Addressing the Tension of Laws in Legal Pluralism: Women’s Rights in Africa

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Abstract for Article:
Addressing the Tension of Laws in Legal Pluralism: Women’s Rights in Africa
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This Article explores the tensions of law apparent in conflicting approaches to women’s rights in African customary tribal law, constitutional law, and international human rights laws. This Article suggests that effecting changes to improve women’s rights in Africa requires a multi-faceted approach that includes legal reforms as well as grass-roots activism. This Article also applies key principles of organizational behavior theory, including Kurt Lewin’s three stage analysis and force field analysis, to analyze prescriptive approaches that could be utilized in improving African women’s rights.

First, this Article addresses the historical roots of women’s rights in Africa, with reference to and analysis of customary African tribal law. Particular attention is paid to the tension between women’s rights under customary tribal law with their rights under international human rights law. Second, this article explores the tensions of law as evidenced in three prominent cases involving property ownership and burial rights from three different African countries: Magaya v. Magaya (Zimbabwe), Otieno (Kenya) and Bhe (South Africa). The reactions and responses to these cases from the courts, women in the society, tribal elders, the media and human rights groups (both national and international) are discussed. Where legal reforms were suggested as a result of these cases, these legal reforms are addressed. Finally, prescriptive approaches suggested by various legal scholars are analyzed, within the context of change management theories taken from the field of organization behavior theory.
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INTRODUCTION

In a country in sub-Saharan Africa, a twelve year old girl marries, and in return her father is paid a “bride price”.¹ The girl has no voice in this decision because under tribal law, she has no right to a voice.² During her marriage, she is considered the property of her husband’s family, and they make all the decisions about her daily work, and her reproductive rights. Her husband’s family can even require her to marry another family member if her husband dies.³

In yet another African country, a Supreme Court decision holds that under tribal law, a daughter cannot inherit property.⁴ Because her father died without a will and the tribe’s customary law prefers male heirs, she has no right to the house or property she lives in and takes care of, simply because she is female.⁵


³ In levirate marriages, the widow marries a brother of her deceased husband. See Radhika Coomaraswamy, Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women, 34 GEO. WASH. INT’L L. REV. 483, 507 (2002); see also Oppermann, supra note 2, at 80.


And in another Supreme Court in another African country, a widow is told that she cannot bury her husband but must defer to his family, because the laws of the husband’s tribe say he must be buried near his place of birth, and his brother is asserting tribal rights.6

The illustrative example and the two referenced cases are representative of the rights of thousands of African women.7 Despite the fact that most African countries are signatories to international treaties that affirm equality and decry discrimination based on gender, most women in Africa continue to receive very different treatment from men. The United Nations Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”) is the international treaty that specifically focuses on women’s rights. CEDAW was ratified in 1979 and has been signed by almost every country in the world, including most African countries.8

CEDAW defines discrimination against women as 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 of women, irrespective of their

6 The Oteino case. See generally Venter, supra note 1; Ambreena Manji, Of the Laws of Kenya and Burials and All That, 14 CARDOZO STUD. L. & LIT. 463 (Fall, 2002); see also E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (First Harvard University Press, 1954) p. 215 (explaining ancient Ashanti beliefs surrounding burial).

7 In addressing the rights of “African women”, it is important to note some general caveats that limit definitive statements. Firstly, Africa consists of many countries and in each country, there are numerous tribes. Since customary law differs from tribe to tribe, it would be unfair to ascribe the specific interpretations of customary law of one tribe to all tribes or to make definitive statements about the rights of all African women under customary law. Secondly, African countries differ in types of governmental structures and in constitutional provisions. Again, this limits definitive statements about women’s rights in Africa. Thirdly, women’s rights vary over time. A discussion of women’s rights in South Africa, for example would require one to differentiate between women’s rights under apartheid and women’s rights under the new South African constitution. Even with these three caveats in mind, however, it is fair to note generally that women in Africa do not have the same rights as men in terms of property ownership, freedom to marry, and freedom to work. The three cases chosen for discussion in this paper involve burial rights and property ownership rights. In two of these cases, traditional customary law was interpreted to deny one woman the right to make burial choices for her husband, and to deny a daughter the right to inherit property from her father. These two cases are contrasted with a third case where customary law that traditionally would have deprived a woman’s right to inherit property was supplanted by constitutional provisions in the new South African Constitution. This underscores the importance of recognizing that women’s rights in Africa are not static and unchanging.

8 185 countries have ratified CEDAW (over 90% of the members of the United Nations). For information on CEDAW, see http://www.un.org/womenwatch/daw/cedaw/states.htm).
marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁹

CEDAW specifically requires its signatory nation states to take affirmative actions to eliminate discrimination against the women in their country.¹⁰ Several countries in Africa have also written women’s rights and non-discrimination clauses into their constitutions. And yet, different and discriminate treatment of women continues to be the norm in African countries, even in countries that have signed the CEDAW convention without reservations.¹¹

This Article explores the tensions of law¹² apparent in the conflicting approaches to women’s rights under African customary tribal law, constitutional law, and international human rights law. This Article assumes that changes in women’s status to conform with the norms articulated by international treaties to accord African women greater property, economic and marital rights are desirable. Effecting such changes requires a multi-faceted approach, however; an approach that includes legal reforms as well as grass-roots activism. This Article draws on

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¹⁰ By accepting the CEDAW Convention, signatory states commit themselves to undertake a series of measures to end discrimination against women in all forms, including to: incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and ensure elimination of all acts of discrimination against women by persons, organizations or enterprises. CEDAW Convention http://www.un.org/womenwatch/daw/cedaw/states.htm.

¹¹ See Jessica Neuwirth, Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action, 18 HARV. HUM. RTS. J 19, 19-24 (Spring, 2005) (referencing wife obedience still in effect in Algeria, Mali, Sudan and Yemen, restricted property rights in Lesotho, right to work controlled by husband in Cameroon, and women prohibited from working at night in Madagascar. Also noting that assault of a wife is not an offense in Penal Code of Northern Nigeria if inflicted “by a husband for the purpose of correcting his wife,” “so long as it” does not amount to the infliction of grievous hurt.” All of these countries have ratified CEDAW.)

¹² Throughout this paper, the term “tensions of law” will be used to refer to legal pluralism, where there is more than one legal approach within a single state, and the legal approaches differ enough to produce tension. “Tensions of law” must be distinguished from “conflicts of law”, which involves different legal approaches in different states. According to Black’s Dictionary, “conflicts of laws” refers to different laws of different states of countries between the laws of different states or countries in a case that has connections to two or more jurisdiction. “Tensions of laws” as used in this paper refers to multiple systems of laws within one state.
key principles of organizational behavior theory and change management techniques, namely force field analysis, to analyze proposals to advance African women’s rights.

Part One of this Article addresses the historical roots of women’s rights in Africa, with reference to and analysis of customary African tribal law. Particular attention is paid to the tensions of law that are apparent in comparing women’s rights under customary tribal law with their rights under international human rights law because this is a highly visible area of tension. This Article posits that tensions of law are endemic in legally pluralistic societies. In any African country, the types of laws that may be concurrently in effect include tribal law (also known as customary law), religious law (most commonly, Sharia or Islamic law), codified customary law, constitutional law (as codified in the country’s constitution), international law.


14 The term “legal pluralism” is used by legal scholars to describe systems where there is more than one type of legal approach in effect, and there is no clear hierarchy amongst the various legal approaches.

15 “Sharia” law (also “Shari’a”, “Shariah”) is the “law of the Islam religion”. The extent of women’s rights under Shari’a law is not addressed in this paper. However, Shari’a law is complex and even a cursory review of the subject reveals differing interpretations of Sharia law, as well as differing views about what rights women should be accorded under Sharia law. See generally Symposium: Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women’s Rights? 24 MICH. J. INT’L L. 347 (Fall, 2002) (discussing Sharia law and relationship with international human rights law); see also Katherine M. Weaver, Women’s Rights and Sharia Law: A Workable Reality? An Examination of Possible International Human Rights Approaches Through the Continuing Reform of the Pakistani Hudood Ordinance, 17 DUKE J. COMP. & INT’L L. 483 (Spring, 2007) (discussing the changing rights of women in Pakistan under Sharia law); see also Johanna E. Bond, Women, Children, and Victims of Massacre Crimes: Legal Developments in Africa: Article: Constitutional Exclusion and Gender In Commonwealth Africa, 31 FORDHAM INT’L L. J. 289 (January, 2008); see also 24 MICH. J. INT’L L. 347, 398 (quoting C. L. Brandt-Young noting some Muslim women want polygamy recognized as a legal possibility because it is part of Sharia law); see also Sarah Crutcher, Stoning Single Nigerian Mothers for Adultery: Applying Feminist Theory to an Analysis of Gender Discrimination in International Law, 15 HASTINGS WOMEN’S L.J. 239 (Summer, 2004) (analyzing the Nigerian case of Amina Lawal Kurami, sentenced to being stoned to death due to pregnancy, referencing Sharia law in Nigeria, Nigeria’s ratification of CEDAW, and the international outrage at the Sharia Court’s decision).

16 See Erin E. Goodsell, Student Author, Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa, 21 BYU J. PUB. L. 109, 122 (2007); see also Hallie Ludsin, Cultural Denial: What South Africa’s Treatment of Witchcraft Says For the Future of Its Customary Law,
treaties, and customary international law (considered to be law that every country is subject to as per international legal norms).

Part Two explores tensions of law by analyzing three recent cases from three different African countries. The reactions and responses to these cases from the courts, women in the society, tribal elders, and media and human rights groups (both national and international) are discussed.

Part Three introduces change management theories from the field of organization behavior theory, and applies force field analysis to various prescriptive approaches suggested by legal scholars. Applying organizational behavior theory appears to be a unique approach in addressing tensions of law issues, and provides a new perspective.

While some scholars question whether it is even possible to resolve the fundamental differences that underlie these tensions of law, others have proposed a variety of solutions. “Top-down” approaches focus on reforms at the governmental level, while “bottom-up” approaches involve efforts to activate the individual members of the community. Top down approaches include signing treaties, reforming constitutions, and judicial advocacy. Some scholars also advocate using economic development or financial aid as human rights tools.

21 BERKELEY J. INT’L L. 62, 71-72 (2003)(witchcraft is practiced in several indigenous cultures, and is the subject of customary laws in these societies. This article discusses South Africa’s recent efforts to outlaw witchcraft).

17 Magaya v Magaya, SC No. 210-98 (Zimbabwe, Feb. 16, 1999); Otieno case, Kenya, 1987; Bhe and Others v. The Magistrate, Khayelitsha and Others, Case CCT 49-03, October 15, 2004).


19 Andrews, supra note 5, at 317; see Rebecca Wright, Student Author. Finding an Impetus for Institutional Change at the African Court on Human and Peoples’ Rights, 24 BERKELEY J. INT’L L. 463 (2006) (proposing linking the human rights-related aid to the African Court); see also Nyamu, supra note 5, at 381.
Bottom-up approaches focus on programs that empower individual women, including economic reforms (like microfinance initiatives which empower women by providing a way to earn their own income), providing legal education and support to tribal elders who interpret customary law, and disseminating legal information to women so they are more aware of their rights. Several studies have shown that women remain largely unaware of their legal rights even when there have been constitutional or judicial changes that accord them more rights.

It is this Article’s position that in order to effect change in women’s rights in Africa, a combination of approaches is required, both top down and bottom up, and that the principles of force field analysis could be utilized in facilitating successful change.

**PART I: HISTORICAL ROOTS OF WOMEN’S RIGHTS IN AFRICA**

To fully appreciate the historical roots of women’s rights in Africa, it is important to consider customary African tribal law and women’s place in it, differing approaches to human rights, and the powerful impact of colonialism and the post-colonial reforms that began in the 1960’s.

**A. Customary African Tribal Law**

In discussing customary African tribal law, it is important to first acknowledge that each country in Africa is different and has its own unique approach to law. In fact, given that most African countries have several different tribes and that “customary tribal law” varies by tribe, it

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20 Coomaraswamy, *supra* note 3, at 504-505 positing that women’s rights will only change when they have access to land and economic power, suggestion microfinance approaches, and referencing the success of the Gramyn (sp - Grameen) bank in Bangladesh.


is critical to proceed cautiously in making any definitive statements about what customary tribal law is or is not.\(^{24}\)

The research on customary tribal law in general, and African customary law specifically, bears out this caution. There have been studies and analyses attempting to articulate common principles of customary African law, including by respected anthropological writers Max Gluckman, T.W. Bennett and E. Adamson Hoebel. All three have endeavored to posit some basic principles that relate to all tribal law.\(^{25}\) However, research and scholarship in customary tribal law remains an area fraught with academic disagreement, including on the most basic question as to how to define customary law.\(^{26}\)

The study of tribal law is also complicated by the fact that tribal law was oral, not written. This created linguistic barriers, further undermining definitive conclusions. Some commentators say that historical anthropologists have tended to view tribal law through their own ethnocentric western-based filters, and may not have understood completely or accurately what they saw.\(^{27}\)

T.W. Bennett observes that most writers who studied African law were more interested in describing the characteristics of customary law than in defining the law itself.\(^{28}\) He quotes I. Hamnett from his book **SOCIAL ANTHROPOLOGY AND THE LAW** as follows:

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\(^{24}\) *Supra* note 7.


\(^{27}\) Ocran, *supra* note 13, questioning whether colonists and others could truly understand customary law.

\(^{28}\) Bennett, *supra* note 23, at p. 7.
Customary law can be regarded as a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority. The positive content of this definition may be taken as fourfold: the relation of norms to practice rather than to “lawyers” reasoning; the dominant role of the actors as participants in the determination of the law; the authoritative or legitimate, rather than merely factual or utilitarian, character of the emergent rules; and the essentially social nature of their validation and status.29

Some scholars focus on the differences between “custom” and “law”, separating custom (what people “do”) from law (what people “ought to do”).30 Others have noted that customary law was originally unwritten and uncodified,31 that it was constantly evolving and adapting,32 flexible and evolving,33 and that it varied by ethnic group and even varied in its implementation within different communities within a tribe.34 Laurence Juma says that even the term “African Customary Law” may be misleading because it implies that the only source of African law is “custom” and ignores laws that may have been passed by tribes like the Kebaka tribe, who lived in the Buganda Kingdom of present day Uganda and were known to enact laws.35

Probably one of the best means of identifying customary law is to contrast it with the system of laws introduced by the colonizing nations. Customary law can be defined as that which existed prior to and separate from the laws introduced by colonizing nations like England and France.

30 Juma, supra note 13, at 467-468.
31 Ocran, supra note 13, at 467-468.
32 Calaguas, Drost & Fluet, supra note 18, at 528.
33 Bond, supra note 15, at 296.
34 Calaguas, Drost & Fluet, supra note 18, at 528.
35 Juma, supra note 13, at footnote 47.
The Berlin Conference in Africa in 1885 is generally considered the official beginning of colonialism in Africa.\textsuperscript{36} Even though individual European powers entered specific agreements with indigenous peoples in Africa earlier, the Berlin Conference, attended by Germany, France, Britain, Belgium and Portugal, was where the European powers officially agreed amongst themselves on how to divide up the African continent.

Deciding to divvy up the continent was one thing: figuring out how to colonize the newly “acquired” territory presented some major challenges. Much has been written about the way the British handled the countries they colonized.\textsuperscript{37}

As part of the Colonial Administration, the British naturally wanted to enforce law and order and to generally regulate the lives and habits of the people that they conquered. This was not always easy for the British, both as a practical matter and as a matter of legal doctrine and theology. They encountered a legal system quite different from their own legal traditions. They had to deal with a religion-based legal system simultaneously meant for secular application that was unlike other forms of religious law, such as Canon law, which largely applied to the spiritual realm of life.

They also faced hostile reaction from strong indigenous cultures which were not necessarily prepared to accept the assumption of the Western cultural mind.\textsuperscript{38}

The colonial governments were in no position to impose their own laws on these native and uncomprehending populations: the colonizers had neither the finances nor manpower necessary to force obedience, and they wanted to avoid rebellion.\textsuperscript{39} The British decided to

\textsuperscript{36} Ocran, \textit{supra} note 13, at 465.

\textsuperscript{37} El-Obaid & Appiagyei-Atua, \textit{supra} note 13; Juma, \textit{supra} note 13; Kent, \textit{supra} note 21.

\textsuperscript{38} Ocran, \textit{supra} note 13, at 465-466.

\textsuperscript{39} T.W. Bennett, \textit{supra} note 25, quoting Allott., \textit{NEW ESSAYS} 12-13, in footnote 2, p. 7.
permit the tribes to keep the least offensive areas of their customary tribal law, and to codify the other areas of law, those they were most invested in.\textsuperscript{40}

The decision to separate customary law from other laws governed by constitution and statute marked the beginning of a bifurcated system of justice. In the colonized nations, the British set up a constitution and a system of courts to deal with areas of law related to regulating security and order in the community (i.e. basic civil and criminal laws). The British left personal, more private law in the hands of the tribes. This included the areas of domestic and family law, such as marriage, divorce, child custody, inheritance of land and burial rights.\textsuperscript{41} It was these areas of law that profoundly affected women in all their societal roles: as daughters, wives, and mothers. It was tribal law that dictated a woman’s right to marry or divorce, to own land, and to keep her children (in the event of desertion, divorce or her husband’s death).

Allowing the tribal elders to govern these issues was a pragmatic decision on the part of the British. The British needed the help of the indigenous cultures in order to successfully colonize these countries.\textsuperscript{42} By allowing the tribes to keep some of their own laws, as well as their own systems to interpret and enforce these customary laws, the British were able to co-opt the tribes into accepting the British presence and laws covered by the Constitution.

However, the British were not completely hands off when it came to customary tribal law. They introduced one other legal provision to ensure some control over customary law: the

\textsuperscript{40} Nyamu, supra note 5, footnote 112 for list of scholars of legal anthropology and legal history that demonstrate how crucial the colonial period was in defining what is now considered customary law in African countries.

\textsuperscript{41} See David M. Bigge and Amelie von Briesen, Student Authors, Conflict in the Zimbabwean Courts: Women’s Rights and Indigenous Self-Determination in Magaya v. Magaya, 13 HARV. HUM. RTS. J. 289 (Spring, 2000). In Zimbabwe, the following areas of law are considered customary tribal under Section 89 of the Constitution: “adoption, marriage, divorce, burial, devolution of property, or other matters of personal law” at 302.

\textsuperscript{42} Bond, supra note 15, at 297.
The repugnancy clause was introduced to provide a method for filtering out any customary law that was deemed “repugnant” to the British. Any aspect of customary law that European culture found appalling, ridiculous, or simply unhelpful to the inculcation of Christian ideals could be identified as “repugnant” and barred.44

The words referencing the repugnancy clauses in the constitutions enacted varied slightly from country to country but generally included references to “natural” or “religious justice”, “morality”, and “good conscience”.45 Areas often considered repugnant included female circumcision, slavery, trial by ordeal, witchcraft, polygamy46, and bridewealth47, also known as...

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43 See Ocran, supra note 13, at 475-476 (for discussion of repugnancy clauses); See Kent, supra note 21, at 516 (suggesting that the British attempted what might be termed an early type of “norm internalization” through the use of the so-called repugnancy clauses); Venter, supra note 1, at 17 (stating that subjecting customary law to the repugnancy clause, and limiting the jurisdiction of the chiefs and tribal elders, was a form of discrimination).

44 Ocran, supra note 13, at 470.

45 Id., at 470 references R.S. Rattray’s book ASHANTI LAW AND CONSTITUTION for good examples of the kinds of crimes and civil offenses among the Ashantis of Ghana in the 19th century that the British found extremely strange, disgusting, amusing or simply intolerable.

46 Polygamy or polygyny is the taking of more than one wife, and is still legal in several African countries both under customary tribal law and under Sharia law. See Oppermann, supra note 2, at 82 (looking at polygamy, currently practiced in South Africa by many tribes and pointing out the conflict with the constitution because it affords men a right that women do not have - men can have more than one wife; wives cannot have more than one husband); contra Symposium: Dueling Fates, 24 MICH. J. INT’L L. at 398 (discussing Muslim women in South Africa who want polygamy recognized as a legal possibility because it is part of Shari’ah and therefore ought to be legal).

47 “Lobolo” or “bridewealth”. This is money paid by the prospective husband to the bride’s father to effect a marriage under African customary law. See Venter, supra note 1, at 8 stating that African customary law does not consider a marriage wholly valid until the lobolo or “bride price” has been paid in full to the woman’s father by the prospective husband.; see also Coomaraswamy, supra note 3, at 505 saying payment could be in the form of cattle, money, or, in urban areas, other forms of amenities; compare Itoro Eze-Anaba, Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges, 14 CARDOZO J.L. & GENDER 21 (Fall, 2007) at 29 (describing the reasoning behind “lobolo” in traditional times: “the institution of bride price in traditional times was not conceived as a sale of the girl but was proof of the girl’s importance to both families. Her family must be compensated for her loss and it ensures that the husband’s intentions are serious” with Andrews, supra note 5, at 336-337 (suggesting modernizing the “lobolo” so that instead of the payment being controlled by the father (and often having the consequence of entrapping a woman in an unhappy marriage) lobolo could be altered so it takes on the form of security for a woman when she is ill-treated or abandoned by her spouse.); see also Higgins, supra note 23, at 531 (discussing the present concerns with women trying to leave unhappy or abusive marriages: “her own family may not welcome her back because they may be forced to return the lobolo, or bridewealth, which they may be unwilling or unable to do.”)
lobolo. Some of these practices were also condemned under tribal law: notably, witchcraft and suicide. Other tribal practices were considered repugnant by the British but were ultimately tolerated because of their widespread popularity. Both polygomy and bridewealth were considered repugnant by the British but survived, and in fact, continue to be practiced today. Often what the tribes found criminal, for example, “sleeping in the bushes” apparently baffled the British.

By introducing repugnancy clauses into the Constitutions, the British became the arbiters of what was just and moral within African society. This gave them discretion in deciding what customary tribal law should or should not be recognized.

The repugnancy clause was not well-received by the African tribes. The clause was both resented and viewed as hypocritical. There were marked inequalities between men and women in British colonial society, and yet the colonial authorities often invoked the repugnancy clause

48 T.W. Bennett, supra note 25, at 129.

49 See Ocran, supra note 13, at 470-472 (discussing witchcraft or “Bayie” and African community’s general response of dread and abhorrence towards witchcraft.); see generally Ludsin, supra note 16 (reviewing the history of witchcraft in South Africa and discussion of witchcraft in modern day South Africa under the common law). Compare with Andrew M. Kanter, Note: The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense, 4 S. CAL. INTERDIS. L.J. 411 (Winter, 1995) (proposing a moral and theoretical basis for a cultural defense of witchcraft related crimes in tribal law given Navajo beliefs).

50 Ocran, supra note 13, at 470 (referencing Ashanti beliefs about suicide. The Ashantis believed that the person was barred from entering the land of spirits and roamed as a ghost. So, they would dig up the dead man, “try him” for his crime of suicide and then decapitate the dead body.)

51 Id. at 470-473 (noting that the British were baffled by the crime of suicide, which involved a belief that the ghost of the person who committed suicide would roam until put to rest and the crime of witchcraft, which presented particular challenges in proof as well as in determining appropriate legal options for dealing with victims and relatives. Another criminal act among the Ashantis involved having “sexual intercourse in the leaves” (having sexual intercourse outside in the bush). The Ashanti culture saw this as a defilement of the Earth, which the Ashantis called “Asaase Yaa”. This made an act which was otherwise not a sin into one because it was impudent to have intercourse in the face of great supernatural powers.)

52 Bond, supra note 15, at 301.

53 Kent, supra note 21, at 516.

54 Bond, supra note 15, at 301-302.
in an effort to free African women from what colonialists considered to be oppressive traditional practices.\textsuperscript{55}

Most African countries got rid of the repugnancy clause when they declared independence in the late 1950’s and early 1960’s.\textsuperscript{56} But even though the repugnancy clauses are gone, the resentment about its existence and use by the colonizers remains. Valorie Vojdik\textsuperscript{57} says that “the specter of the Enlightenment gone wrong in the colonies still exists”\textsuperscript{58} and Allison Kent\textsuperscript{59} observes:

\begin{quote}
The use of colonial legal devices such as repugnancy clauses perhaps foreshadows the constant debate in international human rights over universality versus cultural relativism, often framed as a Northern or Western notion of universality and a counterpoint advanced by the global South…Though repugnancy clauses were arguably grounded in early conceptions of what became known as human rights, they are invariably tainted by their use as a colonial mechanism to assert power and cultural superiority over the colonized. For example, some human rights norms, especially those that oppose widespread traditional practices or promote gender equality, are often challenged by some of sub-Saharan Africa as concepts imposed by the West.\textsuperscript{60}
\end{quote}

\textsuperscript{55} Id. at 302.

\textsuperscript{56} Ocran, supra note 13, at 477.


\textsuperscript{58} Id.

\textsuperscript{59} Kent, supra note 21.

\textsuperscript{60} Id. at 517-518.
The repugnancy clause has been modified or eliminated from most modern African constitutions.\textsuperscript{61} But for several African nations, the words used in the repugnancy clauses remain indelibly associated with colonialism.\textsuperscript{62}

This has important implications for international human rights law. When international human rights groups and the international legal community use the words “justice”, “morality”, “human dignity”, “natural law”, or “universal moral principles” to advocate for women’s rights, they are using the same words the colonizers used delineating what was “non-repugnant.”\textsuperscript{63} These same words that inspire and uplift Western nations and are commonly used in United Nations treaties and Conventions can evoke the repugnancy clause and remind African nations of their colonization. This can produce resistance from African nations, not because these nations have no sense of justice or moral principles, but because the language is reminiscent of the repugnancy clause.\textsuperscript{64}

It is important to emphasize that notions of fairness and equity are not foreign to customary African tribal law.\textsuperscript{65} In fact, there is a concept called ubuntu in the Zulu culture that

\textsuperscript{61} See T.W. Bennett, supra note 25, at 133 (stating that the repugnancy clause was still in effect in Botswana as a general restraint on application of customary law in the courts; and in Lesotho and Swaziland in the courts of chiefs and headsmen).

\textsuperscript{62} Kent, supra note 21, at 518.

\textsuperscript{63} Fareda Banda, Global Standards: Local Values, 17 INT’L J. L. POL’Y & FAM at 7 (2003).

\textsuperscript{64} Kent, supra note 21, at 518.

\textsuperscript{65} Goodsell, supra note 16, at 146. Ubuntu translates into “humaneness” or “morality” and emphasizes “respect for human dignity”, as well as social justice and fairness. In one South African court decision, justices suggested that “ubuntu” provides “a connection between indigenous value systems and universal human rights embodied in international law”: See also El-Obaid & Appiagyei-Atua, supra note 13, at 845 advising that “the element of duty underlies the concept of rights in the African community. The community helps the individual to exercise his or her rights, and the individual, in turn, ensures a contribution to general community development. Individuals exercise rights to enable them to perform duties to four entities in the community: the community’s supreme moral being/authority, the individual, the family and the community.” But see also Mutua, supra note 142, at 359 cautioning legal scholars from seeking western based concepts of human rights in African culture and identifying African based concepts instead.
could help bring together traditional African culture and human rights law.\textsuperscript{66} Ubuntu translates into “humaneness” or “morality” and emphasizes “respect for human dignity”, as well as social justice and fairness.\textsuperscript{67} In one South African court decision, justices suggested that ubuntu provides “a connection between indigenous value systems and universal human rights embodied in international law”.\textsuperscript{68}

It is also important to note that while fairness is honored in both customary tribal and western-based human rights approaches, the notion of fairness differs. In African tribes, fairness is considered in the context of one’s place and duties in the community.\textsuperscript{69} According to one group of African legal scholars,

the element of duty underlies the concept of rights in the African community. The community helps the individual to exercise his or her rights, and the individual, in turn, ensures a contribution to general community development. Individuals exercise rights to enable them to perform duties to four entities in the community: the community’s supreme moral being/authority, the individual, the family and the community.\textsuperscript{70}

The valued placed on the community and one’s place in it has a huge impact on the notion of rights in African tribes, and influences the interpretation of human rights, particularly in the context of women’s rights.

\begin{footnotesize}
\begin{itemize}
\item[66] Id.
\item[67] Id.
\item[68] Id.
\item[69] Some scholars characterize the differences between the international community and the tribal societies as a direct conflict between an individual rights focus (international community) and a communitarian approach (tribal societies). \textit{See Symposium: Dueling Fates}, 24 Mich. J. Int’l L. at 347, 402; and Venter, \textit{supra} note 1, at 1. Other scholars believe this is a simplification of the African perspective. \textit{See} El-Obaid & Appiagyei-Atua, \textit{supra} note 13, at 821 (positing that the African perspective on human rights is neither completely individualistic or communal).
\item[70] El-Obaid & Appiagyei-Atua, \textit{supra} note 13, at 845.
\end{itemize}
\end{footnotesize}
B. Differing Approaches To Human Rights

One of the biggest differences between norms of customary law and international human rights law is their differing perspectives on the individual. Customary law is indigenous and defines each individual’s role in terms of the community, while international human rights law focus on universal rights, the rights common to all human beings, regardless of differences. For women living in a society based on customary law, their rights derive from their duties to the community in their roles as wives, mothers and daughters. The rights necessary for a woman to fulfill her society’s expectations of her in her community are often far less than those advocated for all individuals under international human rights.

Most human rights activists embrace the concept of universalism because they believe all people enjoy fundamental human rights regardless of their national, ethnic, cultural, gender or other affiliation but others are critical of this approach, claiming that the universalist approach leaves no room for indigenous cultural norms. Still others find a “binary construction of multiculturalism versus equality…objectionable” because it makes a person choose whether to be gender-based or culturally based, as if one could exclude oneself from being both. Single-factor self-identification ignores the reality that most women enjoy membership in multiple communities, only one of which is gender.

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71 A belief that rights are universal is reflected in the language of the United Nations Universal Declaration of Human Rights and CEDAW (Convention for the Elimination of All Discrimination Against Women), and is supported by international human rights groups like Amnesty International and Human Rights Watch.

72 Calaguas, Drost & Fluet, supra note 18, at 480 (stating that “the majority of human rights groups pursue an “abolitionist approach” that echoes the call of early feminists to eliminate cultural practices that contradict the principles of international human rights law. This abolitionist approach seeks to substitute local custom with Legislation”).

73 Bond, supra note 15, at 315.

74 Id.
Customary law is deeply entrenched in African culture and is often the only law the people know, particularly in non-urban areas.\textsuperscript{75} Still, whether one assesses customary law against human rights instruments, which emphasize the concept of the dignity of the individual, or against natural law, which espouses the principle of giving everyone his or her due, it is clear that customary law comes up short when it comes to affording women the opportunity to develop fully within their society.\textsuperscript{76}

There is no question that women remain limited in their role under customary tribal law. Headsman courts were set up by the British so that male elders could interpret customary law.\textsuperscript{77} To this day, in most tribes, the tribal elders are male.\textsuperscript{78} In several tribes, only men can be chiefs.\textsuperscript{79}

There may be some hope in the very procedural methods of traditional dispute resolution, however. Tribes traditionally settled disputes with mediation.\textsuperscript{80} E. Adamson Hoebel in his book \textit{The Law of Primitive Man}, studied the Ashanti tribe, who lived on the Gold Coast/West Coast of Africa.\textsuperscript{81} For the Ashanti, the goal in settling disputes was to restore equilibrium and provide

\textsuperscript{75} Calaguas, Drost & Fluet, \textit{ supra} note 18, at 478.

\textsuperscript{76} Venter, \textit{ supra} note 1, at 16.

\textsuperscript{77} See Bigge and Briesen, \textit{ supra} note 41, at 291-292 for a description of the ongoing bifurcated court system in Zimbabwe with reference to the period from 1888 to 1980, the formalization of the Community and Primary Courts in 1990, and the continuing use of local courts to handle customary law. In 1980, Robert Mugabe declared independence but the bifurcated court system remained in effect. \textit{See also Magaya v. Magaya case}, infra p.18-21 of this paper).

\textsuperscript{78} Coomaraswamy, \textit{ supra} note 3, at 503 (referencing a few matrilineal tribes that use maternal ties in determining property rights but stating that a distinction must be drawn between matrilineal tribes (which base kinship groupings on maternal rather than paternal ties) and matriarchal societies or tribes (in which women share or exercise power)).

\textsuperscript{79} Venter, \textit{ supra} note 1, at 11-13 for discussion of barriers to women in holding positions of power in tribal groups.

\textsuperscript{80} Wright, \textit{ supra} note 19, at 474; Venter, \textit{ supra} note 1, at 21-22.

\textsuperscript{81} \textit{HOEBEL}, \textit{ supra} note 6, Chapter 9, p. 211-254 on the Ashanti tribe.
closure by offering “impata” (pacification) to the affronted.\textsuperscript{82} The idea was to cleanse the soul of the plaintiff of ill-feeling and to assuage his hurt.

Some scholars see this traditional process of mediation disputes and reconciliation as offering the brightest hope for the advancement of women’s rights under customary tribal law.\textsuperscript{83} The norms and substance of customary tribal law may restrict women’s rights but the very process of mediation and reconciliation opens the door for dialogue and compromise that allow a woman’s needs and desires to be considered in resolving specific concerns. There are documented examples where tribal elders have been very progressive towards individual women in resolving issues,\textsuperscript{84} as well as some communities where local customs are far more progressive than the strict letter of the law.\textsuperscript{85} These examples, albeit rare, offer hope.

**Post-Colonial Reforms**

When the colonizing nations decided to leave Africa in the late 1950’s and 1960’s and African nations achieved independence, several nations changed their laws.\textsuperscript{86} The African intellectual elite largely modified or eliminated the repugnancy clauses from their constitutions.\textsuperscript{87} The majority of African governments strived to introduce codes of law that would integrate or

\textsuperscript{82} Id. at 218.

\textsuperscript{83} Venter, supra note 1, at 21-22.

\textsuperscript{84} See Kent, supra note 21, at 507 (describing how a sabubu (tribal elder with ongoing responsibilities to couple, families and offspring) resolved a child support issue by mediating a settlement for the mother of the children with the uncle with assistance of paralegals); see also Nyamu, supra note 5, at 415 (discussing the contrast between the courts interpreting inheritance rights with the decision by tribal chiefs in Zimbabwe, where several court decisions upheld the rule that eldest son was always his father’s heir but the chiefs disagreed and said the most important goal was to provide for the family of the deceased from the property left by the deceased person).

\textsuperscript{85} See Nyamu, supra note 5, at 406-407 (noting that in Kenya official landholding by women does not exceed five percent due to formal registration of title that registers male heads of households as title holders). But see 414, (noting that in various parts of Kenya (Makueni District of Eastern Kenya), people generally favor providing land ownership for daughters who do not marry or whose marriages don’t work out).

\textsuperscript{86} Ocran, supra note 13, at 477.

\textsuperscript{87} Id.
unify the different strands of law existing within the country.\textsuperscript{88} The African Conference on Local Courts and Customary Law held in Dar es Salaam in 1963 inspired some changes.\textsuperscript{89}

However, the post-colonial period in Africa was fraught with several challenges. It was largely a period of disillusion, with newly independent nation states trying out various political ideologies, including socialism, one-partyism, pro-Americanism, pan-Arabism and pan-Africanism.\textsuperscript{90} What started out as a hopeful transition from European control to a new independence largely resulted in the development of ruling elites who controlled the wealth, and systems rife with repression and corruption.\textsuperscript{91}

At the same time, during the 1970s and 1980s, human rights were gaining prominence in international law.\textsuperscript{92} A number of international conventions and treaties were introduced during this period, including two that were highly significant for African nations: the International Convention on the Elimination of All Forms of Racial Discrimination (1969) and CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women (1979). Unfortunately, the addition of international treaties didn’t always clarify the interplay of laws. The fundamental tension already noted between women’s rights and indigenous rights is reflected in international treaties as well.

\textsuperscript{88} See Juma, \textit{supra} note 13, at 480 (referencing Tanzania (where African customary law was codified into written law) and Kenya (which did not explicitly affirm customary law when Kenya adopted the independence constitution)); \textit{See generally} Calaguas, Drost & Fluet, \textit{supra} note 18, (discussing how Tanganyika and Zanzibar tried to reconcile the “legal stew of European laws superimposed upon or existing concurrently with indigenous systems of customary and religious laws” (at 475)).

\textsuperscript{89} Calaguas, Drost & Fluet, \textit{supra} note 18, at 492 (referring to Kenya creating the Commission on the Law of Marriage and Divorce in 1967 and Tanzania adopting reforms and creating the Law of Marriage Act (LMA) in 1971.)

\textsuperscript{90} El-Obaid & Appiagyei-Atua, \textit{supra} note 13, at 822.

\textsuperscript{91} Id.

\textsuperscript{92} Andrews, \textit{supra} note 5, at 435.
In order to more fully explore the tensions of laws in African countries, it is helpful to examine actual cases to see how the courts have worked with the various laws. This paper explores three cases that were extremely high profile within their countries. Two of these cases, *Magaya v Magaya* (Zimbabwe), and the *Otieno* case (Kenya), clearly demonstrate the challenges courts face in dealing with tensions of law in legally pluralistic societies. The outcomes in both cases were highly controversial, both nationally and internationally. The third case, *Bhe and Others v. The Magistrate, Khayelitsha and Others* (South Africa), is more recent. This was one of the first cases the South African Constitutional Court considered after the country adopted the 1994 Constitution (post-apartheid). South Africa specifically addressed tensions of laws in their 1994 Constitution, and the *Bhe* case demonstrates how the new constitution was interpreted by the Court.

**II. THREE RECENT CASES AND ANALYSIS**

**A. CASE ONE: *MAGAYA v. MAGAYA*93 (Zimbabwe)**

“The *Magaya* case illustrates the difficulties women face when custom simply trumps gender equality rights.”94

When Shonhiwa Magaya died, he left behind two families, but no will. He also left behind a house in Harare and some cattle at a communal home outside the city.95 Veneria (Venia) Magaya, his eldest child and only daughter, lived with her parents prior to her father’s death, and she sought to inherit. With the support of her mother and three other relatives, she was given title to the house and the cattle.96

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95 Bigge and Briesen, *supra* note 41, at 293.

96 *Id.*
Venia’s oldest brother, Frank, didn’t assert any claim. Customary law traditionally requires the person inheriting property to take care of any family members who depend on the property, and Frank didn’t want that responsibility. However, Nakayi, the second son (half-brother to Ms. Magaya), claimed rights under customary law, as a son.

The case was first considered by the Magistrates Court who appointed Nakayi Magaya as the lawful heir. The Court decided the ruling law on inheritance of land was the Administration of Estates Act, which at the time stated:

If any African who has contracted a marriage according to African law or custom, or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.

Venia Magaya appealed to the Supreme Court of Zimbabwe. The Supreme Court affirmed the lower court’s decision, primarily based on their interpretation of customary law and the 1983 Zimbabwean Constitution. The Court concluded that the customary law of tribal succession gave preference to males over females, and said interpreted the constitutional division between customary and civil laws to mean there was no room for constitutional scrutiny. Nakayi Magaya was given the property, and promptly evicted his sister. She moved into a shack in a neighbor’s backyard.

97 Kent, supra note 21, at 536.
98 Bigge and Briesen, supra note 41, at 293.
100 Bigge and Briesen, supra note 41, at 293.
102 Bigge and Briesen, supra note 41, at 293.
103 Id. at 294.
The backlash was immediate and intense. Media reports, both within Zimbabwe and internationally, accused the Supreme Court of denying women’s rights.\textsuperscript{104} The \textit{Magaya} decision violated a series of international treaties signed by Zimbabwe, including CEDAW, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Zimbabwe was also a signatory to the African Charter on Human and People’s Rights, commonly known as the Banjul Charter. This Charter was formally adopted in 1981 by member states of the Organization of African Unity, the predecessor to today’s African Union (AU). The Banjul Charter entered into force in 1986 and was ratified by Zimbabwe, as one of the fifty three member states of the OAU.\textsuperscript{105} The Banjul Charter was specifically intended to address serious and widespread human rights violations of the post-colonial era, and bring an “African focus” to the protection of human rights, using international human rights’ concepts as well as African legal traditions and African needs.\textsuperscript{106} The Court’s ruling in \textit{Magaya} violated Zimbabwe’s commitment to Africa’s Banjul Charter as well.

Women’s rights groups in Zimbabwe responded immediately to the \textit{Magaya} decision. Women converged on the steps of the court and picketed with signs reading: “Discrimination against women is not compulsory in African Society” and “we will not accept customary

\begin{footnotes}
\item[104] See Bond, \textit{supra} note 15, at 336; Bigge and Briesen, \textit{supra} note 41, at 295-296.
\item[106] \textit{Id.} at 781.
\end{footnotes}
Lawyers, law organizations, international human rights groups and international women’s rights groups also responded, condemning the Court’s decision. To be fair, Zimbabwe’s Constitution of 1983 clearly reflected the tensions of law evident in the Magaya case. While one section of the Declaration of Rights section of the Constitution affirmed equality based on sex (and other protected grounds), another section affirmed customary tribal law in matters of succession. The Magaya Court referenced the Zimbabwe Constitution in their decision, interpreting the Constitution as affirming customary tribal law. Although the outcome was understandably criticized from a human rights perspective, the tension in the Constitution made the Court’s decision legally defensible. These same tensions of law apparent in the Zimbabwe Constitution remain present in the constitutions of several other African countries.

Yet another interesting perspective on the Magaya case involves an emerging area of focus for international human rights groups: the right to housing. The outcome of Magaya v.

107 Bigge and Briesen, supra note 41, at 295.
108 Id. at 296.
109 See Knobelsdorf, supra note 105, at 760-763 (for detailed discussion of Zimbabwe’s Constitution referencing inconsistencies between section eleven in the Declaration of Rights which ensures gender protection as a right and section twenty three in the Declaration of Rights which excludes gender from protections against discrimination, and declares that matters involving succession (under customary law) are exempt from discrimination provisions).
110 Id.
111 Id. at 772-777 for detailed analysis and comparison of Zimbabwe’s Constitution with constitutions of Botswana, Ghana, Zambia, Malawi, South Africa and Uganda. Note: South Africa directly addressed the tensions of law in its 1994 Constitution. The specific provisions in South Africa’s Constitution regarding gender rights and customary tribal law, and the South African Constitutional Court’s interpretation of those provisions, will be discussed in depth later in this paper (Part Two and Part Three).
112 The right to housing is codified as a right in the United Nations Declaration of Human Rights (Article 25(1)) as follows: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." This is also identified in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) with the guaranteed right of everyone to “an adequate standard of living for himself and
Magaya, and Venia Magaya’s failure to keep her home was largely viewed as a failure by the Zimbabwe Court to recognize her rights as a woman. In the coming decades, Magaya v. Magaya may also be viewed as a failure to recognize Venia Magaya’s rights to housing.

**B. CASE TWO: THE OTIENO CASE (Kenya)**

S.M. Otieno, a prominent Kenyan lawyer, died in 1986, without a will. His wife, Wambui Otieno, wanted to bury her husband’s body in Nairobi, where they spent their married life. However, her late husband’s brother, a prominent member of the Luo Clan, asserted a claim to bury his brother’s body near the ancestral home.\(^{113}\) Place and manner of burial are extremely important in customary tribal law.\(^{114}\)

The Kenyan Constitution contained clauses which prohibited discrimination on the basis of gender but the customary law of succession in the Luo tribe required that the deceased be buried by his male relatives.\(^{115}\) The Court of Appeals found in favor of Otieno’s brother, holding that there was an exception to the anti-gender discrimination clauses of the Constitution for customary burial law.\(^{116}\)

Ambreena Manji observes that the Court did not consider what S.M. Otieno’s wishes might have been but rather decided the case in terms of Otieno’s ethnic identity and birthplace.\(^ {117}\)

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\(^{113}\) Venter, *supra* note 1, at 18-19 for description of the Otieno case.

\(^{114}\) *Supra* note 6.

\(^{115}\) Venter, *supra* note 1, at 19.

\(^{116}\) *Id.*

\(^{117}\) Manji, *supra* note 6, at 463.
Given the underlying values of customary law, it is arguable that a true interpretation of customary law would have considered and weighed Otieno’s personal wishes in the decision.\footnote{Id. at 479 (discussing the analysis of the Otieno case by Eugene Cotran, author of CASEBOOK ON KENYAN CUSTOMARY LAW. Cotran’s analysis is referenced throughout Manji’s article. Cotran details four reasons why the Court of Appeal’s judgment in Otieno are important in Kenyan legal history as follows: (1) the judgment drew a line through the colonial notion that an educated, urbanized African escapes customary law; (2) the judgment laid to rest the argument that customary law can be held to be repugnant to justice and morality in cases where it differs from western rules; (3) the judgment challenged the notion that one must choose between customary law and the common law in a way that implies the superiority of one and the inferiority of the other – the Court described the two systems as complementary in its dicta; (4) the judgment acknowledged that it is necessary for customary law to continue to develop in the future and, the words of the Court, “keep abreast of positive modern trends”. Cotran notes two reservations, however, with the Court’s decision: (1) the importance of the wishes of the deceased and (2) the position of the widow. (p. 465-468)). See also Venter, supra note 1, at 21 (noting that “customary law’s emphasis on reconciliation could be a great benefit for an emerging South African society, if it could successfully make the transition into the general legal system…and (could be) its saving grace.”)}

Given that Otieno did not personally observe tribal customs, it could have been inferred that his preferences were better reflected by his widow’s requests. Otieno’s wishes was a central point of contention in the case\footnote{Id. at 470.} because there was evidence that Otieno had expressed contrary wishes, telling one person he wished to be buried in Nairobi and another that he wished to be buried near his birthplace.\footnote{Id.} With no written evidence of Otieno’s wishes, and conflicting testimony, the court had to make a choice. The court deferred to Otieno’s brother, rather than to his widow, Wambui Otieno.\footnote{See generally Wanjiru Kariuki, Keeping the Feminist War Real in Contemporary Kenya: The Case of Wambui Otieno, JENDA: A JOURNAL OF CULTURE AND AFRICAN WOMEN STUDIES (Issue 7, 2005) suggesting Wambui Otieno as a model of freedom fighting and “defiance” in contemporary Kenyan society.}

Laurence Juma notes that most commentaries on the case depict the contest as resting on the contradictions in Kenya’s laws but he observes that this was largely a result of the way the two parties presented their cases.\footnote{Juma, supra note 13, at 483.} The case was presented by both sides as a face-off between
the rights of the widow and the rights of the family. As a result, it can be argued that there was a missed opportunity to re-conceptualize possible solutions under customary law.

In an effort to portray Luo customs as repugnant, the widow’s lawyer failed to challenge with evidence the inapplicability of some of the traditional reconstruction of customs put forth by the clan. The strength of the widow’s case should have rested, not in denying customary law, but on asserting that those customs could allow for burial in places other than one’s ancestral home.123

The Otieno case was as high profile in Kenya as the Magaya case was in Zimbabwe. At the end of the trial, thousands of people tried to invade the courthouse.124 There was also increased activity in rural Kenya as members of the urban middle class made provisions for their eventual burial in their rural homes.125 Several books and articles have been written on the Otieno case but while it was very important in Kenya, it did not receive the same reaction from national and international human rights groups that the Magaya case did.

There could be any number of reasons for this but it is worth noting some key differences between the two cases. First, over a decade separates the two cases. The Otieno case happened in 1987 while the Magaya case was in 1999. Second, it can be argued that the Otieno case was largely one of conflicting and equally legitimate interests within a family (wife/widow vs. brother/tribe), rather than being strictly about differential treatment of individuals based solely on gender. Although the Otieno case was positioned and presented by both sides as a battle between women’s rights (the wife/widow) and indigenous tribal rights (the brother and Luo tribe), it was also a conflict between family members whom, it could be argued, had equal

123 Manji, supra note 6, at 484.

124 Id. at 478. See also footnote 76 of article, referring to photographs of the court house on the day of the final judgment by the Court of Appeal (found in Egan, ed. S. M. Otieno: Kenya’s Unique Burial Saga (Nairobi: Nation Newspapers, 1987).

125 Id at 478.
claims. It is unclear whether the situation could have been reversed: a husband arguing for burial rights for his wife with her tribe asserting their rights to bury her, because the literature on burial rights only references men. However, one article mentioned that a few months after the funeral, Otieno’s clan stood by a freshly dug grave and announced to the media that the grave was dug in preparation for Wambui Otieno’s burial, thereby asserting a tribal right over her burial as well). This may have been a symbolic gesture intended to rebuke or insult Wambui, rather than a true statement of the tribe’s legal rights regarding her burial. However, it would be interesting to see if tribal rights would prevail in a case involving a woman’s burial.

In contrast, the Magaya case focused on the different treatment of two people in regards to the same right: the right to own property. The differential treatment of the daughter (female) and the son (male) was based solely on gender. This made the Magaya case about women’s rights in a very clear way, both within Zimbabwe and the international community.

Finally, it is important to emphasize that both cases arose because the people who died did not leave wills. Wills are regularly challenged by heirs, with different parties asserting rights to property claims, so one can posit that the situation that arose in Magaya v Magaya of a daughter and son battling over land could still have occurred, even if the father had left a will. However, it is less likely the Otieno case would have occurred had S.M. Otieno made his wishes clear in a will. The parties in the Otieno case were both asserting secondary rights, and the wishes and rights of the deceased, if known, would have been considered primary.

126 Id.
C. CASE THREE: Bhe and Others v. The Magistrate, Khayelitsha and Others\textsuperscript{127} (South Africa)

The final case to be addressed, Bhe, involves the right to inherit land, just as the Magaya case did. Bhe occurred five years after Magaya, but more importantly, Bhe occurred in South Africa, rather than in Zimbabwe, and after South Africa had abolished apartheid. To understand the significance of this, it is important to consider South Africa’s history.

South Africa can be differentiated from most of the other sub-Saharan African countries because of apartheid. While other African nations were experimenting with various approaches to government from the time of independence in the late 1950’s and early 1960’s, South Africa was stuck in a rigid system in which whites had political and economic power, and blacks had none.\textsuperscript{128} While Black Africans in most countries were actively participating in a full range of activities and styles of government, forming parties and running for offices in some countries, and declaring themselves dictators in military coups in others, blacks in South Africa continued to have no standing.

When apartheid finally ended, the South African government devoted a tremendous amount of time and energy to healing the rifts. In addition to the Truth and Reconciliation process which was intended to help heal the past, the government placed high priority on creating a new Constitution. Several groups in the community were involved, including women’s groups and tribal elders,\textsuperscript{129} and the resulting legislation, the South African Constitution

\textsuperscript{127} Bhe and Others v. The Magistrate, Khayelitsha and Others, Case CCT 49-03 (October 15, 2004).

\textsuperscript{128} There is no specific date that can be affixed to the abolishment of apartheid, but it had clearly ended by the democratic election of 1994. The years 1990-1993 are generally referenced as years in which apartheid fell apart.

\textsuperscript{129} See generally Andrews, supra note 5 (discussing the involvement of women’s groups and tribal elders representing customary rights. While eradicating sexism was not initially on the agenda, and the primary focus of the ANC (African National Congress) and the Nationalist Party was to address racism, there was an organized women’s lobby that confronted delegates with how apartheid had affected women. At the constitutional
of 1994 is considered by several legal scholars to be the most progressive bill of rights in constitutional history.\(^{130}\)

The South African Constitution is unique in several ways. First, the Constitution guarantees full equality for women and prohibits the state or any person from unfairly discriminating against anyone on the grounds of gender, sex, pregnancy or marital status. At the same time, the South African Constitution guarantees the rights of tribal and cultural groups by directing the courts to apply customary law when that law clearly applies.\(^{131}\) In order to reconcile the two goals of guaranteeing the equality of women and honoring customary tribal law, customary law is honored but with a huge caveat. The caveat is that no one exercising tribal customary rights may do so in a way that is inconsistent with any provision of the Bill of Rights, and that means that the guarantee to women of equal rights takes precedence over customary law. In addition, the Constitution expressly recognizes international law, affirming that customary international law is automatically part of South African Law, unless it is incompatible with the Constitution or national legislation.\(^{132}\) This further ensures that women’s rights are protected, since customary international law recognizes women’s rights.

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\(^{131}\) Nyamu, \textit{supra} note 5, at 411.

The Constitutional Court of South Africa is charged with the ultimate interpretation of the South African Constitution. In the case of Bhe, the Constitutional Court had the perfect opportunity to clarify the interplay of customary law and women’s rights, and the Court embraced the opportunity.

In Bhe v Magistrate, the widow and the deceased had lived together for twelve years. They had two children, both girls. The husband was a carpenter, and the wife was a domestic worker. They were poor and lived in a temporary informal shelter in Cape Town but the husband got a state housing subsidy that let him purchase some property and buy some materials to build a house. Unfortunately, he died before the house could be built. The magistrate who considered the case ruled for the deceased’s father, basing the ruling on customary law’s standard rule of primogeniture. The deceased’s father was named heir, and he made plans to sell the property to pay for funeral expenses.

There Court turned its attention to the two sources of customary law the magistrate based his decision on, and considered both in the context of the South African Constitution. One was a statute, the Black Administration Act 38 of 1927 (the BLA) which dealt with intestate estates of deceased Africans and dictated the application of customary law, and the other was the long-standing principle of primogeniture within the customary law of succession. The Constitutional Court swiftly dismissed the Black Administration Act, finding it both unconstitutional and a “legacy of apartheid”. The Court then considered customary law separately to ascertain whether or not it should be the governing law. As discussed, South Africa’s Constitution calls for courts to apply customary law when the law is applicable but makes it subject to the Bill of Rights provisions regarding equality rights for women.

133 Higgins, supra note 23, at 533.
The Constitutional Court found that the principle of male primogeniture in customary law violated women’s rights to equality and dignity, and because the Constitution would not permit violations of the Bill of Rights, that customary law on land inheritance could not stand. The Court did include supportive dicta on customary law, and differentiated between the fluid aspects of customary law in its most organic form and the more ossified approach of codified customary law,\textsuperscript{134} noting that “the rules of succession in customary law have not been given the space to adapt and keep pace with changing social conditions and values (because they were written down in legislation, textbooks and court decisions, without allowing for the dynamism of customary law).”\textsuperscript{135}

The response within the legal community to \textit{Bhe} has been resoundingly supportive. The \textit{Bhe} case is viewed as “an important legal victory for women’s equality in the face of patriarchal custom,”\textsuperscript{136} “an example of a court balancing constitutional equality rights and the right to culture,”\textsuperscript{137} and “exemplifying[ies] internalization of human rights norms by reforming customary law through the formal legal system.”\textsuperscript{138}

And yet, a study involving interviews with South African lawyers and representatives of nongovernmental organizations working on gender equality issues\textsuperscript{139} conducted after the \textit{Bhe}

\textsuperscript{134} Kent, \textit{supra} note 21, at 536.

\textsuperscript{135} Id.

\textsuperscript{136} Higgins, \textit{supra} note 23, at 535.

\textsuperscript{137} Bond, \textit{supra} note 15, at 337 and 339 (stating that the \textit{Bhe} case is significant for two reasons. “First, it illustrates the power of subjecting personal or customary law to constitutional scrutiny…Second, the decision demonstrates South Africa’s attempt to balance rights to culture and equality…By simultaneously valuing the positive aspects of customary law and requiring that custom conform to the Bill of Rights, the Constitution reflects a commitment to rights-balancing. Although the \textit{Bhe} Court goes to great lengths to articulate its commitment to custom and customary law, gender equality rights carry the day.”)

\textsuperscript{138} Kent, \textit{supra} note 21, at 535.

\textsuperscript{139} Higgins, \textit{supra} note 23, at 535.
decision suggests that the case has had “virtually no impact”\textsuperscript{140} even on the adjudication of disputes concerning inheritance rights within the South African rural communities. Even though legal services organizations conduct training sessions for lawyers and magistrates on a limited basis, most estates are still administered informally by family members or traditional leaders in rural and semi-urban communities, where knowledge of the Bhe decision is virtually nonexistent.\textsuperscript{141} What this means is that in practical terms, in most of South Africa’s rural areas, a widow’s access to her deceased husband’s home and property continues to depend on the inclinations of the male heir. If he chooses to evict her from the property, he can do so.

The Court’s decision in Bhe relied on the very powerful provisions of the South African Constitution, and is testament to the power of constitutional reform as a top-down approach. But the subsequent discovery that the result in this case failed to be communicated to other South African women highlights the need for additional measures at the grassroots level. While constitutional reform and judicial enforcement of laws are critical, broad communication and education is also necessary for top-down approaches to truly change lives.

\textbf{PART III. POSSIBLE APPROACHES TO RESOLVING THE TENSIONS OF LAW}

Several scholars have addressed the issues raised in this paper, and suggested different approaches, both top-down and bottom up, to resolve the tensions of law in African countries. This section of the paper will review these suggestions in some depth, and suggest applying a new approach, force field analysis, borrowed from organizational behavior change management theory. However, it is important to preface any specific suggestions with an overview of the variance in approaches within international human rights law and the international legal

\begin{flushleft}
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\end{flushleft}
community regarding the legal support for and legitimacy of international human rights and international human rights law. Sensitivity to these differences in perceptions provides valuable context in considering prescriptive solutions.

A. Varying Approaches to International Human Rights Law

International human rights law is a field of law that largely developed in the latter half of the twentieth century, and has increased in focus and attention with the growth of the human rights movement from the 1970’s on. Most legal scholars reference the Nuremberg Trials after WWII, and the subsequent formation of the United Nations and issuance of the UN’s Charter of Human Rights as seminal in the development of international human rights law. This is not to say that this is the first time human rights were ever referenced in laws. But the formalization aspect was largely absent until the UN Declaration of Human Rights (UNDHR).

It is important to point out that while the UNDHR is considered to be aspirational rather than binding in nature, it has more nation state signatories than any other international treaty, suggesting there is wide support for the values articulated in the UNDHR. This is, however, an area of much controversy, with questions being raised as to whether the values espoused in the


UNHDR and the protections it guarantees have a western, “developed nation” bias and thus do not reflect the values of developing nations, like those in Africa. Some scholars question the idea of “individual” human rights and see this as antithetical to the African tribal approach of “communitarian” rights while others object to the protected grounds for individuals in international human rights law and argue that these rights conflict with indigenous peoples’ rights. Others question the very legal grounding for universal human rights, characterizing universal human rights as a western European notion that originated during the Enlightenment, predominantly advocated by Western societies.

There is also cynicism and questioning about the motivation of Western governments as proponents of “universal human rights.” Some link the espousal of universal human rights values to the colonial powers and their desire to “control” the native populations. There are allegations that Western powers use the idea of universal human rights in order to control the developing world, both through the control of foreign aid by tying financial aid packages to

145 See Sundhya Pahuja, Comparative Visions of Global Public Order (Part I): The Postcoloniality of International Law, 46 Harv. Int’l L.J. 459 (Summer, 2005) (pointing out the inherent paradox of discussing “universal” norms in postcolonial states where there is an inherent assumption of the “other” in the post colonial state itself, and analogizing this to the notion of the “nation state” and universals in customary international law.) See generally Makau wa Mutua, 35 Va. J. Int’l L. 339 (for a discussion of different notions of universal norms). See Charlesworth, Chinkin & Wright, Feminist Approaches to International Law, 85 A.J.I.L. 63 (October, 1991) (discussing the contrasting views of First and Third world feminist views on women’s rights). See also Weaver, supra note 15, at 498 (discussing the perception of western bias in Pakistan and impact on Islamic law, and concluding that until the stereotype that human rights are western rights is broken, little progress can be made.)


147 Nyamu, supra note 5, at 381; Andrews, supra note 5, at 307.

148 Mutua, supra note 142. The author also heard Makau wa Mutua speak at the ASIL Conference, 102nd Annual Meeting, during a panel discussion entitled Just Back from the Human Rights Council (April 11, 2008) (Mutua noted that Western countries like the US and Britain continue to use the notion of universal human rights as a way to assert superiority over the “brown and black peoples” of Africa.)

149 Id.

150 Kent, supra note 21, at 517.
human rights’ records, and through an overall “shaming” of African nations as inferior. These criticisms echo those made during the colonial period, and often cite the hypocrisy of Britain (colonial superpower) and the United States (current superpower) presenting themselves as models of human rights advocacy, given the history of slavery in both countries, and recent human rights violations during the “war on terror”.

Proponents of universal human rights counter these arguments in several ways. Regardless of any discussions, the UNHDR has been signed by most of the countries in the world, including most nations in Africa. To that extent, proponents advance that the UNDHR can hardly be said to be solely an instrument of developed, western nations. This is true of other

151 See Juma, supra note 13, at 494-497 (arguing that economic rights are inextricably linked to a society’s ability to sustain human rights); see also El-Obaid & Appiagyei-Atua, supra note 13, at 852 (positing that the main factors that have shaped “modern” African human rights have been economics and politics, not culture, and have involved the industrial world’s attempt to incorporate African economics into the global economic system and the West’s insistence on democracy and human rights from African states); see also Olowu, supra note 18, (discussing the human development and poverty reduction between 2005 and 2015 as established in the Second Tokyo International Conference on African Development (TICAD II) as “lofty goals” and general discussion on the debate about whether IMF and World Bank Group have a role to play in human rights violations, and concluding that development approaches in Africa need to be human-rights based.) For feminist analysis on economic development approach to human rights, see generally Nyamu, supra note 5; see also Andrews, supra note 5, at 317. See also Wright, supra note 19, at 485 (proposing that foreign aid be tied to the African Court on Human and People’s Rights in order to encourage accountability among African nations, as already happens with the Inter-American Court, which receives funding from both the EU and individual European countries).

152 Human rights non-governmental organizations (NGO’s) including Amnesty International have used the phrase “mobilization of shame” to characterize their work in bringing human rights abuses to light and publicizing them. See Peter R. Baehr, Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGO’s, a presentation made at a UNU Public Forum on Human Rights and NGO’s (September 18, 1996). Available at http://www.gdrc.org/ngo/lecture14.html


UN Conventions as well. Most African nations are signatories to CEDAW and the Convention on the Rights of the Child (“CRC”).

The idea of western nations imposing their own norms on other nations is a particularly sensitive one, and criticisms of western bias are often launched at the World Bank and the International Monetary Fund, two of the major groups that provide funding for developing nations. Some scholars advocate linking economic development and financial aid to human rights, while others are uncomfortable with the idea of any external nation or group of nations imposing laws or legal norms on another nation-state. The imposition on a state from an external actor (whether another state, a group of states like the UN, or an outside judiciary such as the International Criminal Court) is an ongoing issue in international law, because the sovereignty of nation-states is a longstanding principle of international affairs and relations.

This has led some scholars to look within the various African nations and cultures for African or tribal ideas of human rights. As discussed in Part I, scholars have focused on the notion of Ubuntu, the collaborative approach used to resolve disputes in customary tribal law, and the incorporation of human rights law and principles by tribal elders in resolving specific disputes.

The various prescriptive approaches that have been suggested by scholars can be divided into two different groups: one utilizing “top-down” approaches like constitutional reform and

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155 Goodsell, supra note 65, at 146.

156 Venter, supra note 1, at 21.

157 See Nyamu, supra note 5, at 415 (contrasting of court decisions in Zimbabwe with tribal chiefs, noting that several court decisions upheld the rule that eldest son was always his father’s heir but the tribal chiefs disagreed, saying that the most important goal was to provide for the family of the deceased from the property left by the deceased person.) See also Kent, supra note 21, at 507 (discussing the involvement of paralegals with tribal elders in mediation of child support cases. Case study describes the involvement and role of the sabubu (tribal elder with ongoing responsibilities to couple, families and offspring, even after a separation) with assistance of paralegals). See also Wright, supra note 19, at 474.
judicial interpretation that enforce equality-based laws; and the other utilizing “bottom-up”
approaches that involve communication and education with tribal elders and other members of
the society in order to effect change.

It is the position of this paper that in order to affect lasting and effective change, both top-
down and bottom-up approaches need to be utilized. Organizational behavior theory dealing
with change management provides some insights.

B. Organizational Behavior Theory

It is always risky to attempt to prescribe solutions to complex issues when one is an
outsider. To borrow a principle from organizational behavior theory, the stakeholders (those
with a stake in the outcome) are the parties in the very best position to propose and enact
solutions to the specific problems and challenges within their own systems. However,
organizations often seek to benefit from the perceptions of outside consultants, who are less
attached to the system itself, and can approach the situation from a broader and, perhaps, wider
perspective. Outside consultants bring fresh eyes and new insights to situations where the
stakeholders themselves feel enmeshed and unable to generate creative solutions. Legal scholars
commenting on the tensions of law in Africa play a similar role.

Organizations have made use of behavior theory to facilitate change for several years
now. Kurt Lewin (1890-1947) is often attributed with the origins and development of
organizational theory. He created a three stage theory of change, which is widely used by
organization behavior theorists.\footnote{Understand and Manage Change article at BNET http://www.bnet.com/2410-13058_23-95590.html. See also http://www.entarga.com/orgchange/lewinschein.pdf for a synopsis of Lewin’s three stage theory of change by Ross A. Wirth (PhD).}
Lewin’s essential premise is that in order for any change to take place, whether it involves an organization, group or individual, the total situation has to be considered. Of particular interest to the “change agent” is the “boundary zone”, where the internal and external worlds meet.

Lewin’s change process involves three stages. Stage 1 is the Unfreezing, during which the existing individual and/or group mindset has to be challenged and shifted. Because there is inertia in the status quo, people often view change as threatening and will resist giving up the certainty of the familiar for the unknown of the new. Sometimes, in order for things to “unfreeze”, a shock is required. Stage 2 involves changes that come after the “dismantling” or softening of the mindset, and often begins with a period of chaos and confusion. This is a period of reflection, and often discomfort for those who prefer certainty. Stage 3 involves Refreezing, as new approaches start to habituate and a level of comfort sets in as the new “norms” solidify.

Clearly, top-down changes like constitutional reforms and new laws challenge existing norms and practices. Lewin’s model suggests there will be a process of adjustment (Stage 2) as people get used to new laws. Customary law has defined women’s rights in a particular way and in several parts of Africa, people have become entrenched (or frozen, to use Lewin’s terminology) in that approach. When a top-down change is introduced, like the constitutional changes made in South Africa, an initial period of chaos and confusion is expected. In South Africa, at present, there are serious issues related to women, including a very high rate of

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159 See generally Higgins, supra note 22; Oppermann, supra note 2; see also Venter, supra note 1, at 8 (stating that “the position of women in African customary law could be generally characterized as being that of a perpetual minor subject to the guardianship and authority of her husband, if married, or her father”.)
domestic violence.\textsuperscript{160} This could be seen as a Stage 2 reaction to the changes in women’s status under the law.

Yet another top-down approach involves the signing of treaties, which involves a nation state in making a commitment to external parties, either on an international basis (other nation states in the international community, the UN General Assembly) or on a regional basis (signing charters with other African countries). At present, most African nations are arguably overly-treatied in that most are signatory to the several human rights treaties, most commonly: UNDHR, CEDAW (Convention on the Elimination of All Forms of Discrimination towards Women), CRC (Convention on the Rights of the Child), International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Banjul Charter.\textsuperscript{161} And yet, a major discrepancy remains between the vision and commitment to equal rights and respect for the rights of women espoused in these treaties and the actual treatment of women in their homes and villages.

To suggest an organizational behavior analogy to the situation that presently exists in most African nation states, it is as if the Board of Directors of a large corporation has made commitments to the government, other members of the business community and its customers to do something in a new way, and now finds itself unable to get enough people in the organization to make the changes necessary to deliver on the promises. Organizations are generally structured into smaller departments and groups, and in the event that there was mass resistance to a change

\footnotesize{\textsuperscript{160} Andrews, Symposium: Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law, 8 TEMP. POL. & CIV. RTS. L. REV. 425 (exploring the legacy of apartheid on women (5 years after the “birth of the new South Africa in 1994), and domestic violence against women, including high levels of rape and domestic violence.) See also Vojdik, supra note 55, at 487 (citing statistics from a World Health Organization (WHO) study in 2006 concluded that domestic violence against women is universal and pervasive. In fifteen nations studied by WHO, fifteen to seventy-one percent of women in intimate relationships reported having been physically assaulted by an intimate male partner.) See also Eze-Anaba, supra note 47, at 21 (stating that “women in Africa suffer domestic violence including battery, beatings, torture, acid baths, rape and even death through honor killing. It is estimated that one in every three women suffers domestic violence” (source: Heidi Hudson, A FEMINIST READING OF SECURITY IN AFRICA, 1998)).}

\footnotesize{\textsuperscript{161} Supra note 105.}
the organization had identified has being desirable, it is likely the focus of attention would turn to these smaller departments and groups. Analogously, to effect a change in women’s rights in African societies where customary law has been the norm, the focus cannot be exclusively in the actions and commitments made by those at the top (the government) but must be addressed to any groups that are offering resistance as well.

C. Change Management Model: Force Field Analysis

Organization behavior theory operates on a general premise that every change meets with resistance. As a result, organization behavior theory draws on the research of psychologists, who have delved into what conditions must be met before people will change their behavior. One technique utilized in organizational behavior to identify areas of resistance is “force field analysis”, which essentially analyzes the likelihood of the change based on the balance of “driving forces” and “restraining forces”. “Driving forces” consist of things and people that will aid the change and make it more likely to occur while “restraining forces” are points of resistance, or things and people that will get in the way of or block a change from happening. If the analysis shows that the restraining forces that are blocking the change are stronger than the driving forces that support the change, the recommended approach is to either increase the driving forces for change, or neutralize or remove some of the restraining forces.

162 See The Psychology of Change Management, THE MCKINSEY QUARTERLY (14 April 2008) (noting that child and adult development psychologists have made several important discoveries about what conditions must be met before people will change their behavior. First, people must see the point of the change and agree with it, at least enough to give it a try. Then, the surrounding structures – reward and recognition systems, for example – must be in tune with the new behavior. Finally, people must see colleagues they admire modeling the behavior, and must have the skills to do what is required of them.)

As mentioned, several of the prescriptive approaches recommended by legal scholars and members of the international community involve increasing the driving forces for change (both top-down and bottom-up approaches). Of equal interest are approaches that decrease the restraining forces (or resistance to change).

A force field analysis could be useful in the case of a nation like South Africa that has decided to institute constitutional change, in analyzing the various driving and resisting forces. In the case of South Africa, women’s rights groups were a driving force for change, while the tribal elders were a resisting force. CEDAW and international customary law related to women’s rights were also driving forces, while the tribal customary law regarding primogeniture was a resisting force.

If the government desiring to institute constitutional change finds a disproportionate number of resisting forces, the government could decide to first address the resistances before trying to implement the change. So, if, for example, the resistance is related to fears about how the change would work, the way to reduce the resistance could be an education and
communication campaign about the proposed changes. If the resistance is related to loss of power from a key group like the tribal chiefs or elders, one way to increase their support could be to involve them in the actual design of the change, or to identify a new role for them within the proposed changed system.

Force field analysis does not question whether or not the organization (or country) should set any particular goal for change. Rather it analyzes readiness for change, providing a way to assess the likelihood of change in advance, and to constructively address any barriers, so that proposed changes can be effected as smoothly as possible.

A number of legal scholars have identified various ways to address the resolution of the tensions of law evident in African society. While none of them have applied a force field analysis or spoken in terms of driving or restraining forces, their analyses can easily be embodied within such an approach.

It has been observed that women’s rights are often implicated in the realm of private law, rather than public law. Women’s rights within marriage, divorce and widowhood; their rights concerning their children; their right to own property or inherit property, or to have financial independence; and their right to be free from marital abuse or rape: these are all matters that happen behind closed doors, in the privacy of the family. And these are all areas that have been traditionally governed by customary tribal law. Various reforms have been proposed in all of these areas.

\[164\] See Charlesworth, Chinkin & Wright, supra note 145, at 626 (discussing the public/private distinction as a feminist concern at 626 and articulating a general argument that women’s rights are often violated in private or domestic law, and that most law (including international) is public law (related to public concerns)); see also Bond, supra note 15, at 316-317 (stating that for two decades, women have worked to dismantle the public/private dichotomy. Liberal theory has largely concerned itself with abuses of state power and addressed these under public law, as opposed to abuses of private power but feminists are now focusing on the private sphere because shielding the private from scrutiny serves to perpetuate male domination in the family.)
D. Top-Down Approaches

Constitutional Reform and Judicial Interpretation

At present the constitutions of most African countries do not represent driving forces for change. South Africa’s experience with constitutional reform post-apartheid is frequently advanced as a hopeful beacon and model for change for African nations addressing tensions of laws.\footnote{See generally Bond, supra note 15, and specifically at 321-327 (discussing the process of constitutional reform and the potential for initiating a society-wide dialogue, and referencing the Uganda experience in 1986 (when the National Resistance engaged in a nationwide inquiry to both assess the people’s views about the constitution and to raise public awareness of constitutionalism) and South Africa’s experience in 1993 (dialogue on gender equality provisions and debate amongst women’s groups and traditional leaders who fought to include an exclusionary clause). Bond suggests seeking the option of a “middle path between assertions of cultural rights and gender equality” and the need for “internal dialogue and cross-cultural collaboration”. Bond also sees the Bhe case as illustrating “the potential for women to initiate constitutional dialogue concerning normative content of customary law and gender equality law…The case represents significant progress for the many women who are subject to customary law in South Africa. It reminds us that when women have the opportunity to promote gender equality within their cultural communities, they will use the constitution, among other things, to do so” (at 329).} Once a right is clearly included in the constitution, it opens up the possibility of seeking the enforcement of that right through the judicial system.\footnote{Kent, supra note 21, at 535 (commenting that the Bhe case exemplifies the internalization of human rights norms by reforming customary law through the formal legal system.)} While other constitutions in Africa include women’s rights,\footnote{Knobelsdorf, supra note 105, at 760 (noting that the anti-discrimination provisions in Zimbabwe’s Constitutional Declaration of Rights raises questions of whether gender-based determinations and customary legal decisions are excluded from these provisions); see also Juma, supra note 13, at 510 (noting that “the Ugandan Constitution prohibits “any laws, cultures, customs or traditions” which undermine the status of women. In Tanzania, equality rights, as provided for in the constitution and enunciated by the international instruments have been held supreme over customary law”, and at footnote 281, citing Ephraim v Holaria Pastory (1990) L.K.C. (Const). in which a woman who had inherited land from her father by will sought to sell land to a non-clan member. Her relatives challenged her successfully in primary courts but the High Court reversed, holding that customary law was discriminatory and inconsistent with Tanzanian constitution and international human rights instruments to which Tanzania was a party.)} South Africa’s constitution is unique in that it indicates a hierarchy of laws and specifically provides that courts must apply customary law but that customary law is subject to the Bill of Rights. By making customary law subject to the Bill of Rights, South Africa’s Constitution allowed for the Constitutional Court in \textit{Bhe} to reach the decision it did: namely that the customary law provision for male inheritance of property was discriminatory.
towards women and unconstitutional. By clearly delineating a hierarchy of laws, South Africa’s Constitution’s became a driving force for change. The Constitutional Court’s ruling in Bhe likewise supported the change, adding to the driving forces. This is in direct contrast cases in other African countries, including one very high profile case in Nigeria where the law was interpreted to allow a single mother to be stoned to death for adultery under Shari’a law.\textsuperscript{168} It is not surprising, then, that constitutional reform is advocated by several legal scholars.\textsuperscript{169}

Other scholars point out the critical role the judiciary has.\textsuperscript{170} The role of the courts is to interpret the law, and courts decide what case law they will utilize in making those decisions. Women’s rights are an area of intense focus in international human rights law, and other nations’ laws and cases can become a driving force for change. Some courts reference other nations’ laws as well as international laws and norms (including CEDAW) in rulings related to women’s rights.

\textsuperscript{168} Crutcher, supra note 15, at 257-259 (analyzing the Nigerian Constitution promulgated in May 1999 and prohibiting human rights abuses like torture and other cruel, inhuman, or degrading treatment. The Constitution also provides for freedom of religion, including freedom to change one’s religion or belief, but the implementation of an expanded version of Shari’a law has continued, challenging constitutional protections for religious freedom.)

\textsuperscript{169} Bigge and Briesen, supra note 41, at 309; see also Juma, supra note 13, at 508-511 (discussing how constitutional reform would benefit Kenya; also noting the important role the judiciary plays in interpreting constitutions and commenting on how the U.S. has achieved great strides in individual freedoms and civil liberties through judicial interpretation of a “relatively vague constitution” (at 509).) But see Fineman, supra note 112, at 4-8 (arguing that even constitutions that support equality should also address substantive equality issues of economic, social and cultural discrimination as the Canadian Charter of Rights and Freedoms does, and contrasting the Canadian approach to the U.S. approach.)

\textsuperscript{170} Juma, supra note 13, at 500 (noting the difficulty the Kenyan judiciary has had in assimilating notions of human rights and concepts of individual rights freedom.) See also de Wet, supra note 132 (discussing the South African Constitutional Court’s use of international law); see also Reem Bahdi, Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts, 34 GEO. WASH. INT’L L. REV. 555 (discussing several courts that have referenced decisions in other countries and international bodies, including Botswana (referencing decisions in England and New Zealand); the South African Court referencing the General Comments of the Committee on Economic, Social and Cultural Rights (UN Convention); the Nigerian Court of Appeal considering CEDAW.)
and there is some evidence of a “transjudicial” trend as courts take into account extra-territorial laws.\footnote{See Margaret A. Burnham, \textit{Symposium: Constitution-Making in South Africa: Symposium Article: Cultivating A Seedling Charter: South Africa’s Court Grows Its Constitution}, 3 Mich. J. Race & L. 29 (Fall, 1997) for an analysis of Constitutional Court’s decisions in South Africa under the new Constitution, particularly referencing the court’s use of international law and case law from other countries.}

\textbf{E. Bottom-Up Approaches}

A classic change management technique in organization behavior is to involve members of the organization (employees) in designing and implementing the change. Involving members at a grass-roots level not only identifies those who are resisting the change but also gives them an opportunity to indicate their reasons for resistance. Involving people in the change process invites their input and their participation.

\textit{(i) Economic Reforms}

Several legal scholars have identified the necessity for economic reforms. Without the ability to be financially independent, women remain dependent on husbands, fathers or other male relatives. Some scholars define the problem in very broad terms,\footnote{See Olowu, 5 San Diego Int’l L. J. at 202 stating that “the day to day realities of increasing numbers of people all over the world who are chronically malnourished, unhealthy, homeless and illiterate constitute a huge cutback in whatever progress the world has recorded since the 1990’s”; \textit{see also} Andrews, \textit{supra} note 5, at 432 (noting that “in the Transkei…the average household spent three hours every day fetching and carrying water. In rural Kwa Zulu, where three out of five women over the age of thirty suffer from a severe, crippling form of arthritis, sixty percent of households spent one hour per day collecting water. For those too disabled to collect it, water cost twenty-eight times more than it did for urban families.”)} noting the general impoverishment of most Africans, and the challenges facing African nations as a whole. Other scholars focus on the importance of improving women’s lives on a smaller, more individual scale. Microcredit and microfinance initiatives are often suggested.\footnote{Microfinance involves lending a small amount of money to entrepreneurs (generally women) so that they can start their own businesses. Grameen Bank is one of the most well-known microfinance programs in existence, and the founder, Muhammed Yunus, was awarded with the 2006 Nobel Peace Prize. For more information on microfinance, see http://www.grameenfoundation.org/what_we_do/microfinance_in_action/} There is evidence that...
microfinance opportunities greatly improve the lives of the women who participate,\textsuperscript{174} and their families as well.\textsuperscript{175}

If the overall goal of a nation is to improve women’s rights, microfinance programs could act as a very powerful “driving force”. Studies indicate there is a direct correlation between a woman’s increased economic power and the level of domestic violence (decreased) that she experiences.\textsuperscript{176} Whether this is because having more economic power increases a woman’s status in the marriage or her ability to assert herself, or simply gives a woman the financial freedom to leave an abusive situation is not clear. However, it makes sense that the ability and opportunity to earn one’s own income has beneficial side effects by both building a woman’s confidence, and increasing her options in terms of living arrangements.

Microfinance programs for women represent a strong potential driving force in increasing women’s rights. One might anticipate some resistance to microfinance programs because the

\textsuperscript{174} Coomaraswamy, supra note 3, at 504 (stating that “women’s rights will only change when they have access to land and economic power” referencing the success of the Grameen Bank microfinance initiatives); see also Amnesty International report on IVAWA (referencing The Intervention with Microfinance for AIDS and Gender Equality (IMAGE) study in South Africa, demonstrating the connection between microfinance programs and a substantial reduction in intimate partner violence against women. A South African non-governmental organization, the Small Enterprises Foundation, implemented the microfinance portion of the IMAGE study using their pre-existing loan criteria, but added an educational component. In addition to receiving microfinance, the participants completed a two-phase series of training sessions on HIV awareness and interpersonal skills in tandem with microfinance loan meetings. Two years after joining the program, women participant’s risk of physical or sexual violence from an intimate partner was reduced by 55%, relative to a matched control group who did not participate in the intervention (source: JC Kim, C Watts, JR Hargreaves, LX Ndhlolvu, Phetla G, LA Morison, J Busza, JDH Porter, PM Pronyk, Understanding the impact of a microfinance-based intervention on women’s empowerment and the reduction of intimate partner violence in the IMAGE Study, South Africa (AMERICAN JOURNAL OF PUBLIC HEALTH, 2007, p. 2). Women participating in the IMAGE intervention reported greater household communication and collective action, mobilizing their villages around a range of issues, including violence and HIV. There is evidence to suggest that these benefits also reached young people in their households, resulting in greater openness and communication around HIV. In addition, the loan repayment rate for the microfinance program was 99.7%. From these findings, it is clear that there is compelling evidence that suggests that empowering women by addressing structural factors such as poverty and gender inequality may reduce intimate partner violence (same source as above, p. 3))

\textsuperscript{175} Id. at 504-505 referring to studies that show that husbands spend 90% of earnings for their own consumption while a wife and mother spends the majority of her earnings on the children.

\textsuperscript{176} Supra footnote 174, referring to IMAGE study in South Africa.
program does result in women having their own financial freedom and increased options, and could be seen as decreasing the power of the men in their lives but there does not appear to be substantial research on that phenomenon at this time. This could be a potential area for future research in studying exactly how microfinance affects changes in family and relationship dynamics: in other words, how microfinance programs act as a driving force and what restraining forces (if any) microfinance engenders.\textsuperscript{177}

Whether economic reform is addressed via microfinance loans, development grants or some other approach (like a government subsidy paid directly to women), poverty of women in Africa has been identified as a major issue affecting women’s rights.\textsuperscript{178} There is an interconnectedness of factors that contribute to women’s poverty\textsuperscript{179} including marriage laws and customs (the lobolo), and inheritance laws that affect property ownership (particularly in case of divorce or widowhood). Women are generally not involved in the political or judicial processes in leadership roles. If women were involved in the political process, they could influence the laws that affect them. If they were involved in the judiciary, either in the judicial system interpreting constitutional and statutory laws, or in the tribal hierarchy that interprets customary

\textsuperscript{177} The author has researched and written on the human rights implications of microfinance initiatives, Exploring the Human Rights Implications of Microfinance Initiatives, available upon request. Existing research on MFI programs tends to focus on the Grameen Bank’s program, with more analysis on macro societal dynamics of MFI programs, rather than on the micro impact of these programs on individuals and their marriages.

\textsuperscript{178} See Brandt-Young, 24 Mich. J. Int'l L. at 387-396 discussing female poverty of African women that results from divorce, desertion, or disability; see also Nyamu, supra note 5, for impact of marriage, divorce and death as key defining factors in determining property rights of women and children.

\textsuperscript{179} See Higgins, supra note 23, at 530-532 (delineating the “complex structure of patriarchy” found in studies on women and families in South Africa as follows: in patrilineal and patrilocal communities, spouses reside in the husband’s community and children are regarded as part of the father’s family line. This increases a woman’s vulnerability to violence in a number of ways because (1) she is an outsider (not part of the bloodline of the community), (2) if she chooses to leave her husband’s community, she must leave her children and her property (3) even if she is willing to leave under these terms, her own family may not welcome her back because they may be forced to return the lobolo, or bridewealth, which they may be unwilling or unable to do. Given the punitive results associated with leaving the family, there is tremendous pressure in cases of domestic violence to resolve the matters within the family or endure the abuse. This is complicated by the ineffectiveness of law enforcement. “In interviews with NGO representatives working on domestic violence in South Africa and police charged with responding to such complaints, we learned that incidents are formally reported only in the most severe cases” (at 531-532)).
law, women could act as a driving force by advocating for laws to enhance women’s economic rights.

**(ii) Property Ownership and Inheritance Laws**

Land is the most valuable economic resource in the Third World, but inheritance laws under customary law continue to reinforce the economic gap between men and women. Under customary law, women cannot and do not generally inherit land, and can only enjoy the land through their husbands and sons.\(^{180}\) There is a direct connection between the denial of property rights and the cycle of poverty for women.\(^{181}\) Even in South Africa, where the *Bhe* decision held that women could inherit property, many rural communities continue to administer estates informally by family members or traditional leaders,\(^{182}\) meaning that a widow’s access to her deceased husband’s home and property depends on the inclination of the male heir. Some countries have guardianship laws that permit men to marry off and inherit adult women, assume decision-making power over their children and property, and control their movement and activities.\(^{183}\)

It has been noted that property laws are in discord with social changes in some countries: for example, in Tanzania, women make up 80% of the agricultural labor force and 49% of the

\(^{180}\) Coomaraswamy, *supra* note 3, at 503.

\(^{181}\) Andrews, *supra* note 5, at 326-327 (noting that when women are denied the right to own property, inherit or be recognized as heads of households, they are left in poverty.)

\(^{182}\) Higgins, *supra* note 23, at 535-536 (stating that if the heir is her son, a widow will likely remain in her home but if the heir is another male relative, a widow may well be evicted from the property, particularly if she has no children of her own.)

\(^{183}\) See generally Bennett, Faulk, Kovina & Eres, *supra* note 5, at 456 (discussing widows’ rights in Uganda, in particular p. 463-469 with reference to their analysis of Succession Act – which gives home and property to nearest male lineal descendant to the deceased (usually the eldest son)). *See also* Ezer, Kerr, Major, Polavarapu & Tolentino, *supra* note 1 (discussing Tanzania’s inheritance laws and how they disadvantage women. Also at 624 how property is often taken from women by accusations of witchcraft, noting that it is common for the husband’s family to accuse a widow of causing her husband’s death through witchcraft.)
total work force but are denied rights of ownership. The change in inheritance laws that is signaled in the *Bhe* decision has huge implications. If women can inherit property, this could be a major driving force in changing women’s rights in other areas as well.

An interesting situation has evolved in Rwanda, where women have inherited property as a result of the 1994 genocide. In this case, women inherited as the last remaining family member. Indications are that the women farmers are out-producing the men.

(iii) Marriage Laws

The customary tribal practice of lobolo continues to be in effect in several African countries. Under this arrangement, a bridewealth payment is made to the bride’s family by the husband’s family. This, in effect, secures the woman as a bride, and in earlier times may have acted to ensure that the suitor/potential husband had sincere intentions. From a modern perspective, however, the practice is more often treated as if the husband has purchased his bride, with the woman largely forfeiting her rights to her husband.

From a purely practical perspective, the lobolo often keeps a woman in a marriage she would prefer to leave, because if the husband and wife divorce, the husband is entitled to get the

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184 Ezer, Kerr, Major, Polavarapu & Tolentino, *supra* note 1, at 632.


186 *Id.*


188 Eze-Anaba, *supra* note 47, at 29 (contrasting the traditional approach: “the institution of bride price in traditional times was not conceived as a sale of the girl but was proof of the girl’s importance to both families. Her family must be compensated for her loss and it ensures that the husband’s intentions are serious” with the modern: “But in modern times, the bride price symbolizes the sale of the girl and the ownership by her husband and his family.”)

189 See Oppermann, *supra* note 2 (noting that the lobolo represents the husband’s marital power and if a wife "returns to her family, the lobolo, or a portion thereof, must be returned); see also Higgins, *supra* note 23, at 532, and Coomaraswamy, *supra* note 3, at 336 (discussing lobolo and the need for reforms.)
the lobolo paid back to him. Often, the family who has received the lobolo cannot afford to repay the husband, so the wife effectively has no option to leave the marriage.

In South Africa, the practice of the lobolo is still in effect but now lobolo requires the woman’s consent.\textsuperscript{190} This adaptation recognizes rights of choice and respect for a woman’s individual choices but allows for an entrenched practice of customary law to continue. Other reforms have been suggested as well. It has been suggested that a woman’s family should not be required to return the lobolo to the husband in cases of spousal abuse,\textsuperscript{191} or that lobolo could be altered so it takes on the form of security and is repaid to a woman if she is ill-treated or abandoned by her spouse.\textsuperscript{192}

It is also important to note that under customary law, the position of women is fairly well-defined and rigid. Women may not negotiate or terminate their own marriages, and in some countries, are entered into marriage at very young ages.\textsuperscript{193} Moreover, a woman's consent to enter a marriage is generally not required: her lack of consent is not considered a bar to the union.\textsuperscript{194}

South Africa now allows for people to choose whether to marry under customary law or general law. The South African Law Commission (SALC) passed a Recognition of Customary

\begin{itemize}
\item[190]\textsuperscript{190} Coomaraswamy, \textit{supra} note 3, at 507.
\item[191]\textsuperscript{191} Higgins, \textit{supra} note 23, at 532.
\item[192]\textsuperscript{192} Coomaraswamy, \textit{supra} note 3, at 507.
\item[193]\textsuperscript{193} See Ezer, Kerr, Major, Polavarapu & Tolentino, \textit{supra} note 1, at 360 (discussing a proposed reform to the child marriage law in Tanzania requiring girls to be 18 years of age in order to marry, and noting that as of 2006, girls could marry as young as fourteen under the Law of Marriage Act, as young as puberty under customary law, and as young as nine under the Islamic Restatement Law.)
\item[194]\textsuperscript{194} Oppermann, \textit{supra} note 2, at 79.
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Marriages Act (Marriages Act) that requires all marriages to be freely chosen and consensual. This law also specifies that all property acquired during the marriage is community property.

This is further evidence of the interconnectedness of factors, with marriage laws governing women’s economic status and independence as well as the right to own property. A simple alteration regarding the use of the lobolo so that women retain an ownership interest in it and can access this interest when leaving an abusive relationship significantly changes the dynamic. In force field analysis terms, changing the lobolo so that women retain a right in it could change the lobolo from a resisting force to a driving for advancing women’s rights.

(iv) Laws that Address Violence towards Women

Violence towards women is another issue which, while not exclusive to African societies, is of concern in African nations. Punishing domestic violence requires criminal laws relating to assault, battery and rape as well as the will to punish abusers. Domestic violence is primarily a private matter, however. It generally happens inside the home, away from public eyes, or perhaps even public awareness. Laws punishing domestic violence are rare, and there may even be cultural norms that support violence towards women in some African countries under customary law. Perhaps more significantly, there is no clearly stated opposition to or disapproval of violence towards women under customary law.

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195 Coomaraswamy, supra note 3, at 506.

196 Id.

197 See Eze-Anaba, supra note 47, at 37 (discussing Section 55(1) of Nigeria’s Penal Code which allows a man to correct an erring child, pupil, servant or wife and says that “nothing is an offence which does not amount to infliction of grievous hurt upon any person which is done…by a husband for purpose of correcting his wife, such husband and wife being subject to any native law and custom under which such correction is lawful”. Also sexual abuse of children between thirteen and sixteen is known as defilement, not rape (at 38), and in many cases of sexual assault, the law requires corroborating witnesses (at 40). Nigeria signed CEDAW on June 13, 1985 without reservations, and ratified the Optional Protocol to CEDAW on November 22, 2004. The Violence Against Women (Prohibition) Bill 2003 (VAW), an initiative of coalition of non-governmental organizations had been sitting in the lower House of Reps for five years (as of 2007). The barrier appears to be the provision on marital rape.)
South Africa addressed domestic violence with the Domestic Violence Act of 1998, and the Constitutional Court has upheld the Act, by authorizing warrants of arrests when issuing protective orders of domestic violence.198 There is evidence that other countries are also responding to violence against women. The CEDAW Special Rapporteur issues regular reports compiled of actions reported by member countries. Between 1994 and 2003, country actions involved changes to domestic law in several areas including female genital mutilation, honor-kilings, forced marriage, and marital rape.199 One of the most frequently reported reforms was enhancement of criminal penalties.200 While these reports are not exclusive to African nations, the reports do indicate an international trend, and the issues referenced are ones that affect women in African nations.

Laws punishing violence against women could be a powerful driving force for change. Not taking action to address the violence provides support and strengthens the resisting forces.

The same interconnectedness of factors identified in the discussion of economic and marital rights is significant here. There is a correlation between financial dependence and levels

198 Vojdik, supra note 57, at 512 (referencing Omar v. The Government of the Republic of South Africa; also distinguishing the South African Constitution from the US Constitution in that the South African Constitution explicitly guarantees the right to gender equality as a foundational constitutional norm. Also at 516 stating that the Constitutional Court has repeatedly held that the Constitution provides women with a right to be free from domestic violence and the state has an affirmative obligation to prevent and eliminate such violence. Also at 517-519 contrasting the case of Carmichele v Minister of Safety and Security (South Africa) with Castlerock (US Supreme Court case). In Carmichele, the Constitutional Court held that the South African government has an affirmative duty to prevent domestic violence whereas in Castlerock the US Supreme Court held that police had no liability in their failure to enforce restraining orders.)

199 Julia Goldscheid, 28 T. Jefferson L. Rev. 355, 378 (Spring, 2006). See also Coomaraswamy, supra note 3, at 497-498 (suggesting that the way to counter practices that are exclusive to women (Sati in India; female genital mutilation in Africa; honor killings) is to point out the parallels to the elements of torture: severe pain and suffering or intent to inflict severe pain or suffering, for a specified purpose that includes punishment and discrimination, and done with the consent or acquiescence of a public official.)

200 Goldscheid, supra note 196, at 388 (noting that countries also amended family law codes to authorize more equal rights for women in context of divorce, custody and inheritance, including amendments that allow for property sharing. Several countries accomplished these through constitutional or statutory protections.)
Act of violence against women represent a strong resisting force to the advancement of women’s rights. Acts taken to prevent and punish violence against women could be a powerful driving force for change.

(v) Education and Communication

It is critically important to change the laws regarding women’s rights. But if the women themselves and the communities they live in and the tribal elders who interpret the customary laws are not aware of the new laws, customary law will continue to be applied the way it has been, and change will be slow. Several scholars have noted that educating women about their rights is absolutely necessary. Others have suggested legal education for tribal elders and judges. It has been observed that judges in many African countries do not come from legal traditions which have advanced or upheld women’s rights so education of judges as well as customary law tribal elders is required. One other factor of note is that it has become more

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\textsuperscript{201} Supra note 174.
\textsuperscript{202} Higgins, supra note 23, at 531 writing about interviewing community members in South African rural communities after the Bhe decision and finding that no-one including traditional leaders knew about the Bhe decision.
\textsuperscript{203} Andrews, supra note 5, at 456; see also Eze-Anaba, supra note 47, at 52 (regarding women’s lack of awareness of their legal rights in Nigeria, noting the high level of illiteracy among Nigerian women (UNESCO rates Nigeria as one of the nine countries with highest illiterate population in the world and 46% of women in Nigeria have never attended school)).
\textsuperscript{204} Venter, supra note 1, at 20-21; see also Higgins, supra note 23, at 532.
\textsuperscript{205} Venter, supra note 1, at 20-21.
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common for African law students who are educated abroad (in the US and Western European law schools) to return home to Africa to practice law.\textsuperscript{206}

When something new is first introduced, it is natural to see resistance (stage one of Lewin’s three stage theory). But as people get more accustomed to something, it no longer seems new or alien. A law student from Africa who is exposed to female professors and colleagues may find the experience alien at first. But as the student gets more comfortable with women in an academic setting, it could change his or her thinking about women’s rights.

\textbf{(vi) Dialogue and Involvement}

Women’s groups took an active role in South Africa’s creation of their Constitution, and were able to effectively advocate for and advance women’s rights.\textsuperscript{207} These women were a major driving force in changing women’s rights in the Constitution. There are several other examples of women coming together and working in groups to effect change in women’s rights, not only in the women’s movement in the United States, but also internationally.\textsuperscript{208}

It is important not to oversimplify women’s issues, however, or to assume that all women agree with each other simply because they share a gender. One woman might embrace change relative to one factor where another woman might resist it. It has also been noted that women are not simply women but often belong to multiple groups. Intersectionality theory\textsuperscript{209} which

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\textsuperscript{206} This trend was referenced repeatedly during a recent American Society of International Lawyers (ASIL) conference that the author attended (April 10-12, 2008) as a factor that is changing African law and has great potential for changing African societies as well. Several of the speakers noting the change were African lawyers and African law students studying in the U.S.

\textsuperscript{207} Supra note 129.

\textsuperscript{208} See generally, Jean Shinoda Bolen, \textit{Urgent Message from Mother: Gather the Women, Save the World} (San Francisco: Conari Press, 2005) for stories of women throughout the world, including Africa, working together to effect changes in their societies.

\textsuperscript{209} Bond, supra note 15, at 324.
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surfaced in feminist and anti-racist circles during the 1990’s articulates an understanding of “self” as “complex, fluctuating and subject to multiple sources of oppression and privilege”. Not only can a woman belong to several different groups as per race, religion and gender, she also has multiple roles that may not be easily reconciled. So, a woman can be black, Muslim and African, and also a mother, wife and entrepreneur. All of these various aspects of her intersect within herself. Ascribing a simple label to her will not encompass her full or authentic experience as a person.

(vii) Interconnectedness of Factors

The interconnectedness of the factors discussed above is critical. To effect a change in women’s rights, ideally there will need to be several driving forces, working in concert. Resistance will need to be identified and addressed, to see if the resistance can be neutralized or shifted.

And yet, any one of the factors identified above could be either a driving or resisting force for change. If a woman has access to education, she will have an opportunity to develop her skills and appreciate the power of her own mind, but if she is denied access to education, she will have less opportunity to exercise her mind and envision other possibilities. If a woman can own her own land or earn her own income, she will have the opportunity to make her own economic choices, but if she is denied access to land or money, she will be dependent on others to provide for her. If a woman has access to other women and can share her experiences, she will be more likely to feel supported and unite with other women in joint projects, but if she is isolated and controlled by her husband or her elders (tribal or family), she will be less likely to reach out and join with others.

210 Id.
CONCLUSION

It is the year 2009 and right now somewhere in sub-Saharan Africa, a twelve year old girl is being married and her father is receiving a bride price. The girl had no voice in the decision to marry because under tribal law, she has no voice. Under this marriage, she will be the property of her husband’s family.

If she is lucky, though, her country is addressing women’s rights. Maybe there are legislators who are considering or working on constitutional reforms that will specifically advocate equality for women or clarify that customary tribal law cannot violate the commitment made to women, because they realize that their country needs to change. Perhaps they are bothered by the dissonance between the treaty they signed (CEDAW) and what is happening in their villages and cities. Maybe they have studied abroad and realize the benefits that women bring to a society when they have a voice, when they have power. Or perhaps the sense of fairness that underlies customary law seems at odds with what they see happening in their society.

If the young girl is lucky, her country will change their constitution so that her rights are clearly delineated. And if she is lucky, there will be a high court with judges who interpret the new constitution to articulate and clarify the rights guaranteed to her in the Constitution. Perhaps she will discover she has rights she doesn’t know she has: to right to own property, the right to earn her own income or even start her own company with the help of a microfinance loan, the right to choose whether or not to remain in her marriage. And perhaps she will join with other women to participate in dialogues with legislators and tribal elders, to influence and take part in the decisions that affect her society. Perhaps this young girl will even run for office and continue
to advocate laws that protect herself, her mother and sisters, her peers and her daughters.

Perhaps she will even be President one day.