Gender Equality & the Empowerment of Women[21 June 2013] online:<
<http://www.unwomen.org/en/news/stories/2013/6/in-sub-saharan-africa-aids-widows-strive-to-regain-their-rights-after-husbands-are-gone>>. Department of Public Information, News and Media Division, New York, “Reduce Widows Suffering by Raising Their Status in Their Honour of Need,” Secretary General SG/SM/13655, OBV/100,WOM/ 1865 online: <
<http://www.un.org/News/Press/docs/2011/sgsm13655.doc.html>

⁶⁹ *Ugandan Constitution*, article 31.

⁷⁰ *Ibid.*

and Nigeria. Widows in rural settings, whose lives are strongly influenced by customary law, are especially affected.

In Nigeria, two principal statutes regulate marriages between a man and a woman, namely the *Marriage Act*⁷¹ and the *Matrimonial Causes Act (MCA)*.⁷² In Uganda, a valid marriage can be contracted in several ways, each with its own legislative regime. The *Marriage Act*⁷³ regulates statutory marriages. The *Marriage and Divorce of Mohammedans Act*⁷⁴ applies to Muslim marriages. Customary marriages are registered under the *Customary Marriages (Registration) Act*.⁷⁵

Under the Nigerian *Marriage Act* and the *MCA*, no specific provisions are made for widows who married under the customary law, except for section 33(1) of the *Marriage Act* which provides that “a statutory marriage is void where either of the parties is at the time of the marriage married under customary law to any person other than the person with whom such marriage is had.”⁷⁶ This position emphasized that customary law marriage is valid under the Nigeria law, as such a man cannot contract a marriage under the Act and another under the native law and custom.

Laws related to divorce, annulment, separation, maintenance, separation, reconciliation, restitution of conjugal rights, custody of children, and settlement of property form part of the *MCA*.⁷⁷ A cursory look at the *MCA* shows that it deals only with monogamous marriages.⁷⁸

For example, section 114(6) of the Act states, “[n]othing in this Act shall have effect in relation to a marriage which is not a monogamous marriage or which is entered into in accordance with Muslim rites or with any customary law in force in Nigeria.” To this extent,

⁷¹ *Marriage Act, Laws of Federation of Nigeria 1990*, c28. The Act regulates Statutory, Customary and Islamic marriages.

⁷² *Nigerian Matrimonial Causes Act, LFN 1990*, c220. [MCA]. The Act regulates the dissolution of statutory marriages.

⁷³ *Ugandan Marriage Act, 1904*, c251.

⁷⁴ *Ugandan Marriage and Divorce of Mohammedans Act, 1904*, c 252,

⁷⁵ *Ugandan Customary Marriages (Registration) Act, 1973*, c 248. [UCMRA]

⁷⁶ *Marriage Act, section 33(1)*.

⁷⁷ Eunice Nkiru Uzodike, “Custody of Children in Nigeria: Statutory, Judicial & Customary Aspects” (1990) 39 *The International & Comparative Law Quarterly* 419 at 420; C.U Ilegbune, “A Critique of the Nigerian Law of Divorce Under the Matrimonial Causes Decree” (1970) 14 *Journal of African Law* 178 at 179.

⁷⁸ *MCA, supra* note 73 at s114.

there is no attempt in the *MCA* to regulate any marriage contracted under customary law or Islamic law.

Women in Nigeria who contract statutory marriages generally enjoy greater formal legal protection and have their property rights determined by a wide range of statutory laws.⁷⁹ For example, widows whose marriages were conducted under the *Marriage Act* can show proof of their marriage by producing a marriage certificate or certified copy thereof in order to be entitled to the distribution of their late husband's estate.⁸⁰ By contrast, the legal rights of widows who marry under customary law are determined exclusively under the primogeniture rule. However, in practice, many widows enjoy little legal protection regardless of the nature of the marriage contracted.⁸¹ A widow can either be "inherited" by a relative of her deceased husband, or returned to her natal home.⁸²

In Uganda, the situation is not much different. The *Marriage Act* of Uganda⁸³ regulates the dissolution of church or civil marriages but does not define "matrimonial property." As a result, it is usually difficult for wives to make property claims.⁸⁴ However, one main difference between marriage laws in Uganda and Nigeria is that, under Ugandan Marriage laws, there is the *Customary Marriage (Registration) Act* that governs marriages contracted under customary law (and any other purposes connected therewith). However the *Act* does

⁷⁹ See generally, *Marriage Act*, 1914 & 1958, *Marriage (Amendment) Act*, 1971, *Matrimonial Causes Decree*, 1970, *Matrimonial Causes (Amendment) Act*, 1975; *Marriage (Validation) Decree*, 1971; *Legitimacy Act*, 1958, LFN 1929, c103; *Legitimacy Law*, 1963 LFN 1929, c76; *Administration-General Law*, 1961, c4; *Administration of Estate Laws*, 1959, c1; *Legitimacy Law*, 1929, c62; *Married Women's Property Law*, 1958, LFN 1959, c76.

⁸⁰ *Marriage Act*, s 30(1) & 32.

⁸¹ Chinwe R. Ezeifeke & Nneka N.Osakwe, "Gender Representation in the 1999 Nigerian Constitution: A Critical Discourse Analysis on Socio-Political Equity," online: (2013) 24 *Discourse & Society Journal* 10 at 452.

⁸² Kaniye S.A Ebeku, "The Legal Status of Nigeria Children born by a Widow: Chinweze v. Mazi Revisited" (1994) 38 *Journal of African Law* 46 at 47.

⁸³ *Ugandan Marriage Act*, *supra* note 74.

⁸⁴ Florence Butegwa, "Using the African Charter on Human and People's Rights to Secure Women's Access to Land in Africa" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) at 495-496.

not deal with issues pertaining to grounds for divorce or distribution of properties upon divorce.⁸⁵

According to Tamale, widows who marry under the *Customary Marriage (Registration) Act* are “considered as their late husband’s property, therefore they are not entitled to own or inherit in their late husband’s property except for their personal items such as clothes and kitchen utensils.”⁸⁶ On divorce, customary practices also treat husbands and wives unequally in matters arising from child custody. Although under the Ugandan *Customary Marriage (Registration) Act* the principle of the “welfare of the child” applies, often the court awards custody to the husband.⁸⁷ In the “few cases where custody is awarded to the wife, she is entitled only to Ugshs 2, 000 (\$2) per month per child in maintenance, which in most cases is not enough to sustain her, and only few receive it.”⁸⁸ On the contrary, under Tanzania’s *Marriage Act*, property acquired during the subsistence of the marriage is presumed to belong to both parties.⁸⁹ However, this is not an Africa-wide rule.

The *CEDAW* Committee, at its 575th and 576th meetings on 9th August 2002, considered Uganda’s third *CEDAW* periodic report and expressed concern over Ugandan laws that conflict with the *1995 Constitution* and *CEDAW* commitments, especially with respect to Uganda’s slow progress in removing de jure discrimination and eliminating de facto discrimination against women. In the words of the *CEDAW* Committee:

While noting that Article 33 (6) of the Constitution “prohibits laws, customs or traditions which are against the dignity, welfare or interest of women,” the Committee notes with concern the continued existence of legislation, customary

⁸⁵ *UCMRA*, *supra* note 76 at section 3(1).

⁸⁶ Sylvia Tamale, “Law Reform and Women’s Rights in Uganda” (1993) *E. African J. of Peace & Hum. Rts.* 1 at 225 [*Tamale*].

⁸⁷ See for example, *Nakagwa v Kiggundu* [1978] HCB 310 at 312; *Lough v Ward* [1945] 2 All ER 338 at 348; Consideration of Reports Submitted by State Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Initial and Second Periodic Reports of State Parties, Uganda. UN CEDAW 14th Session, UN Doc/CEDAW/C/UGA/1-2 (1995) [Hereinafter called Uganda’s Initial and Second Periodic Reports to CEDAW].

⁸⁸ Fiedler, Anne Akia, *Women’s Rights on Agenda* (London: IC Publications Ltd, 1999) 23.

⁸⁹ See *Tanzania Law of Marriage Act*, 1971, s 60.

laws and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price, guardianship of children that discriminate against women and conflict with the Constitution and the Convention. The Committee urges the State party, in line with Article 33(6) of the 1995 Constitution, to amend these laws and prohibit such practices.⁹⁰

The foregoing recognizes that many widows lack adequate protection on the death of their husbands. States ought to be bound by the provisions of their constitutions; unfortunately, most states retain provisions that encourage the subordination of women.

In the struggle for substantive gender equality for widows in Uganda and Nigeria, NGOs also have significant roles to play. With the help of NGOs in both countries, rights-based ideas and strategies can be put in place that will help to eliminate gender discrimination and ensure that constitutional guarantees and domestic laws in Uganda and Nigeria are not only in conformity with international human rights norms but actually operate in accordance with those norms. The role of NGOs is discussed in greater detail in Chapter Four.

3.4.2 The Status of Widows under Wills, Intestacy, Land, and Succession Laws in Uganda and Nigeria

In most cases, the type of marriage contracted by a widow determines whether or not she is entitled to inherit from her husband. In Nigeria, there are a variety of means by which a deceased's estate can be administered. This includes common law, the laws of various states (for example, the *Administration of Estate Law* of Lagos state), the *Wills Act*, and customary laws. In ascertaining how one determines the applicable laws in cases of intestacy, the case of *Administrator-General v Egbuna* provides guidelines for the distribution of property.⁹¹

Sagay opined:

The factor which determines the system to apply in each case depends on the type of marriage contracted by the intestate deceased. For example, if a person

⁹⁰ Consideration of Reports submitted by State Parties under Article 18 Of the *Convention on the Elimination of All Forms of Discrimination Against Women*, Third Periodic Reports of State Parties, Uganda, U.N CEDAW, Extraordinary Session, U.N Doc/CEDAW/c/UGA/3 at 62(2002) [Hereinafter Uganda's Third Periodic Report to CEDAW].

⁹¹ I.E. Sagay, *Nigerian Law of Succession: Principles, Cases, Statutes and Commentaries* (Nigeria: Malthouse Press Limited, 2006) at 73.

contracts a Christian (monogamous) marriage outside Nigeria, the common law of England governs the distribution of his estate. If he contracts a statutory marriage in Nigeria, and he dies domiciled in Lagos or any of the states comprising the old Western Region, then the *Administration of Estate Law* will govern. If he contracts a statutory marriage, but dies domiciled in any of the states comprising the former Northern or Eastern Regions, which are yet to enact their own law on non-customary succession, then the common law will also govern the distribution of his estate.⁹²

In Nigeria, at the demise of a man who married under the *Act* but died intestate (without a will), all rights, duties, and powers are devolved to his personal representatives or the executors of his estate. For marriages contracted under customary law, the personal representatives are usually the eldest sons of the deceased or brothers to the deceased. When men who married under customary law die, most are intestate (without a will). The customary law of succession then applies; the deceased person's rights and duties automatically become those of the heir, who is often said to have stepped into the shoes of the deceased. This rule is known as the male primogeniture rule.⁹³ In instances "where the deceased has no sons, or his sons predeceased him, then the estate devolves to the deceased's father or, if he is no longer alive, it goes to the nearest male relative."⁹⁴

In Uganda, laws relevant to the regulation of rights to succession of property are contained in the *Succession Act*,⁹⁵ the *Administrator General's Act*,⁹⁶ the *Administration of Estates (Small*

⁹² *Ibid* at 73. See generally, *Administrator-General v Egbuna & Ors* [1945] 18 NLR 1; *Tapa v Kuka* [1945] 18 NLR 5; *Re Estate of Aminatu Alayo, A-G v Tunkwase* [1946] 18 NLR 88; *Asiatu v Gongallo* [1900] 1 NLR 41; *Bornu N.A v Abarcha Magudana* [Unreported]; *Dr T.E.A Salubi v Mrs Benedicta Nwariakwu & Others* [1997] 5 NWLR pt 505 at 442; *Olowu v Olowu* [1985] 12 SC 84; *Adesobokun v Yinusa Rasaki* [1971] NNLR 77; *Idehen v Idehen* [1991] 6 NWLR Pt 198 at 382; *Zaidan v Mohsons* [1973] All N.L.R. 86; *Oke v Oke* [1974] 3 SC 1; *Mary Ekem v Ekua Neba* [1947] 12 WACA 258 at 259-260; *Agidigbi v Agidigbi* [1992] 2 NWLR PT 221 at 98; *Ogiamien v Ogiamien* [1967] NMLR 245 on how properties were distributed under the Nigeria succession laws.

⁹³ Likhapha Martha, "Reforming the Customary Law of Succession" (2002) 18 South African Journal on Human Rights 200 at 272.

⁹⁴ Nelson Tebbe, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" (2008) 88 The Journal of Religion 466 at 472.

⁹⁵ *Succession Act*, 2000, c 162 Laws of Uganda.

Estates) (Special Provisions) Act,⁹⁷ *Resistance Committee Judicial Powers Statute 1988*, and the *Public Trustee Act*.⁹⁸ Similarly, in Uganda the primogeniture rule is central and paramount under customary laws of succession. Under this rule, as in most patrilineal societies in Africa, the customary heir is usually the eldest son⁹⁹ who acts as both administrator and successor to his father's estate.¹⁰⁰ If the deceased has no male child, the deceased's father, or the father's closest male descendant, succeeds him.¹⁰¹

At the death of a widow's husband in Uganda and Nigeria, the customary heir ought to ensure the proper maintenance of the widow and her children, but this does not happen in all cases. Such "rights are often conditional and this benefit is often overbalanced by significant disadvantages to women as a result of native law and customs that require a widow to be 'inherited' by her deceased husband's brothers or relatives"¹⁰² When that is not the case, "a widow's right to support depends in practice on a cordial relationship with the heir—an element that is often missing once her husband dies and she becomes subservient to the heir especially when the heir is not her son."¹⁰³

3.5 Judicial Gender Bias and the Status of Widows under Wills, Land, Intestacy, and Succession Laws in Uganda and Nigeria

The courts in Uganda and Nigeria ordinarily preserve the status quo characterized by inequality and discrimination between men and women. For example, on the question of whether daughters, wives, or widows have a right to inherit either their father's or husband's property, in the case of *Nzekwu v Nzekwu*¹⁰⁴ the Supreme Court of Nigeria held that "the widow's dealings over her deceased husband's property must receive the consent of the family, and she cannot by the effluxion of time claim the property as her own. She has,

⁹⁶ *Administrator Generals Act*, 2000, c157, Laws of Uganda.

⁹⁷ *The Administration of Estates (Small Estates) (Special Provisions) Act*, 2000, c156, Laws of Uganda.

⁹⁸ *Public Trustee Act*, 2000, c161, Laws of Uganda.

⁹⁹ This means the person recognised by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person.

¹⁰⁰ Bennett, *supra* note 15 at 460.

¹⁰¹ *Ibid.*

¹⁰² Nelson Tebbe, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" (2008) 88 *The Journal of Religion* 466 at 472.

¹⁰³ *Ibid.*

¹⁰⁴ [1989] 2 NWLR 373.

however, a right to occupy the building or part of it during her lifetime, but this is subject to her good behaviour.”¹⁰⁵ In *Nezianya v Okagbue*¹⁰⁶ the court held that “under the native law and custom of Onitsha, a widow’s possession of her deceased husband’s property is not that of a stranger, and however long it is, it is not adverse to her husband’s family and does not make her the owner, she cannot deal with his property without the consent of his family.”¹⁰⁷ Unfortunately, courts have long sustained such customary practices which subjugate women by using them as cultural tools, as seen in the above mentioned cases.

Another judicial decision exhibiting gender bias is the case of *Akinnubi v Akinnuhi*.¹⁰⁸ There the widow, who had married under Yoruba customary law, sought to act as the administratrix of her husband’s estate. Her application was opposed by her in-laws. Relying on a rule of Ikale customary law, her in-laws argued that the widow was “part of the deceased's estate, [and] must be allotted or bequeathed according to Ikale Customary Law to one of the deceased's brothers [sic].” The court agreed and “held that a widow of a Yoruba customary law marriage could not maintain an action to be one of the administrators of her deceased husband's estate as it is against the native law and customs.”¹⁰⁹

A South African case decided in 2000 reflects the judicial gender bias barring daughters from inheriting from their father’s estate or a wife from succeeding to her late husband’s estate. This rule is applicable in most sub-Saharan Africa countries. In *Mthembu v Letsela*,¹¹⁰ the eldest male heir argued that he was not obliged to care for his step-mother and step- siblings even though by custom he is expected to do so. In delivering the court’s judgement in the appeal, it was held that the appellant (Mthembu) was not legally married to the deceased (Letsela) because “only three-quarters of the lobolo (bride payment) had been paid. Therefore, the widow and her daughters were not eligible to claim maintenance from the deceased’s estate, or live in the family home.”¹¹¹

¹⁰⁵ *Ibid* at 378.

¹⁰⁶ [1963] 1 All NLR 352.

¹⁰⁷ *Ibid* at 358.

¹⁰⁸ [1997] 2 NWLR 145.

¹⁰⁹ Remigus N. Nwabueze, “Securing Widows Sepulchral Rights through Nigeria Constitution” (2010) 23 Harv. Hum. Rts. J. 141 at 148.

¹¹⁰ [2000] Zasca 3 All SA 219.

¹¹¹ Poologasundram, Viroshan. “Intestacy Rights of Widows in South Africa: Has Customary Law Been Oppressive” (2013) 14 UNSWLJ Student Series 4.

Most court judgements in Nigeria and Uganda, like those cited above, demonstrate the conservative attitude and disposition of judges that makes them reluctant to challenge and eliminate gender inequality and discrimination against widows. There have been instances, however, where the courts took steps to ensure greater equality for women/widows and these are discussed next.

3.6 Few Steps Forward: Court Interventions towards Equality and Non-Discrimination of Widows

As noted above, the state has a responsibility to ensure that widowhood practices are consistent with international and regional human rights standards and domestic laws. As demonstrated above, while “there have been few direct challenges to personal laws as constituting violations of the constitutional guarantee of equality...in a series of landmark cases, the courts have shifted the limits of personal law in favour of greater protection of women’s rights...such courts decisions have been interpreted in the light of constitutionally and internationally accepted equal rights provisions.”¹¹²

For example, notwithstanding the rules on primogeniture that apply in Uganda and Nigeria, the Supreme Court of Nigeria in *Mojekwu v Mojekwu* took a second look at customs that discriminate against women on issues relating to inheritance.¹¹³ The court held that the “custom of Nnewi in Anambra State under which only male children inherit their father’s property is unconstitutional and repugnant to natural justice, equity and good conscience”¹¹⁴ A related case is *Mojekwu v Ejikeme*,¹¹⁵ where the “Court of Appeal held that a female child could inherit from the deceased father’s estate in Igbo land without the performance of the Nrachi¹¹⁶ ceremony.”¹¹⁷

¹¹² Sara Hossain, “Equality in the Home: Women’s Rights and Personal Laws in South Asia” in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) at 478.

¹¹³ [1997] 7 NWLR 283.

¹¹⁴ *Ibid.*

¹¹⁵ [2000] 5 NWLR 402.

¹¹⁶ Nrachi is a ceremony in which a man keeps one of his daughters at home unmarried for the rest of her life to raise children, especially males, to succeed him. After a daughter performs this rite, she takes the position of a man in her father’s house. Technically, she

In the South African case of *Bhe & Others v Magistrate, Khayelitsha & Others*,¹¹⁸ two minor girls sought to inherit their deceased father's estate. However, "under the South African law and custom only their grandfather was entitled to inherit."¹¹⁹ The plaintiffs (the girls) argued that South African native law and custom was inconsistent with the 1996 Constitution. Judgement was given in favour of the girls and the court "declared section 1(4b) of the Black Administration Act 91 of 1987 unconstitutional and invalid."¹²⁰

On issues of sexual assault and sexual offences, the Kenyan Court of Appeal took a step forward in ensuring that women are adequately protected especially on sexual offences related matters. The Kenyan Court of Appeal "challenged the stereotyped beliefs that women are untruthful and most likely to fabricate allegations of sexual assault".¹²¹ For example, in the Kenyan case of *Mukungu v. Republic*,¹²² the Kenyan Court of Appeal "determined that the requirement for corroboration in cases concerning sexual offences against women and girls was unconstitutional."¹²³

3.7 Legislative Initiatives in Uganda and Nigeria Relating To Widows

While legislative initiatives and reforms are progressing at a rather slow pace in Uganda and Nigeria, these initiatives have begun to address issues related to widowhood rituals, property disinheritance, inter-personal violence and other related matters, such as assault, sexual assault and marital rape, loss of the use, control and ownership of land, child custody, and

becomes a "man." A brief definition of "Nrachi" is provided in *Mojekwu v Mojekwu* [1997] 7 NWLR 283.

¹¹⁷ *Supra* note 119 at 422-423.

¹¹⁸ [2005] 1 BCLR 1 cc; ESCR-Net, *Bhe & Others v Magistrate, Khayelitsha & Others 2005(1) BCLR 1 (CC), 15 Oct 2004*, online: ESCR-Net- International Network for Economic, Social & Cultural Rights < <http://www.escr-net.org/docs/i/400589>>. See also, the Botswana case of *Magaya v Magaya*. [2013] ZWHHC 67.

¹¹⁹ [2005] 1 BCLR 1.

¹²⁰ *Ibid.*

¹²¹ Simone Cusack, "Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases," Final Paper, Submitted to the United Nations Office of the High Commissioner for Human Rights, June 9, 2014 at 40, Online: United Nations Office of the High Commissioner for Human Rights: http://www.ohchr.org/Documents/Issues/Women/WRGS/judicial_stereotyping2014.docx

[Cusack]

¹²² [2003] 2 EA 482, Paras 11-14.

¹²³ Cusack, *supra* note 121 at 40.

protection from property grabbers.¹²⁴ Legislation is sometimes used to guarantee equality and non-discrimination for widows. These initiatives represent gender-positive initiatives that draw on international human rights laws relating to the status of widows in society. Representative initiatives include the *Ugandan Domestic Relations Act* (discussed above), the *Uganda Land Alliance Act*, the *Law to prohibit certain Obnoxious Traditional Widowhood Practices and Rites and for Other Matters Connected Thereto* (enacted in the state of Akwa Ibom, Nigeria), the *Ugandan Sexual Offences Bill*.

In 2004 the Ugandan government enacted the *Domestic Relations Act*,¹²⁵ subsequently amended in 2008.¹²⁶ The *Domestic Relations Act* is an important piece of legislation for Ugandan women and was enacted to bring Ugandan family laws into better conformity with the guarantee of equality and non-discrimination enshrined in the Ugandan constitution. The Act is a piece of legislation that improves the status of widows/women in Uganda. The Act stipulates that women have equal rights to property in marriage and provides for the appointment of a surviving spouse as the administrator of the estate as well as the protection of widows from property grabbers. It also provides women with the right to negotiate sex on grounds of health, sets the minimum age of marriage at eighteen, prohibits widow inheritance, and criminalizes marital rape.¹²⁷ Even though political debates in Uganda related to the *Domestic Relations Act* are on-going, the Act is a progressive step for Ugandan women who have long been oppressed, subjugated, and silenced by customary beliefs and practices.

¹²⁴ At the international level the Millennium Development Goals (MDGs) provide a leading example of protecting women and children in society. The eight MDGs include promoting gender equality and empowering women, reducing child mortality, improving maternal health, combating HIV/AIDS, malaria and other diseases. Commonly referred to as “roadmap for world development by 2015,” MDGs are “core content of the current development agenda of global governance and are treated as the current framework of international development cooperation, to which there would allegedly be no alternative.” See United Nations, *MDG Momentum*, online: United Nations < <http://www.un.org/millenniumgoals/mdgmomentum.html>>.

¹²⁵ *Domestic Relation Bill*, 2003, s 72 online: < <http://www.ulii.org/ug/legislation/bill/2003/2003>>.

¹²⁶ Saidat Nakito “Polygamy in the Domestic Relations Bill 2003: A Barrier to the Women Human Right in Uganda” University of Nottingham Dissertation for Degree of Masters in Law (LLM) In Human Rights Law (2010) [*unpublished*] [Nakito].

¹²⁷ *Domestic Relations Act*, section 14(a).

Uganda and Nigeria's commitments to gender equality and non-discrimination are reflected in their domestic laws dealing with rights to own land and other property, but this has not changed the status of widows on issues related to personal/family laws. Women, especially widows who married under customary law, continue to suffer under the burden of discrimination. In the words of Lashawn R. Jefferson,¹²⁸ "women's property rights violations are not only discriminatory, they may also prove deadly."¹²⁹

In Uganda and Nigeria, patrilineal systems of inheritance and succession result in the marginalization of women, especially widows, according them inferior de facto status to men and denying them their constitutionally and internationally recognized right to equality and non-discrimination. While it is true that comparatively few steps have been taken by these governments to alleviate the sufferings perpetrated on widows, if "sufficient resources are channelled towards educating the public on the need to give due priority to widows' rights to equality and non-discrimination, prejudices and practices based on the "inferiority" of women can be gradually eliminated."¹³⁰

3.7.1 Other Nigeria and Uganda Legislative Initiatives Relating to Widowhood, Sexual Violence, and other forms of Inter-personal Violence

In 2013, the Akwa-Ibom state government in Nigeria passed a bill prohibiting unwholesome practices against widows in the state.¹³¹ This bill was passed in response to the need to criminalize all forms of injustice and abuse against widows in the state. The bill prohibits forcing widows to perform or submit to any of the listed acts:

Taking any form of oath, or forced to cut the hair on her head or pubic area, or forced to cry loudly, or be forced to lie down or sit next to the corpse of the husband, or forced to drink water which has been used to wash the husband or stripped naked or made to bathe in public, or jeered or pushed around if she fails to cry loud enough, or forced to sit on floor or mat to mourn her husband or

¹²⁸ Lashawn Jefferson is the Executive Director of the Women's Rights Division of Human Rights Watch.

¹²⁹ "Women Stripped of Property in Kenya," *Human Rights Watch* (4 March 2003) online: <<http://www.hrw.org/news/2003/03/04/women-stripped-property-kenya>>.

¹³⁰ Bennett, *supra* note 16 at 492.

¹³¹ *A Law To Prohibit Certain Obnoxious Traditional Widowhood Practices And Rites And For Other Matters Connected There to 2013*.

forced to dress in filthy clothes or rags as a sign of mourning, or prevented from washing her clothes or having a bath; forced to cook with or eat from unwashed or broken pots or bowls, or forced to observe a period of supervised mourning...or subjected to any kind of confinement or ordeal.¹³²

Likewise, the Enugu state and Edo state governments have passed the Enugu State *Prohibition of Infringement of Widows and Widowers Fundamental Rights Law*¹³³ and Edo State *Inhuman Treatment of Widows (Prohibition) 2004*,¹³⁴ respectively. Section 4(1) of the Enugu *Prohibition of Infringement of Widow and Widowers Fundamental Rights* prohibits the following;

[t]o permit the hairs on the head or any other part of the body to be shaved; to sleep either alone or on the same bed or be locked in a room with corpse of the husband/wife; not to receive condolence visits from sympathizers during the period of mourning; to be re-married by a relative of the late husband/wife; to sit on the floor or be naked during any period of the husband's/wife's burial rites; to drink the water used in washing the corpse of the husband/wife; to weep and wail loudly at intervals at any time after the death of the husband/wife except at one's own volition or involuntary action; to remain in confinement after the death of the husband/ wife for any given period; to vacate the matrimonial home; to do any other thing which contravenes the fundamental rights entrenched in the Constitution or is degrading the person.¹³⁵

On issues relating to inter-personal violence and sexual violence, there has been a paradigm shift; the government has enacted laws that provide for the more effective protection and promotion of widows rights. For example, in Nigeria, laws such as the *Prohibition Against*

¹³² Akwa Ibom House of Assembly, "AKHA passes Law to Prohibit Obnoxious Widowhood Practices –" *Akwa Ibom Government*, (25 March 2013) online: Akwa Ibom Government < <http://www.akwaibomstatehouseofassembly.org/akwa-ibom-legislature-procedures/2013/ akwa-ibom-house-of-assembly-passes-law-prohibiting-obnoxious-widowhood-practices.php>>

¹³³ *The Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law no 3 of 2001*.

¹³⁴ E. I Nwogugu, *Family Law in Nigeria* (Nigeria: HEBN Publishers, 2014) at 124.

¹³⁵ *Ibid*, section 4.

Domestic Violence Law of Lagos State (Nigeria),¹³⁶ the *Protection Against Domestic Violence and Related Matters Law 2004 of Cross River State (Nigeria)*¹³⁷ and the *Domestic Violence and Maltreatment of Widows (Prohibition) Law 2005 of Ebonyi State (Nigeria)*¹³⁸ have been passed to address gender-based violence of all forms as criminal matters. However, evidence of much change in the past decade in the way widows are actually treated is limited.¹³⁹

The Ugandan government has also taken steps to ensure that Ugandan women/widows are adequately protected. This is why the government drafted a *Sexual Offences Bill*. The Bill addresses issues relating to sexual offences and sexual violence and stipulates punishments for the perpetrators of all forms of sexual offences. Presently, the Bill is awaiting adoption by the Ugandan parliament. It should be adopted promptly to increase the legal protections for widows in Uganda.

In conclusion, whether some of these above mentioned laws are, or could be enforced, to protect widows from violence on the death of their spouses or address the issues of property disinheritance and all other forms of inter-personal violence is still unknown. However, the framework within which these laws is being put in place tends to suggest that at the territorial/sub-national level there is a move towards, and the possibility of, a major overhaul of all discriminatory personal laws and harmful cultural practices that violate widows' rights, to bring cultural practices into compliance with international human rights laws and standards on equality, non-discrimination, and the rights to own and inherit property, not to be subjected to any form of inhuman treatment and to be protected against all forms of gender-based violence.

¹³⁶ Lagos State Government, *A Law to Provide Protection against Domestic Violence and for the Connected Purposes 2007* (Nigeria: Oxbrand Planet, 2007) 3-30.

¹³⁷ No 10 of 2004.

¹³⁸ No 003 of 2005.

¹³⁹ Canada: Immigration and Refugee Board of Canada, Nigeria: Ritual whereby a widow drinks the water used to clean her husband's corpse; consequences for a widow's refusal to drink the water; whether a widow's refusal is interpreted by others as responsibility for her husband's death (2002-2004), (12 January 2005), online: < <http://www.refworld.org/docid/42df614811.html> >; Bartholomew Madukwe, "International Widows' Day: Are their Human Rights Protected," *The Vanguard* (27 June 2013), online: < <http://www.vanguardngr.com/2013/06/international-widows-day-are-their-human-rights-protected/> > .

3.7.2 Uganda Land Alliance

The Uganda Land Alliance (ULA) is a consortium of local and international NGOs whose objective is to ensure that land is accessible for use by everyone. Although the ULA does not form part of a legislative initiative, it is concerned with the “effects of customary land practices in Uganda, the negative impacts of property grabbing and government role in sponsoring foreign investment in tourism and mining.”¹⁴⁰ More than twenty-five years ago the ULA proposed that domestic land policies and laws be reviewed to make land ownership more easily accessible to vulnerable and marginalised groups in Uganda, including widows and orphans.¹⁴¹ This is of great importance in the patrilineal society of Uganda, where women are not entitled to own land under customary law. In most sub-Saharan African countries, “women are the primary users of land and therefore are directly affected by land policies and laws that exclude them from land policy development, planning, control, management and ownership.”¹⁴² Even “where they are given the right to farm on the land, they are not allowed to control whatever is planted, unless they are permitted by male family members to do so.”¹⁴³

Whether the NGOs will ultimately be successful in pursuing a rights-based strategy to attain their goals remains to be seen. What is laudable, however, is that the NGOs are challenging customary practices and rules that perpetuate gender inequality and discrimination in Uganda. These practices are impediments to women’s economic empowerment and advancement. The NGOs’ work helps to bring attention to these extremely important issues.

3.8 CONCLUSION

Rights of women/widows to land, marital property, and inheritance are enshrined in and protected by Nigeria and Uganda’s constitutions and domestic laws. Unfortunately, customary and religious laws have often diluted the strength of these legal guarantees. In

¹⁴⁰Tamale, *supra* note 89 at 257.

¹⁴¹Margaret Rugadya, “Land Reform: The Ugandan Experience” (Paper delivered at the Land Use & Villagisation Workshop, Hotel De Mille Collines Kigali 20-21 September 1999) [*unpublished*].

¹⁴²*Ibid.*

¹⁴³Bina Agarwal, *A Field of One’s Own: Gender and Land Rights in South Asia* (Cambridge: University Press, 1994) at 19.

addition, at the national level most governments have not yet taken appropriate and adequate steps to change laws, practices, traditions, rituals, and customs that violate widows' rights. As aptly observed by Florence Butegwa, "women's rights discourse must go on at the national level because until states understand the fact that some customs are illegal under the laws of the country, the discourse might backfire and little headway on any women's issues will be possible."¹⁴⁴

Despite partial formal legislative recognition of women's right to land, property, and succession, both in marriage and at the death of their husbands, women continue to face serious challenges in claiming and securing their rights. The major obstacles include harmful customary norms and practices such as the "male primogeniture rule," lack of control over property during marriage, gender-bias, customary conflict resolution mechanisms that often perpetuate the unequal division of property upon divorce, and unequal access to goods and services, including shelter and legal services. Other contributing factors include unresponsive governments, traditional authorities and institutions, ineffective courts, lack of awareness and lack of effective and accessible enforcement.

In addition, "lack of access to basic resources tends to limit women's knowledge about the transmission of HIV/AIDS. As a result, most rural women find it hard to take care of themselves and their children, they do not have the power to negotiate safe sex, especially when they have to submit to "sexual cleansing or widow cleansing," nor do they have access to proper health care."¹⁴⁵

And finally, states are responsible for changing their domestic laws in order to bring them into conformity with international human rights law. But what strategies can be utilized that do not undermine the integrity and efficacy of the domestic laws? One such strategy, proposed by An-Na'im, recommends:

¹⁴⁴ Rebecca J. Cook, "Women's International Human Rights Law: The Way Forward" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Philadelphia Press, 1994) 18.

¹⁴⁵ Meaza A. Shenafi & Zenebe Worke Tadasse, "Women: HIV/AIDS, Property & Inheritance Rights: The Case of Ethiopia" (2005) [unpublished].

States should try to regulate the operation of some of these religious and customary laws by providing for procedural safeguards to be enforced by administrative organs or tribunals. In addition, a strongly motivated and well informed local constituency willing and able to engage in organized action might be useful to mobilize political support and press for the implementation of policies and strategies for change.¹⁴⁶

In addition, NGOs can play a major role in achieving the necessary legal reforms and changes. However, these suggestions are unlikely to be immediately and fully realized when the issue of changing religious or customary laws arises in a given situation. But in all probability, there

would be some level of official obligation and commitment to change, some degree of broad political support, and some sort of constituency willing to work for it who can pressure the state into ratifying the relevant treaty or into increasing or effectuating its commitment to implement change in accordance with international human rights law.¹⁴⁷

Additional means by which NGOs can generate the necessary degree of official commitment and local political support are discussed in the next chapter.

¹⁴⁶ Abdullahi Ahmed An-Na'im, "State Responsibility under International Human Rights Law to Change Religious and Customary Laws" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Philadelphia Press, 1994) 176.

¹⁴⁷ *Ibid.*

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

*Gender stereotypes damage men as well as women. We need to rethink the idea of what is male or female. Humanity as a whole will be better off when boys and girls can live without these limitations.*¹

*Men must act in partnership with women to understand that gender norms are destructive for both women and men and make an effort to give up patriarchal privileges. Depriving women of their human rights degrades men as human beings.*²

*When we as men embrace the equality of women and girls, the world becomes a more just place and we move from seeing gender equality as a zero-sum game of women vs. men to seeing it as good for all of us.*³

INTRODUCTION

This thesis has argued that there is still widespread discrimination against widows in sub-Saharan African countries as a result of the continued observance of harmful widowhood rituals, despite state ratification of international and regional conventions. There are many international, regional, and domestic instruments that assert women's rights to equality, non-discrimination, inheritance, and protection from all forms of gender-based violence. Human rights discourse and human rights laws have not proven to be adequate to protect widows at the grassroots or local level. As Celina Romany, explains:

¹ Mikeal Gustafsson, Member of the European Parliament and Chairman of the Committee on Women's Rights and Gender Equality at the HeforShe Initiative of the international Women's Rights Day 2014, online: Heforshe < <http://heforshe.org/>>.

² Dragan Bozanic, UN Secretary General's Network of Men Leaders at the Heforshe Initiative of the International Women's Rights Day 2014, online: Heforshe < <http://heforshe.org/>>.

³ Gray Barker, International Director and Co- Chair Men Engage Alliance, UN Secretary-General's Network of Men Leaders at the HeforShe Initiative of the International Women's Rights Day 2014, online: Heforshe < <http://heforshe.org/>>.

Women are everyday subjects of a system of familial terror that includes diverse modalities of violence...Violence assaults life, dignity, and personal integrity. It transgresses basis norms of peaceful co-existence...Women are the paradigmatic alien subjects of international law. To be an alien is to be *another*, to be an *outsider*. Women are *aliens* within their states, *aliens* within an international exclusive club that constitutes international society.⁴

In advocating for a discourse based on human rights law for the adequate protection of widows' rights, this thesis argued that, to date, States have failed to effectively condemn all practices that entrench discrimination and violate gender equality. It is not enough that a particular provision is put in place under international human rights law; the international law of state responsibility also requires states to respect, ensure and protect women's international human rights by providing effective protection and remedies against human rights violations. State responsibility "extends not only to laws enacted by formal legislative organs of the state, but also to those attributed to religious and customary sources or sanction, regardless of the manner of their enactment."⁵ Therefore this thesis argues that in order to ensure that women/widows enjoy their rights, certain reforms must be made. Affirmative steps must be taken by international, regional and state communities. NGOs also need to intensify their efforts to ensure adequate protection and promotion of widows' rights.

Uganda and Nigeria are parties to many international and regional conventions. State parties must take steps to address injustice, violations, oppression, and subordination of widows by "establishing freedom that includes the protection of women, and regulat[ing] private as well as public acts to prevent discrimination against women by any person, organization, or

⁴ Celina Romany, "State Responsibility goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" in Rebecca Cook, ed., *Human Rights of Women, National, and International Perspectives* (USA: University of Pennsylvania Press, 2004) at 85. [*Emphasis added*].

⁵ Abdullahi Ahmed An-Na'im, "State Responsibility under International Human Rights Law to Change Religious and Customary Laws" in Rebecca Cook, ed., *Human Rights of Women, National and International Perspectives* (USA: University of Pennsylvania Press, 2004) at 168 [*An-Na'im*].

enterprise.”⁶ The continued violation of widows’ rights exposes the inadequacy of international law to protect their rights as enunciated under international human rights law norms and standards. This inadequacy must be confronted and addressed in order to move forward with effective and (hopefully) efficient strategies to combat violations of widows’ rights. The purpose of this chapter is to examine measures that may be taken to give effect to, implement, and secure the rights of widows in sub-Saharan African countries and eliminate gender inequality and discriminatory cultural practices. The measures discussed are classified under two broad headings: (a) grassroots approaches and (b) socio-economic, cultural, and legal measures.

4.1 THE GRASSROOTS APPROACH

4.1.1 Human Rights in the Vernacular

The starting point from which to tackle the violation of widows’ rights is at the grassroots level. As noted earlier, despite the many international and regional legal instruments that promote women’s human rights in all spheres, widows in most parts of sub-Saharan Africa are still discriminated against and are unable to enjoy their fundamental human rights. Some of these provisions are “inextricably tied to state provision of adequate protection both in the public and private spheres.”⁷ In Nigeria and Uganda, constitutional provisions guarantee equality and non-discrimination. But these provisions are seldom used in the courts to prevent discrimination against women. When they are used, the results have not adequately mitigated the hardships widows experience as a result of discriminatory personal laws.

To address the gap between the ideal and the practical, this thesis adopts a human rights-centered perception of cultural translation based on the work of Sally Engle Merry. This approach proposes translating transnational ideas, such as human rights approaches to violence against women, into local social contexts at the grassroots level in order to address the practical situation and realities of widows.⁸

⁶ Marsha A. Freeman, “Women, Development and Justice: Using the International Convention on Women’s Rights” in Joanna Kerr, ed., *Ours by Right: Women’s Rights as Human Rights* (London: Zed Books, 1993) at 94.

⁷ Margaret Owen, *A World of Widows* (London & New Jersey: Zed Books, 1996) at 179.

⁸ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago & London: The University of Chicago Press, 2006) at 135 [Merry].

4.1.2 Translating Widows Rights into Local Reality

Sally Engle Merry has argued that “vernacularization is the best way to disseminate human rights concepts to indigenous peoples, ethnic minorities, and women, describing vernacularization as the process of appropriating and adapting globally generated ideas and strategies at the local level.”⁹ Under this approach, “[n]orms are framed to make them resonant with local contexts and local ideas about justice and acceptable to local communities, while at the same time preserving their essence and their potential to be transformative of existing local social relations and circumstances that are unequal and or unjust.”¹⁰ But what type of global norms, ideas and strategies can be appropriated and adapted at grassroots level? In Chile, some groups within the women’s movement came together in their demand for democracy by putting a newspaper advertisement in the local newspaper. The women’s efforts were followed by Chile’s ratification of *CEDAW* and the formation of Coalition of Women for Democracy (*Concertacion de Mujeres Por la Democracia*) in 1988.¹¹

Ideas and strategies at the grassroots level can take the form of campaigns, awareness seminars, women’s movements, trainings, and newspaper advertisements. This is exemplified by the Chilean women’s movement. In 2002 the Center for Women’s Global Leadership of Rutgers University organised a campaign called “creating a culture that says no to violence against women.”¹² The Rutgers University anti-violence campaign recognized “that culture is a tool used by individuals and institutions to support beliefs and practices that tend to legitimize and perpetuate violence against women.”¹³ The campaign brought forward other ideas and approaches to be explored in the “production and appropriation of human rights talks about violence against women.”¹⁴ Examples illustrate that human rights can be translated at the local community level.

⁹ *Ibid.*

¹⁰ Peggy Levitt & Sally Merry, “Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India, and the United States” (2009) 9 *Global Network* at 441.

¹¹ Catherine O’ Rourke, *Gender Politics in Transnational Justice* (USA & Canada: Routledge, 2013) at 198.

¹² Merry, *supra* note 8 at 28.

¹³ *Ibid.*

¹⁴ *Ibid* at 34.

In addition, these ideas and strategies can be adopted and implemented by women's organisations and feminist activists who establish "conjectural alliances"¹⁵ with other international actors and NGOs. These groups and individuals have unique abilities to promote a comprehensive approach to improving the lives of widows by creating programs, raising awareness, and setting up local initiatives to raise international standards, norms, and goals. In sub-Saharan Africa, NGOs can use vernacularization to facilitate discourse between traditional leaders and grassroots women. Using Sally Merry's approach, NGOs can also adapt culturally relevant images, symbols, and stories to frame discourse between traditional leaders and grassroots women in the rural areas. Framing strategies through stories will help to structure the dialogue, introduce ideas that challenge patriarchal traditions and when appropriate, suggest new customs that are culturally resonant.¹⁶ Framing will further help to facilitate "the gradual emergence of a local rights consciousness among grassroots people and greater awareness of national and local issues."¹⁷

National political elites, human rights lawyers, feminist activists, movement leaders,¹⁸ and NGOs who "translate global ideas into local discourse, need to move beyond the anthropological studies and human rights discourse used by outsiders in which the former observes and the latter projects its morals upon the target audience."¹⁹ If Sally Engle Merry's approach is effectively operationalized, it is likely to give women, and most especially widows, a voice at the local level in discussions about the normative content of customary law. It would reduce the power disparities between traditional leaders and rural women.²⁰ Vernacularizing global norms to make them resonant with local contexts promises to be effective as a strategy to enhance protection for the rights of widows at the grassroots level. But how are these strategies to be introduced? How do we translate the ideas underlying *CEDAW* and other international/ regional instruments into work in the grassroots? How do

¹⁵ Merry, *supra* note 8 at 134.

¹⁶ Seyla Benhabib, *The Claims of Culture* (USA: Princeton University Press, 2002) at 23.

¹⁷ Merry, *supra* note 9 at 134.

¹⁸ *Ibid* at 135.

¹⁹ Sarah Mukass, "Domesticating the Protocol" in Roselyn Musa, Falsa Jama Mohammed & Firoze MA, eds., *Breathing Life into the African Union Protocol on Women's Rights in Africa* (Nairobi: Nairobi, 2006) at 28.

²⁰ Johanna Bond, "Women's Rights, Customary Law and the Promise of the Protocol" in Jeanmarie Fenrich, Paola Galizzi & Tracy E. Higgins, eds., *The Future of African Customary Law* (USA: Cambridge University, 2011) at 493.

we achieve implementation of human rights law that addresses the practical needs of widows? This thesis proposes that other measures also need to be used in addition to work at the grassroots. These include socio-economic, cultural, and legal measures designed to alleviate the oppression and subjugation of widows and the discriminatory effects of customary widowhood practices.

4.2 CULTURAL REMEDIAL MEASURES

States are responsible for ensuring that their domestic laws are in conformity with international human rights laws. International law cannot ensure strict compliance with its norms except through steps taken by state parties. It is therefore useful to explore possible remedies by which States can ensure that its laws are in conformity with international human rights law.²¹ For cultural remedies to be effective there must be a process of persuasion, resulting in a change in societal attitudes as result of appropriate training and programs. These options are discussed below.

4.2.0 Persuasion

NGOs should seek to persuade the people in communities, especially the traditional leaders, of the need for change. However, persuasion must be grounded in a realistic understanding of the rationale behind customary laws. For example, the “primogeniture rule” which is based on the belief that only men are entitled to own and inherit property, can be redirected to support the view that allowing women the right to inherit, as well, will better support families and will decrease the violation of women’s human rights in the society.²² In ensuring that customary laws are interpreted to comply with international standards, “the state must also judiciously take into account and address both the circumstances and justifying rationale that sustained traditional practices and contemporary economic and sociological factors.”²³ This is essential. It is not enough to identify the cultural barriers that impede the rights of widows; it is also important to understand the social basis of these cultural traditions, norms, and practices, and to ensure that they move into compliance with international human rights laws standards.

²¹ An-Na’im, *supra* note 5 at 175.

²² *Ibid.*

²³ *Ibid.*

4.2.1 Change in Societal Attitudes

Measures can be taken to change societal attitudes about the “capabilities of women.”²⁴ Not only should women teach their daughters and sons about the limitations imposed by stereotypical roles, but fathers also need to educate their sons that “domestic chores are not for women alone, but a shared responsibility.”²⁵ Men and boys are “critical allies in the fight for gender equality and must be proactively and positively engaged at an early stage.”²⁶ In 2010, Kenya created a gender badge. The “gender badge”²⁷ serves as an incentive for adolescents to learn about the value of gender equality from an organization that has the capability and expertise to provide high-quality training to adolescent boys at the local level. The badge also serves as a means to encourage critical thinking on various stereotyped roles, norms, and gender based violence in Kenya.²⁸ This is a grassroots initiative that can be adopted, adapted, and replicated by other organizations around the world.

Changing societal attitudes towards women will take a long time, perhaps a generation, perhaps longer. Nevertheless, raising awareness on the issue of violence and discrimination against women and educating boys and men to view women as valuable partners in the process of social and economic development towards conditions of equal justice, peace and security, are as important as taking legal steps to protect women's human rights and the rights of widows.²⁹

4.2.2 Organising Gender Equality Training Programs

Gender equality programs need to be created and delivered through intensive training. Equality programs can serve as effective platform to engage men and boys in reducing gender

²⁴ Harriet Diana Musoke, “Shattering the Glass Ceiling: What Women in Uganda Need to Make it to the Top” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda, and Tanzania* (Carolina: Carolina Academic Press, 2005) at 375.

²⁵ *Ibid* at 376.

²⁶ United Nations Population Fund, *Engaging Adolescent Boys and Young Men for Gender Equality*, online: UNFPA-United Nations Population. Fund < <http://www.unfpa.org/gender/men.htm> >.

²⁷ Program for Appropriate Technology in Health (PATH), “*Breaking Gender Barriers: Teaching Youth in China and Kenya about Gender Inequalities that can lead to Poor Health*,” online: PATH < <http://sites.path.org/hivaidсандtb/closed-projects/breaking-gender-barriers/> >.

²⁸ *Ibid*.

²⁹ Women and Violence, *United Nations*, online: United Nations < <http://www.un.org/rights/dpi1772e.htm> >.

inequalities, promoting the health and well-being of women, men, and children, and ending all forms of gender based violence. However, such training must have the support of social services if it is to be effective in changing attitudes about the desirability of specific customary practices and it must be presented using reasoning that is thoroughly understood by the affected population.³⁰ As Abdullahi Ahmed An-Na'im pointed out, "to achieve this aim, gender equality programs must not only discredit the customary practice in question, but must also provide a viable and legitimate alternative view of the matter...this alternative view can either be the simple discontinuation of the practice in question or the substitution of another."³¹

An example of gender equality program is the Canadian White Ribbon Campaign. The Campaign started in 1991 and "focuses on engaging men and boys to end violence against women through outreach, media campaigns, education and fundraising."³² Since 1991, the campaign has been conducted in numerous European and North America countries. By way of creating awareness, tiny stripes of White Ribbon are worn as a symbol of support for women from a "feminist, equal rights, and anti-domestic violence perspective."³³ In most sub-Saharan Africa countries, gender equality programs have been instituted at the domestic level. In Uganda, with the help of United Nations (UN) Population Fund, government partners with male leaders to eradicate harmful traditional practices in order to promote healthier behaviours within the local community.³⁴ The challenges of establishing gender equality programs can be met when there is a collective will on the part of States and people to achieve change.

In Nigeria, Management Sciences for Health (MSH), one of the major initiators of Nigeria's projects on gender equality programs, has established three PEPFAR (President's Emergency Plan for AIDS Relief)--USAID funded projects. These include Program to Build Leadership and Accountability for Health Systems in Nigeria (PLAN-Health); Community Based

³⁰ An-Na'im, *supra* note 5 at 178.

³¹ *Ibid.*

³² See generally, The White Ribbon, online: The White Ribbon Campaign < <http://www.whiteribbon.ca/>>.

³³ WRC, Media Release, "Successful Campaigns in the United States" (24 April 2007) online: < <http://www.whiteribbon.ca/>> .

³⁴ UNFPA, *Promoting Gender Inequality and engaging men and boys*, online: UNFPA-United Nations Population Fund < <http://www.unfpa.org/gender/men.htm>>.

Support for Orphans and Vulnerable Children in Nigeria (CUBS) project; and Prevention Organizational Systems for AIDS Care and Treatment (ProACT) project.³⁵ While the training initiative is a relatively new project, it has established policies, strategies, and ideas to support gender equality and to educate women, communities, workers, and service providers on the best practices to address cultural barriers and other impediments to gender equality.³⁶ In addition, in 2014, the UN Women campaign for gender equality and women's empowerment launched an initiative known as "HeForShe" campaign.³⁷ The campaign was launched on the eve of International Women's Day (March 8). The Campaign encourages men all over the world to use social media to speak out against the inequalities faced by women and girls.³⁸

These initiatives/measures alone will not be sufficient. Mass mobilization of NGOs to achieve acceptance for these measures will be required. NGOs can be seen as building bridges with and for widows. In rural settings they may be able to develop the extensive ties and networks that are required to ensure that widows are adequately protected and violations of their rights are promptly addressed.

³⁵ Patience Obo-Effanga, "Advancing Gender Equity in MSH Nigeria Projects" (26 February 2014) online: Management Sciences for Health < <https://www.msh.org/news-events/stories/advancing-gender-equity-in-msh-nigeria-projects>>.

³⁶ *Ibid.*

³⁷ HeForShe campaign is a place for men to speak up and tell the world why equality for every woman and girl is worth fighting for. It is a form of campaign where men are raising their voices for change. The strategy behind the campaign is revealed by its theme, "Hefor she" - in other words, men ought to stand up for the rights of the women of the world who are their mothers, sisters, and daughters. The campaign is a women's rights campaign featuring not a single woman but men. See generally, Heforshe campaign, online: < <http://heforshe.org/>>.

³⁸ Kdevries, "HeforShe Campaign" *The Communication Initiative Network* (10 March 2014) online: The Communication Initiative Network < <http://www.comminet.com/global/content/heforshe-campaign>>; Stuart Elliott, "UN Women's Rights Group Seeks Men's Support," *New York Times* (7 March 2014) online: New York Times < <http://www.nytimes.com/2014/03/07/business/media/un-campaign-asks-men-to-support-womens-rights.html>>. Ryan Henson, "HeforShe Campaign: Men Speaking Up for Women's Rights" (12 March 2014) online: Elizabeth Glaser Pediatric AIDS Foundation < <http://www.pedaids.org/blog/entry/heforshe-campaign-men-speaking-up-for-womens-rights>>; ICCUW, "UN Women Executive Summons Men to stand up for Gender Equality" (26 May 2014) online: International Convocation Unitarian Universalist Women & Progressive Women of Faith < http://www.icuww.com/2008013158/News/Latest/UNWomen_GenderEquality.html>.

4.3 SOCIO- ECONOMIC MEASURES

4.3.0 The Role of Education

The UNESCO World Declaration on Education For All,³⁹ proclaims “education can help ensure a safer, healthier, more prosperous and environmentally sound world while simultaneously contributing to social, economic, and cultural progress, tolerance and international cooperation...hence, education is an indispensable key to, though not a sufficient condition for, personal and social improvement.”⁴⁰ Education plays a major role in the promotion and protection of women’s rights. Investing in women’s education is an effective way to incorporate the perspective of women’s rights as human rights into socio-economic development programs. Educating women promotes their participation in politics and policy making, promotes health and nutrition, and serves as an indicator of the performance of the economy and development progress.⁴¹ Education for women also improves the standard of living, reduces poverty rates, child bearing and maternal mortality rates, and increases female workers’ salaries.⁴²

In Nigeria and Uganda, there are still gender barriers for girls in the educational sector. In Uganda, it continues to be commonly said that “girls do not need education as much as boys as they will end up being married,”⁴³ and in many sub-Saharan African countries, it is still commonly believed that it is better to train a male child than to train a female. The situation in Nigeria is similar. Some Nigerians generally believe that “a woman’s life ends in the

³⁹ UNESCO, World Declaration on Education For All and Framework for Action to Meet Basic Learning Needs adopted by the World Conference on Education For All Meeting Basic Learning Needs Jomtien Thailand 5- 9 March 1990 online: <
<http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm>>.

⁴⁰ *Ibid.*

⁴¹ Women’s Major Group: Gender Equality, Women’s Rights & Women’s Priorities: Recommendation for the Proposed Sustainable Development Goals (SDGs) and the Post_ 2015 Development Agenda [September 2013] [*unpublished*].

⁴² Joy C. Kwesiga, Gender Issues in Higher Education and Issues of Development Management in sub-Saharan Africa: An overview (A Paper delivered at a brainstorming session on building technical capacity and gender advocacy of young professional African women, Nairobi, Kenya [*unpublished*]).

⁴³ Dona Kanabahita Byamukama, “Legal strategies to increase Ugandan Women’s Access to Higher Education” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda, and Tanzania* (Carolina: Carolina Academic Press, 2005) at 16 [*Byamakama*].

kitchen.”⁴⁴ Such stereotypical beliefs suggest that many occupations are perceived to be gendered.

In addition, there are structural barriers to women’s education in most sub-Saharan African countries in both rural and urban settings. These include “inequality in athletic and vocational programs, limited educational systems for girls, and gender biased admission procedures.”⁴⁵ Improving women’s status through increased access to higher education should help to change the “culturally defined”⁴⁶ gender roles regarding women and help countries to develop their full potential. Change is now beginning to occur. A girl’s right to education is now taken seriously in some parts of Africa; nonetheless, gender stereotypes are still prevalent.

4.3.1 Economic Empowerment

Due to traditional and socio-cultural beliefs in Africa, African widows are subjected to serious hardships after their husband’s death. They are denied inheritance or succession to their husbands’ estate, regardless of whether or not such properties were jointly acquired by both parties. Widows tend to lack financial independence and are therefore totally dependent on their deceased husbands’ relatives for support. Liberation and full equality for widows is essential for socio-economic progress and transformation. One of the ways to effectively tackle discrimination against widows and their subjection to perpetual poverty is to ensure that they are economically empowered.

The United Nations (UN) Women supports women’s economic empowerment in the belief that it will “significantly contribute to advancing and promoting sustainable development”⁴⁷ and advance the position and well-being of widows within their families and communities. Economic empowerment helps to address issues related to “household income

⁴⁴ Rosie Boycott, “Why a woman’s place is in the kitchen,” *The Guardian Newspaper* (26 April 2007) online: The Guardian Newspaper <<http://www.theguardian.com/world/2007/apr/26/gender.lifeandhealth>>.

⁴⁵ Byamukama, *supra* note 43 at 18.

⁴⁶ Mande Limbu, “Women and Higher Education in Tanzania” in Johanna Bond, ed., *Voices of African Women: Women’s Rights in Ghana, Uganda, and Tanzania* (Carolina: Carolina Academic Press, 2005) at 39.

⁴⁷ UN Women, *Economic Empowerment*, online: UN Women <www.unwomen.org/en/what-we-do/economic-empowerment>. (14 July 2014)

insecurity, food and nutritional insecurity, stigma, and discrimination for all women including widows who may also be both living with HIV/AIDS and supporting a family.”⁴⁸

To empower widows, NGOs need to incorporate a gender-neutral perspective in the analysis and planning process, and emphasize women’s rights in all areas of socio-economic growth and development, and not simply increase the number of programmes available for widows.

4.4 LEGAL MEASURES

4.4.0 The Role of Judges

Discriminatory laws sometimes result in disputes that judges must resolve. To reach a just decision between competing interests, the court must interpret law in the light of social realities and in a manner that is consistent with overriding principles of justice and fairness. This may require that judges reject discriminatory customs and traditional practices⁴⁹ on the ground that they are unjust. To do so, judges must adopt a progressive activist position on the status of women.⁵⁰ Cusack asserts that, “Just as judges can play a significant role in perpetuating stereotypes, they can also play a significant role in ridding the justice system of those same stereotypes....Judges have a responsibility to uphold the fairness and integrity of the justice system by ensuring that gender-based violence trials are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype”⁵¹ Judges in

⁴⁸ Global Hands, *Economic Empowerment by Farming for Widows in Uganda*, *Global Hand: The Partnership People*, online: The Global Hand <<http://www.globalhand.org/en/search/off/request/8065>>.

⁴⁹ Regina Rweyemamu, “Judicial Activism and Gender Rights in Tanzania: The Task Ahead” in Johanna Bond, ed., *Voices of African Women; Women’s Rights in Ghana, Uganda, and Tanzania* (USA: Carolina Academic Press, 2005) at 67.

⁵⁰ The Court can change laws which are discriminatory on their face, most especially customary laws which remain in place despite changes in the socioeconomic conditions upon which they were based.

⁵¹ Simone Cusack, *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender- Based Violence Cases*, United Nations Office of the High Commissioner for Human Rights, June 9, 2014, at 20, online: United Nations Office of the High Commissioner for Human Rights: http://www.ohchr.org/Documents/Issues/Women/WRGS/judicial_stereotyping2014.docx [Cusack]

Botswana, for example, have long shown a willingness to move towards bridging the “yawning gap between the letter of the law and reality in the field.”⁵²

The High Court case of *Mmusi & Ors v Ramantele*⁵³ elevated the status of women in Botswana. The High Court of Botswana concluded that contrary to the Ngwaketse customary law which states “that only the last son is qualified as intestate heir to the exclusion of his female siblings,” a female child of a deceased Botswana man is entitled to inherit the estate, and not the male member of the family who was the heir under customary law.⁵⁴ Edith Mmusi and her other siblings claimed that they were entitled to inherit their father’s house. Their claim was disputed by their nephew who opined that according to Ngwaketse customary law, they had no right to inherit.⁵⁵ Edith and her other siblings contended that the Ngwaketse customary rule of intestate succession violated section 3(a) of the 1966 Botswana Constitution which guarantees equal protection of the law to all persons regardless of gender and asserts:

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely; a) life, liberty, security of the person and the protection of the law; b) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.⁵⁶

⁵²Palamagambo John Kabudi “The Judiciary and Human Rights in Tanzania; Domestic Applications of International Human Rights Norms” (1991) 24 Law and Politics in Africa, Asia & Latin America 271.

⁵³[2013] 1 BWCA.

⁵⁴*Ibid* at para.15.

⁵⁵[2013] 1 BWCA.

⁵⁶Republic of Botswana Constitution (1966), article 3.

The Court ruled in favour of Edith and her siblings and struck down the customary practice as being in violation of the constitution, stating that “in the name of fairness and equality, women should have the right to inherit.”⁵⁷ Justice Key Dingake stated that “the time has now arisen for the justices of this court to assume the role of the judicial midwife and assist in the birth of a new world struggling to be born...Discrimination against gender has no place in our modern day society.”⁵⁸ While this was a case in Botswana, the decision of the court also comments on similar discriminatory laws in other parts of sub-Saharan African.

In 2009, the Cape Town Constitutional Court ruled that widows in polygamous marriages have the right to claim or inherit from the estates of their husbands who die intestate. This decision was made in the case of *Hassam v Jacobs NO and Others (Muslim Youth Movement of South Africa and Women’s Legal Trust as Amici Curiae)*.⁵⁹ The applicant, Mrs Fatima Gabie Hassam married the deceased (Mr Ebrahim Hassam) in accordance with Muslim rites. Without the applicant’s knowledge, the deceased married a second wife, Mrs Mariam Hassam, also according to Muslim rites. At the death of her husband, the applicant claimed the right to inherit from her late husband who died intestate.⁶⁰

The applicant applied to the High Court, challenging the validity of section 1 (4) (f) of the *Intestate Succession Act 81 of 1987* (the Act) and the *Maintenance of Surviving Spouses Act 27 of 1990* (the MSSA) on the grounds that “it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband” and unfairly excludes widows in polygamous Muslim marriages from protections under the categories of “spouse” and “survivor.”⁶¹ The Court held that the term “spouse” in that Act should be interpreted to include all the spouses in polygamous Muslim marriages. The High Court further held that the word “survivor” in the MSSA should have been read to include all surviving partners of polygamous Muslim marriages.⁶²

⁵⁷ *Supra* note 54 at para. 200-201.

⁵⁸ *Ibid* at para. 217.

⁵⁹ [2009] ZACC 19.

⁶⁰ *Ibid*.

⁶¹ *Ibid*.

⁶² *Ibid*.

Recently, the Supreme Court of Nigeria voided the Igbo customary law that denies daughters the right to inherit their fathers' estate on the grounds that the law is discriminatory and conflicts with the *Nigerian 1999 Constitution*. In the case of *Ukeje v Ukeje*,⁶³ Lazarus Ukeje, (deceased) a native of Imo State died intestate. Mrs. Lois Chituru Ukeje (wife of the late Lazarus Ogbonna Ukeje) had four children with the deceased including Mrs. Gladys Ada (nee Ukeje) who was the respondent in this case.⁶⁴ Mrs Lois and her son (Gladys' brother) sought letters of administration without Gladys knowledge. On becoming aware of this development, Gladys filed an action at the Lagos High Court, claiming she is a daughter of the deceased and, by virtue of that fact, has a right to share in her father's estate.⁶⁵ Gladys sought a declaration that "she is a daughter of the deceased; that the grant of Letters of Administration obtained by her mother and her brother be declared null and void; an order of injunction restraining her mother and brother from administering the estate of her father."⁶⁶ The trial court ruled that Gladys is a daughter of the deceased and should be entitled to inherit her father's estate. However, her brother and mother appealed at the Court of Appeal and the Supreme Court respectively; in each instance, the verdict was that Gladys was qualified under the laws of Nigeria to inherit her father's estate.

Justice Bode Rhodes-Vivour, delivering the lead judgment, stated:

No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate, is a breach of Section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian.⁶⁷

Even though these are only few examples of recent cases in which the judiciary has risen to the challenge of defending of human rights and the Constitution, they are significant and laudable. The Botswana High Court, South African Constitutional Court, and most recently, the Supreme Court of Nigeria have changed their positions, adopting a more liberal approach

⁶³ [2001] 27 WRN 14.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid* at 21.

⁶⁷ *Supra* note 62 at pp 32-33, para E-G.

than they had previously held.⁶⁸ There seems to be no basis for other sub-Saharan African courts to continue to cling to the approach whereby only males are entitled to inheritance. Perhaps, a little bit of judicial/gender activism, flexibility, and creativity on part of the judges will serve the interest of justice in the protection and promotion of women's rights. Although, it is unclear whether these courts' decisions are changing the practical plight of widows in sub-Saharan Africa generally in relation to inheritance rights, one thing is sure, and that is that interpretations of African customs/cultural practices that are more favourable for women are emerging.

4.4.1 Strengthening Existing Enforcement Mechanisms and Developing New Ones

In 2013, the plight of widows was finally recognized by the Human Rights Committee of *CEDAW*. The General Recommendation on Article 16 of the *CEDAW* (economic consequences of marriage, family relations and their dissolution) emphasizes the issue of “inequality in the family in the name of ideology, tradition and culture which are governed by the principles of civil or common law, religious or customary laws and practices, or some combination of such laws and practices that discriminate against women that does not comply with the principles set out in the Convention.”⁶⁹ The Committee further recognized that “law or custom deny widows equality with widowers in respect of inheritance, leaving them vulnerable economically upon the death of a spouse, as the wife or wives may be told to leave the land or may be required to marry a brother of the deceased in order to remain on the land.”⁷⁰

At the same time, international human rights instruments often contain only vague and imprecise provisions with respect to the rights accorded widows. For example, with the exception of the *Africa Charter on Human and Peoples' Rights on the Rights of Women in Africa*, most international and regional Conventions fail to mention that widows are often treated differently with respect to certain specific issues. General terms like “traditional attitudes,” “gender-based violence,” and “stereotyped roles” are often used. A United Nations

⁶⁸ Compare, for example, the court's decision in the South African case of *Mthembu v Letsela*, [2000] 3 All SA 219 (ZASCA).

⁶⁹ UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *CEDAW General Recommendations Nos. 29, adopted at the Fifty-fourth Session, 2013 (contained in Document CEDAW/C/GC/29 paras 49-53*, online:

<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

⁷⁰ *Ibid*

(UN) declaration or a convention that addresses the circumstances of widows, as such, may be needed instead. There are already Conventions for some specific vulnerable groups. For instance, there is a *Convention and Protocol on the Status of Refugees*,⁷¹ a *Convention on the Rights of Persons with Disabilities*,⁷² an *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,⁷³ and a *Convention on the Protection of National Minorities*,⁷⁴ amongst others.

Establishing a United Nations (UN) convention or a declaration can be a herculean task. Ratifying a UN Convention that incorporates precise provisions with respect to widows is likely to be especially difficult because there are already other binding instruments relating to the rights of women. Conventions are legally binding on all State parties. Declarations are non-binding. Conventions usually involve an agreement that the issues are ones of international importance, followed by widespread participation in the drafting process. The drafting of the agreed provisions can take several months or years, followed by the negotiation stage and finally, the determination of which countries will be State parties.⁷⁵ Conventions and declarations both offer opportunities for “advancing a gender perspective and increasing attention to gender issues,”⁷⁶ especially as they affect widows, not only in African regions, but in other regions of the world as well. If we focus our efforts on a Convention, we may find that the opposition will not be that much greater but the success will be much more rewarding.⁷⁷

⁷¹ *UN General Assembly, Protocol Relating to the Status of Refugees*, 31 January 1967, UNTS 606 (entered into force 4 October 1967).

⁷² *UN General Assembly, Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I (entered into force 3 May 1988).

⁷³ *UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNTS 2220, A/RES/45/158 (entered into force 18 December 1990).

⁷⁴ *UN General Assembly, Convention on the Protection of National Minorities, CETS 157* (entered into force 1 February 1998).

⁷⁵ Jennifer Kates & Rebecca Katz, “The Role of Treaties, Agreements, Conventions and other International Instruments in Global Health” (2011) 25 *Infectious Disease Clinics of North America* 460.

⁷⁶ Andrew Byrnes, “Using International Human Rights Law and Procedures to Advance Women’s Human Rights” in Kelly D. Askin & Dorean M. Koeing, eds., *Women and International Human Rights Law* (New York: Transnational Publishers, 2000) at 212.

⁷⁷ Louis Sohn, “The Human Rights Law of the Charter” (1977) 12 *Tex Int’l L.J.* 129 at 140.

In addition, more effective and efficient use of reporting procedures under the various UN human right treaties may be needed. This can be achieved by ensuring that state parties take with utmost seriousness the need to eradicate systemic discrimination against widows, violations of widows' rights, oppressions within their local communities, and society as a whole. For example, to date the African Commission on Human and People's Rights has yet to receive any complaints or communications from either Nigeria or Uganda regarding widows.⁷⁸ Except for the Commission on the status of Women (CSW) and the general human right treaties of *CEDAW*, *ACHPR*, *ICESCR*, and *ICCPR*; there has been very minimal use of reporting procedures from State parties to other treaty bodies.

4.5 OTHER REMEDIAL MEASURES

4.5.0 The Role of the Media and the Arts

During the United Nations Fourth World Conference on Women twenty years ago, it was observed that there is "huge potential for media to make a far greater contribution to the advancement of women."⁷⁹ It was also suggested that "lack of gender sensitivity in the media is evidenced by the failure to eliminate the gender-based stereotyping that can be found in public and private, local, national, and international media organizations."⁸⁰

The mass media, in particular, have a pivotal role in lending a voice to more than 245 million widows in the world who are victims of discriminatory practices, gender inequality, and patriarchal customs and are unable to make their voices heard within their local communities. Media contribute significantly to the promotion of women's rights when they expose and generate awareness of the plight of widows. The media can help both to generate public awareness and to educate widows, their families, and communities about their legal rights.⁸¹

The media must not only report the harms widows suffer, but also work to disseminate

⁷⁸ African Commission on Human and Peoples Rights, *Communications*, online: African Commission on Human and People's Rights:< <http://www.achpr.org/communications/>>.

⁷⁹ Women & Media Diagnosis, *The United Nations Fourth World Conference on Women, Beijing, China- September 1995, Action of Equality, Development & Peace: Platform for Action* online: < <http://www.un.org/womenwatch/daw/beijing/platform/media.htm>>.

⁸⁰ *Ibid.*

⁸¹ Owen, *supra* note 7 at 206.

information about how widows can organize to improve their economic circumstances and opportunities.⁸²

Thus far, the impact of the media on the promotion of the human rights of widows of Uganda and Nigeria has been minimal, especially for widows in the rural communities. However, as Sarup pointed out, “[m]edia is the eye, ear and limbs of the society and they could help a great deal in mitigating violence and abuses against women.”⁸³ The media can certainly attract the attention of decision makers at all levels towards widows’ suffering, objectification, and subjugation through discriminatory laws and practices in African regions and beyond.

4.5.1 The Role of Feminists, Legal Scholars and Individuals

Feminists, legal scholars, and activists have important roles to play in the promotion of the rights of widows. More feminists, legal scholars, NGOs and individuals need to be involved in the promotion of human rights of widows. The literature dealing with widows is limited. Few scholars treat issues affecting widows as human rights concerns. Concrete efforts must be taken by feminists, legal scholars, NGOs, and individual activists to increase awareness of the violation of widows’ rights. “[T]here is no criterion or criteria to determine who stands for the rights of widows.”⁸⁴ Everyone has an important role to play in keeping violations of widows’ rights on national and global agendas.

4.5.2 The Application of Gender Mainstreaming

Gender mainstreaming “surfaced as a remedial concept and tool in the early 1990s and has traveled from the realm of feminist theory to policy application.”⁸⁵ Over the years it has been a widely debated topic among scholars. Some scholars have opined that gender mainstreaming suggests a shift away from a focus on “women's issues,” while others view it

⁸² *Ibid.*

⁸³ Kamala Sarup, “Violence against Women & Role of Media,” *Scoop Independent News* (13 January 2005) online: Scoop Independent News <<http://www.scoop.co.nz/stories/WO0501/S00113.htm>>.

⁸⁴ Susan Moller Okin, “Feminism, Women’s Human Rights & Cultural Differences” (1998) 13 *Hypatia* at 48.

⁸⁵ Jacqui True & Micheal Minstrom, “Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming” (2001) 45 *International Studies Quarterly* at 31[True & Minstrom].

as a way of “politicizing traditional male and female roles.”⁸⁶ Nonetheless, the 1995 Beijing platform identifies the mainstreaming of gender issues as one of the most important enforcement mechanisms for achieving gender equality and empowerment of women on all spheres. As True & Minstrom note, “gender main-streaming is not conceived of as a goal, nor merely as a liberal policy to include women, but as radical strategy for achieving gender equality that requires states to address gender imbalances by developing specific policies for women.”⁸⁷

In the struggle to achieve substantive gender equality for widows, it is hoped that gender mainstreaming may help to challenge discriminatory traditional and cultural practices, address gender-based stereotypes, and ensure reforms of cultural norms, practices, institutions, laws, and policies, that impede the promotion of widows’ rights,⁸⁸ not only in sub-Saharan African countries but in patriarchal societies all over world. To bring about the full realization of these reforms, state policies and processes need to be “reorganized, improved, developed, and evaluated in order to incorporate a gender equality perspective.”⁸⁹ Enforcement mechanisms for implementation of laws and policies need to be clarified under statutory laws. For example, “most African societies are governed by plural systems of rules that influence behaviours and interactions at different levels.”⁹⁰ When ownership of land is tied to customary law, it results in difficulties in implementing the legal rights of widows required by most international and regional conventions. In resolving the conflicts between international, regional and domestic laws, “it is important to harmonize land, marriage, and inheritance laws to ensure congruence and social acceptability on one hand, while allowing plurality and openness in terms of mechanisms of enforcement on the other. This would

⁸⁶ Sally Baden & Anne Marie Goetz, “Who Needs Sex when you can have gender” (1997) 56 *Feminist Review* at 7.

⁸⁷ *Ibid.*

⁸⁸ Aruna Rao & David Kelleher, “Is there Life after Gender Mainstreaming” (2005) 13 *Mainstreaming a Critical Review* at 62.

⁸⁹ Jill Lovecy, “Gender Mainstreaming and the Framing of Women’s Rights in Europe: The Contribution of the Council of Europe” (2002) 10 *Feminist Legal Studies* 280 at 284; Council of Europe, GR-EG, Committee of Ministers, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices, Final Report of Activities of the Group of Specialists on Mainstreaming*, (1998).

⁹⁰ Nitya Rao, “Women’s Rights to Land & Assets: Experience of Mainstreaming Gender in Development Projects” (2005) 40 *Economic & Political Weekly* at 4706. [*Rao*].

involve strengthening local conflict resolution mechanisms, while also making legal services easily accessible.”⁹¹

To achieve these outcomes for widows will require the combined efforts of not only government officials but also local and national NGOs concerned with the advancement of women. NGOs can act as “agents to spread ideas from country to country and transform them into local policy prescriptions.”⁹²

4.5.3 Adequate Access to Justice

In 2001, the *CEDAW* Committee adopted a general recommendation on access to justice. The Committee drafted guidelines for State parties on how to fulfil their international obligations and ensure that women are adequately protected in their use of the justice system as guaranteed under the *CEDAW*.⁹³ The *Optional Protocol to CEDAW* provides two procedures to allow the *CEDAW* Committee to review specific cases of discrimination against women, gender inequality, and interpersonal violence—communication procedure and inquiry procedure. Yet traditional stereotypes and attitudes continue to hamper women’s access to justice. In most African jurisdictions the lack of “adequate access to justice, prevents women/widows from filing grievances and suing or prosecuting those who violated their rights. This remains a significant human rights challenge.”⁹⁴

Barriers to adequate access to justice for widows are exacerbated by gender, but widows also face financial, geographic, logistical and linguistic barriers within their communities. Adequate access to justice is essential to the full realization and enjoyment of women’s and widows human rights. Access to justice is not only a question of the number of courtrooms built within the community; it is also about the quality of justice. This issue is especially significant where violations of widows’ rights are before the courts. Traditional social norms in most Africa countries are based on the belief that women are subordinate to men. Women

⁹¹ *Ibid.*

⁹² True & Minstrom, *supra* note 85 at 39.

⁹³ *United Nations Committee on the Elimination of Discrimination against Women- General Discussion on “Access to Justice,”* UNESCOR, 2001 Supp No 1, UN Doc E/2001.

⁹⁴ Women’s International League for Peace and Freedom, *CEDAW: General Discussion on Women and Access to Justice*, online: Women’s International League for Peace and Freedom < <http://www.wilpfinternational.org/cedaw-general-discussion-on-women-and-access-to-justice/>>.

are therefore often discouraged by law enforcement officers from seeking judicial redress for their grievances or testifying in court.⁹⁵ Women who try to enforce their rights are likely to face systematic exclusion from their community or family.⁹⁶

For widows in rural communities, the social consequences are especially problematic. The pervasive violations to which they are subjected are inconsistent with international human rights norms but are rarely addressed as human rights concerns. For millions of widows all over the world, especially those in rural communities, “the search for justice is fraught with difficulties from laws and legal systems that routinely discriminate against them,”⁹⁷ and they are often faced with “barriers of affordability, acceptability, accessibility, and availability.”⁹⁸

Provisions formally guaranteeing access to justice at the international or domestic level, alone, are not enough to address these issues. Solik concludes:

Women/widows’ access to justice will never be adequate or improve without the political will to modify socio cultural patterns of gender roles, eliminate prejudices against women/widows, and transform law enforcement institutions from resistance to action. The large gap between de jure and de facto will never be bridged if the social, economic, and cultural factors preventing widows from seeking justice is not given the same attention as other legislative issues.⁹⁹

The judiciary is beginning to address the task of protecting women’s rights, but gains in this area, though significant, are slow. As Cusack notes, women in various spheres of the world “should be able to rely on a [justice] system free from myths and stereotypes, and on a

⁹⁵ Aleksandra Solik, *Women’s Access to Justice is not only about the Law*, online: The Wide+ < <https://wideplusnetwork.wordpress.com/news/womens-access-to-justice-is-not-only-about-the-law/>>. [Solik].

⁹⁶ *Ibid.*

⁹⁷ Madeleine Bunting, “UN Women Report: Access to Justice remains a work in progress,” *The Guardian* (6 July 2011) online: Guardian < <http://www.theguardian.com/global-development/2011/jul/06/un-women-report-access-to-justice>>.

⁹⁸ TK Logan et al, “Barriers to Services for Rural and Urban Survivors of Rape” (2005) 20 *Journal of Interpersonal Violence* 602-609.

⁹⁹ Solik, *supra* note 95.

judiciary whose impartiality is not compromised by these biased assumptions”¹⁰⁰ Ultimately, courts have a huge role to play in ensuring that various forms of obstacles, stereotyped roles, and barriers that impede women’s right to non-discrimination and inheritance are eliminated.

4.6 CONCLUSION

Recommendations and reforms alone are insufficient to eliminate discrimination and gender inequality affecting widows in sub-Saharan African countries. International bodies, treaties, and the governments of the states must take bold steps to ensure that international human rights standards are applied and enforced. As Kerr notes,

Genuine improvement in the daily lives of widows requires substantial substantive reform. This will entail the attainment and effective monitoring of international laws and conventions, the implementation of national laws and policies that support the rights of women, legal institutions and government systems which recognize human rights as legitimate, and the transformation of societal norms both cultural and religious, to give greater priority to the rights of widows.¹⁰¹

Existing statutory laws need to be reviewed and reformed to reflect the intent and spirit enunciated in international and regional conventions by more adequately protecting widows and addressing the systematic violation of their rights.¹⁰² When necessary, states should establish and use international mechanisms to protect widows against the violations of their human rights. In addition, educational training and information programs should be designed and put in place to target women in rural areas where rights awareness is usually minimal. “[I]t is not enough that women are aware of their rights, they must also know how to claim

¹⁰⁰ Simone Cusack, “Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender- Based Violence Cases,” Final Paper, Submitted to the United Nations Office of the High Commissioner for Human Rights, June 9, 2014, at ii. Online: United Nations Office of the High Commissioner for Human Rights: http://www.ohchr.org/Documents/Issues/Women/WRGS/judicial_stereotyping2014.docx [Cusack].

¹⁰¹ Joanna Kerr, “Conclusion: Strategies for Action” in Joanna Kerr, ed., *Ours by Right: Women’s Rights as Human Rights* (London: Zed Books, 1993) at 157.

¹⁰² The Centre on Housing Rights and Evictions (COHRE), *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in sub-Saharan Africa* (Switzerland: Netherlands, 2004) at 5 [COHRE].

and enforce them.”¹⁰³ Widows who are empowered can help to reduce poverty within their local communities and widows who have acquired new skills can better support their families, as well.

Widows’ rights must be adequately protected, not just on paper, but also in PRACTICE. If gender equality is indeed to be achieved, there is a need to pay attention to the interests of both women and men, and to “shifts in gender relations occurring as a result of changes in the social context.”¹⁰⁴ It is time to take stock, to ask why change is so slow, and to identify what works and what does not. The challenge is not insurmountable if we have the collective will to address these issues at the global, national, regional, and ultimately the local levels, in communities and families.

¹⁰³ *Ibid* at 209.

¹⁰⁴ Rao, *supra* note 90 at 4707.

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