

2

Square pegs for square holes: An ‘African’ approach to gender responsiveness

*Mariam Kamunyu**

Abstract

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) is an extensive normative framework that protects and promotes women’s rights in Africa. However, there is an alarming disconnect between this framework and the flagrant abuse of women’s rights on the continent. Departing from the premise that women’s rights would be better protected and promoted if an “African” approach is adopted, this chapter proposes an Africa-specific framework for gender-responsiveness. Such a framework firstly entails a contextualised view of women, which considers the lived realities of their experiences in the various dimensions of being an African woman. Secondly, it aims to promote a ‘positive cultural context’ for the realisation of women’s rights. A positive cultural context can be achieved by reconciling women’s rights and culture through cultural transformation rather than cultural displacement. Ultimately, the chapter aims to question the automatic correlation of African culture(s) with harm and illustrates that a reconciliation of culture and human rights is possible. Such a reconciliation ensures that a woman in Africa need not be forced to make a choice between her cultural identity and enjoyment of her human rights.

1 Introduction

The African human rights system contains elaborate normative standards for the protection of women’s rights. The most significant of these is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), which is the continent’s principal

* LLB (Catholic University of East Africa), Dip (KSL), LLM (Pretoria), LLD (Pretoria); Human rights lawyer, Gender equality consultant. This chapter is based on the writer’s doctoral research, M Kamunyu ‘The gender responsiveness of the African Commission on Human and Peoples’ Rights’ LLD thesis, University of Pretoria, 2018, completed under the supervision of Prof Frans Viljoen.

women's rights treaty.¹ The Maputo Protocol is elaborate in its breadth and depth of coverage of all categories of human rights for the benefit of women and girls. The Protocol is also celebrated for its innovations in women's rights protection as it is the first legally-binding treaty to address: the right to a medical abortion;² women's rights protection in the context of HIV and AIDS;³ prohibition of harmful practices, and female genital mutilation (FGM) in particular;⁴ among other issues. Despite this elaborate normative framework, in Africa violations of women's rights are flagrant and continuing. Could it be that the "right" approaches to these human-rights standards are not being applied to prevent and remedy violations of women in Africa? (Can square pegs fit in round holes?) In seeking to answer this question, this chapter advances the theory that women's rights can flourish if protected and promoted using an "African" approach. This chapter therefore develops a gender-responsive framework from an African feminist perspective. The framework will prove useful to human-rights treaty bodies, governments, and other stakeholders advocating for women's rights in Africa by enabling them to respond to the actual lived realities of the women in our continent. This chapter identifies the features of the "African" gender-responsive approach, including existing international human rights law approaches which go further to illustrate how such approaches can be infused with "African" perspectives.

- 1 For a brief historical overview and a thematic discussion of the provisions of the Maputo Protocol see F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72. Banda also undertakes a feminist analysis of human rights in Africa including the Maputo Protocol, in F Banda *Women, law and human rights* (2005) at 66-82. For a detailed discussion situating the Maputo Protocol by way of a comparative analysis with existing regional and international women's rights norms as well as how the Protocol enhances the domestic and regional implementation mechanisms, see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington & Lee Journal of Civil Rights and Social Justice* 11. For a critical analysis of its main features advancing merits and demerits, see DM Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* at 63-96. For criticism of the Protocol as needless, holding that the various mechanisms of the AU would have sufficed if fully utilised and a further criticism of the Protocol's failure to consolidate existing standards, see R Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: Modern feminist approaches* (2005) at 253-272.
- 2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) art 14(2)(c).
- 3 Maputo Protocol (n 2) art 14(1)(d) and (e).
- 4 Maputo Protocol (n 2) art 5.

2 African approaches to international law: An ode to Kéba Mbaye

This chapter was originally developed for presentation at the 'Kéba Mbaye Conference on African approaches to international law, with a focus on international human rights law'.⁵ It is therefore fitting to begin with an ode to Mbaye from the perspective of African women's rights. The drafting, adoption, and coming into force of the African Charter on Human and Peoples' Rights (African Charter) was instrumental in prompting the evolution of the African human rights system. Mbaye, for his part, played a significant role in the drafting of the African Charter. While the African Charter is not as gender responsive as it could be – it only has one women's rights-centric provision – its lack of gender responsiveness is despite Mbaye's efforts. A review of the drafting history of the Charter through its drafting history reveals that the first draft – the Mbaye draft⁶ – contained a number of progressive provisions with normative value for women's rights. These did not survive to the final draft. The then article 1 included a non-discrimination clause and in article 1(2), a clause providing as follows:⁷

Where the exercise of any of the rights or freedoms referred to in paragraph 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, *in accordance with their constitutional processes and the provision of this Charter*, such legislative or other measures as may be necessary to give effect to these rights and freedoms.

Such a provision might have been useful in ensuring that the constitutions of African states truly guaranteed non-discrimination. Yet instead, '[m]any post-independence constitutions of African states exempted personal (private) laws (eg marriage, divorce, adoption, burial, inheritance, and succession) from the operation of the non-discrimination principle'.⁸ The Mbaye draft also contained a number of progressive provisions specific to women's concerns that would have undoubtedly enhanced the normative value of the African Charter as regards the promotion and

5 Kéba Mbaye Conference on 'African approaches to international law, with a focus on international human rights law' held at the University of Pretoria, 5-6 December 2018.

6 K Mbaye 'Draft African Charter on Human and Peoples' Rights' reprinted in C Heyns (ed) *Human rights law in Africa* (1999) at 65-77.

7 Mbaye (n 6) 66 (emphasis mine).

8 S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies*, 47-69, at 54.

protection of women's rights. A selection of these provisions appears below:⁹

Article 5

1. Men *and women* have equal economic, social and cultural rights.

Article 6

3. Every person has the right to the enjoyment of just and favourable conditions of work which ensure in particular;
 - (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and *equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.* (ii) ...
 - (b) *Safe and healthy* working conditions.
 - (c) *Equal opportunity for everyone* to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.

Article 8

2. *Marriage* shall be entered into *with the free consent of the intending spouses.*
3. The States Parties shall take appropriate steps to ensure the *equality of rights and the adequate balancing of responsibilities of the spouses, during marriage, and in the event of its dissolution.* In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own interest.
4. The law shall recognise *equal rights for children born out of wedlock* and those born in wedlock.
5. Mothers have the right to special protection during reasonable periods before and after childbirth. They have *the right to paid leave or leave with adequate social security benefits.*
6. All children have the right to a decent and healthy development through education and special medical care. *Such cultural practices harmful to normal growth and development of the child, such as child marriage and female circumcision, shall be abolished.*

It is disappointing that all these provisions in the Mbaye draft failed to materialise in the final draft. A likely explanation may be drawn from the exclusion of women from the drafting process and a lack of recognition or prioritisation of women's concerns. Discussing the history of the African Charter, Beyani notes that '[m]ale attitudes toward the treatment of women have dominated the conception of human rights, and permeated

9 Mbaye (n 6) 66-67 (emphasis mine).

their application to women in a lopsided manner'.¹⁰ There is certainly a correlation between the exclusion of women in the conceptualisation of a human-rights instrument and its consequent inadequacy in addressing women's rights. Of the African Charter, Viljoen observes that the 'negotiations resulting in the OAU Charter and the African Charter were characterised by the absence of any meaningful contribution by women'.¹¹

This contextual exclusion of women makes Mbaye's contributions in favour of women's rights concerns in his draft all the more significant and remarkable. Aside from this recognition, the proposed provisions were themselves progressive and have since been largely included in the Maputo Protocol. Had such feminist foresight from Mbaye decades ahead of the much-acclaimed Maputo Protocol been accepted, women in Africa could possibly have been further along in their quest for equality than in fact they are. Perhaps the inclusion of women's-rights concerns during the formative stages of the African human rights system would have resulted in a more advanced human rights culture today. Mbaye's contributions at the time are also important in disabusing the notion that only women are feminists or can champion women's-rights concerns. For his efforts to "engender" the African Charter, I consider Kéba Mbaye an honorary African feminist.

The remainder of this chapter relies on the works of other eminent African scholars and feminists such as Abdullahi An-Na'im, Sylvia Tamale, Joe Oloka-Onyango, Celestine Nyamu, Martin Chanock, Fareda Banda, and Thandabantu Nhlapo. Their works are relied on to develop an understanding of gender responsiveness from a contextualised African perspective.

3 Developing a contextualised African response to gender responsiveness

This chapter addresses the significant disconnect between the continent's elaborate normative framework for the protection of women's rights on the one hand, and the flagrant abuse of women's rights on the other. One hypothesis proposed is that one of the reasons that could explain

10 C Beyani 'Toward a more effective guarantee of women's rights in the African human rights system' in RJ Cook (ed) *Human rights of women: National and international perspectives* (2012) 288.

11 F Viljoen *International human rights law in Africa* (2012) 249.

this disconnect is that an African¹² approach to the interpretation and implementation of these norms is wanting. In addition, the hegemony of western culture on Africa owing to the realities of colonialism and neo-colonial influences together with the overall cultural-relativist views that challenge the universality of human rights, necessitate an inquiry into the conceptualisation and implementation of women's rights in Africa. Exacerbating these concerns is the exclusion of African perspectives in international human rights law and particularly in the feminist discourse. Cumulatively, all these factors necessitate a contextualised African response to women's-rights concerns in Africa.

With regard to the exclusion of African perspectives, Charlesworth, a foremost international law feminist, acknowledges that feminist analysis of international law requires a more nuanced perspective. She notes: 'Feminists from the developing world have been critical of the wholesale application of western feminist theories to their societies and the creation of monolithic categories such as "Third World women"'.¹³ However, her commitment to diversifying feminist analysis is somewhat disingenuous in that, barely a paragraph later, she cautions:¹⁴

At the same time, I think that it is important not to become paralyzed to the point of total relativism in this project, to insist that feminism disintegrate into a series of local or regional struggles. We should focus at least initially, on areas common in women's experience.

Charlesworth's likening of a diversified perspective of feminism to "disintegration" merely reinforces the hegemony of western feminism. Her suggestion of focusing on areas common to women's experience, clearly a call to sisterhood, is also problematic as the "common areas" would likely be determined by western experience. Oyewumi raises a similar criticism:¹⁵

From its inception, a recurrent criticism of white feminism ... is that white feminists have considered their experience of womanhood in their culture

12 The use of the term 'African' here should not be misconstrued to contribute to the misguided narrative that views Africa as a single homogeneous nation blind to its wide diversity. The term is used here and in this chapter for convenience to present its contrast to predominant western feminist views.

13 H Charlesworth 'Alienating Oscar: Feminist analysis of international law' (1993) 25 *Studies in Transnational Legal Policy* 1 at 4.

14 As above.

15 O Oyewumi 'Introduction: Feminism, sisterhood, and other foreign relations' in O Oyewumi (ed) *African women and feminism: Reflecting on the politics of sisterhood* (2003) at 4.

as the prototype female experience and have used it to define feminism. I contend that the articulation of sisterhood as a framework for cross-boundary feminist relations is very much tied to the use of white women's experiences as the basis for feminist engagements.

Accordingly, western or mainstream feminism emerges as an inappropriate vehicle through which to develop the concept of a contextualised African response. A more useful discourse is one that insists on a more nuanced and contextualised feminism suited to application in Africa. An African feminist perspective should necessarily guide contextualised African responses.

African feminism is well recognised in academic scholarship, 'scholars differentiate between white feminism, black feminism, Western feminism, Third world feminism, and African feminism'.¹⁶ Its place in international feminist discourse is similarly recognised and well-articulated by Oloka-Onyango and Tamale.¹⁷ In examining African perspectives, they cover wide ground in international feminism ranging from affirming women's rights as human rights, to discussing the relevance of relativism. Germane to the present discussion, they note that 'there's a glaring need for the evolution of an endogenous approach to the implementation of women's human rights in Africa'.¹⁸ This approach, or an African feminist response, necessarily involves responding to women's-rights issues in Africa cognisant of the region's context and peculiarities.

In addition to its grounding in African feminism, a contextualised African response is here defined as encompassing two main ideas. First, in being contextualised, it considers the lived realities of women in Africa. Secondly, it promotes a positive cultural context.

3.1 Recognition of the lived realities of women in Africa

A contextualised African response recognises and accordingly responds to the lived realities of women in Africa. This requires recognising the pertinent issues that affect women and the realisation of their rights in Africa. Overall, women in Africa experience violations in almost every sphere ranging from the private to the public. Since it is impossible to be exhaustive in this regard, this chapter depicts one view of women's lived

16 Oyewumi (n 15) 1.

17 J Oloka-Onyango & S Tamale "The personal is political" or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* at 691-731.

18 Oloka-Onyango & Tamale (n 17) 720.

realities through three illustrations. The illustrations selected represent women's-rights violations that specifically affect women in Africa and depict issues that can be said to be pervasive and are yet to find suitable redress.

Violence against women makes its way to the top of the list owing to its pervasiveness, its impact, and the way in which it is insidiously tolerated in certain contexts. It manifests most notably as physical, sexual, psychological and economic abuse. In its wake, it violates a myriad of rights including the rights to dignity, life, health, and physical integrity, as well as having negative social and economic consequences for the women involved and for society in general. The Maputo Protocol defines violence against women as follows:¹⁹

“Violence against women” means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

As violence against women is a form of gender-based violence,²⁰ this means that its roots are drawn from societal gender inequalities. A number of commentators agree, noting that ‘abuse of women and girls, regardless of where and how it occurs, is best understood within a “gender” framework because it stems in part from women’s and girls’ subordinate status in society’.²¹ For that reason, a contextualised African response will mean that any interventions in response to violence against women must aim to address its root causes which are specific to various contexts. This must necessarily mean paying attention to the vulnerabilities that may exacerbate violence against women for certain individuals or groups. ‘For instance, women with disabilities, migrant women, women with non-binary gender identity and sexual minorities can be particularly vulnerable to violence’.²²

19 Maputo Protocol (n 2) art 1(j).

20 The Declaration on the Elimination of Violence against Women in art 1 defines the term violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.

21 L Heise, M Ellsberg & M Gottemoeller ‘Ending violence against women’ (1999) 27 *Population Reports* at 3.

22 African Union Commission & Office of the United Nations High Commissioner for Human Rights *Women’s rights in Africa* (2017) 30.

Women's sexual and reproductive-health rights are heavily compromised in Africa on account of high maternal mortality rates, limited access to safe abortions, and women's disproportionate vulnerability to HIV. Maternal mortality in particular is an African problem. Sub-Saharan Africa has the world's highest maternal mortality rates with women facing a 1:36 lifetime risk of maternal death compared to 1:3 300 in high-income countries.²³ Worse still, most of the causes of maternal death are preventable. A case in point, unsafe abortions account for 'at least 9% of maternal deaths'²⁴ in Africa. These needless deaths can be attributed to restrictive national laws on access to safe abortions. 'As of 2015, an estimated 90% of women of childbearing age in Africa live in countries with restrictive abortion laws.'²⁵ This statistic is in stark contrast to the enabling environment provided by the Maputo Protocol which recognises the right to a medical abortion in a number of instances.²⁶ The import of these grim statistics is that a contextualised African response must take note of this context and respond to it appropriately. In practice, this response may manifest in various ways. One woman's case alleging the violation of her right to a safe abortion can be examined to evaluate whether it is part of a systemic problem. If this is found to be the case, the remedies can also be structured so as to have the broadest impact beyond the specific litigant and so positively change women's lived realities.

Harmful practices against women are highlighted here because of their reputed prevalence and because they are able to violate a startling number of women's rights simultaneously. The Maputo Protocol defines harmful practices as 'all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.²⁷ Some of the most pervasive harmful practices include female genital mutilation (FGM) and child marriage. The practice of FGM is often carried out under the guise of culture, or religion, or both. While the exact number remains unknown owing to the insidious nature of the practice, 'more than 200 million girls and women alive today have been cut in 30 countries in Africa,

23 UNICEF 'Maternal health: Maternal mortality' available at <https://data.unicef.org/topic/maternal-health/maternal-mortality/#> (accessed 17 January 2022).

24 Guttmacher Institute 'Abortion in Africa: May 2016 Fact sheet' available at <https://www.guttmacher.org/fact-sheet/facts-abortion-africa#1> (accessed 17 January 2022).

25 As above.

26 Maputo Protocol (n 2) art 14(2)(c) authorises medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the foetus.

27 Maputo Protocol (n 2) art 1(g).

the Middle East and Asia where FGM is concentrated'.²⁸ FGM has absolutely no health benefits for women and girls, but it does violate their rights to health, dignity, physical integrity, freedom from discrimination, and sometimes even life. Child marriage is similarly pervasive with a prevalence in Africa higher than the global average.²⁹ It violates girls' rights to reproductive health, dignity, physical integrity, education, and freedom from discrimination. It also flies in the face of their best interests and threatens their survival, development, and protection. A contextualised African response in this regard may include targeted interventions for those countries with a particularly high prevalence of a specific harmful practice. It may further include recognising intersectional identities and their impact in exacerbating a harmful practice. To illustrate this intersectionality, in addition to being vulnerable owing to their gender and age, 'the practice of child marriage was found to be most prevalent among young women who live in disadvantaged households, lack school education, and dwell in rural residence.'³⁰ Further, as most of these practices are perpetuated under the guise of culture, any response will also demand a nuanced and innovative engagement with culture as articulated below.

3.2 Enhancing the cultural legitimacy of human rights

Women's rights in Africa interact both positively and negatively with culture. A contextualised African response needs to promote and enable a positive cultural context for the realisation of women's rights in Africa in the face of culturally-based challenges. There is no denying that in its varying perceptions, culture is a major organising factor and enjoys social legitimacy in many African spaces ranging from the private to the public realms. Accordingly, one of the key issues that a contextualised African response must contend with is African culture and its manifestation in varying practices as well as in customary law. With regard to the use of the term "African culture", this chapter adopts Tamale's position:³¹

Reference to 'African culture' is not because I have no sense of the richness and diversity of African people's heritage. I use the term deliberately to highlight

28 WHO 'Female genital mutilation' updated February 2020 available at <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 17 January 2022).

29 UNICEF 'Child marriage is a violation of human rights but is all too common' updated October 2021 available at <https://data.unicef.org/topic/child-protection/child-marriage/> (accessed 17 January 2022).

30 S Yaya, EK Odusina & G Bishwajit 'Prevalence of child marriage and its impact on fertility outcomes in 34 sub-Saharan African countries' (2019) 19 *BMC International Health and Human Rights* at 33.

31 Tamale (n 8) 49.

those aspects of cultural ideology that are widely shared among Africans (e.g. the communitarian, solidaritarian and *ubuntu* ethos), and politically to call attention to the common historical legacies inscribed in cultures within Africa by forces such as colonialism, capitalism, imperialism and globalisation.

In the human rights – and, more particularly, the women's rights discourse – reference to African culture conjures up negative imagery and is equated, and in fact conflated, with harmful cultural practices. This is undoubtedly one of the effects of a western conception of human rights. In some western literature, for example, African culture is presented or misrepresented as being at odds with human rights values.³² A contextualised African response must accordingly negate this automatic and lazy association of African culture with resultant harm to women. Nzegwu cautions that most of what is presented as African culture is actually fraught with misrepresentations. Using the Nigerian Igbo community as an example, she makes the case that early western ethnographers, Christian missionaries, and colonial anthropologists and educationists viewed Igbo families 'through their patriarchal lens and the male-privileging value scheme of Western epistemology'.³³ Propelled by this interpretive scheme, they proceeded to generate descriptions that reinforced their misinterpretation of patriarchy as the organising principle of the Igbo.

Oloka-Onyango and Tamale too, support this view noting that colonialism sought 'to transform existing social, political and cultural

32 See, eg, J Donnelly *Universal human rights in theory and practice* (2003) at 71-86. In his chapter on non-western conceptions of human rights, he makes the culturally arrogant argument that all non-western societies had no concept of human rights. Of traditional Africa in particular, where African scholars have submitted evidence of a concept of human rights, he presents their arguments and dismisses all their works as "irrelevant" arguing that all examples refer to other concepts and practices but not to human rights. Even where he concedes that Africans had personal rights, he makes the rather degrading proposition that for all African societies, these rights were not based on their humanity but rather on other criteria such as age, sex, lineage, achievement, or community membership. He reaches the overall sweeping conclusion: 'Recognition of human rights simply was not the way of traditional Africa, with obvious and important consequences for political practice.' With this last claim, and in other sections of his work, Donnelly not so subtly implies that African societies are, therefore, culturally predisposed to human rights violations. This absurd insinuation is further confirmed by L Volpp 'Feminism versus multiculturalism' (2001) 101 *Columbia Law Review* at 1186-1187 who criticises this insinuation: 'Incidents of sexual violence in the West are frequently thought to reflect the behaviour of a few deviants – rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterise the culture of entire nations.'

33 N Nzegwu *Family matters: Feminist concepts in African philosophy of culture* (2006) at 6.

structures of organization',³⁴ while colonial laws 'superimposed elements which were manifestly alien to the context in which they were introduced'.³⁵ The effect of this persists to this day and has introduced a double jeopardy for women which presents as follows:³⁶

Women were de-equalized – first (alongside the men) through the mechanics of the juridical system imposed by the colonialists which discriminated against “natives” and secondly through the reinterpreted “customary law” that was progressively (re)constructed by the colonialists and specific African men.

Notwithstanding this defence of African culture and its apparent distortion, a contextualised African response cannot be naïve to the negative use of culture in the historical and continuing subjugation of women. Banda, in her article dedicated to Martin Chanock,³⁷ holds that one of 'Chanock's greatest achievements is that he has fostered a greater understanding, within human rights discourse, of culture and tradition as gendered and as needing to be scrutinised for bias'.³⁸ She highlights his views further that 'culture has been branded by states as a means to circumvent or limit their implementation of human rights'.³⁹

Therefore, a contextualised African response must react to these predicaments that accompany African culture, namely, its potential for distortion and propensity for gender bias. A contextualised African response instead offers the promotion of a positive cultural context that can support the realisation of women's rights. As remedy for the distortion of African culture, Nzegwu calls for the emergence of a culture that is rid of 'fictive traditions and ideologies that forced women to adopt a diminished world view'.⁴⁰ She insists that we should do away with 'prevailing anti-female ideology in the culture' having established that its

34 Oloka-Onyango & Tamale (n 17) 723.

35 K Mann & R Roberts *Law in colonial Africa* (1991) at 9 as cited in Oloka-Onyango & Tamale (n 17) 723.

36 M Chanock 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and the Family* at 72-88 and LA Obiora 'Reconsidering customary law' (1993) 17 *Legal Studies Forum* at 217-252 as cited in Oloka-Onyango & Tamale (n 17) 724.

37 F Banda 'This one is from the ladies: Thank you Martin Chanock, honorary African feminist' (2010) 28 *Law in Context: A Socio-Legal Journal* 8-26.

38 Banda (n 37) 15.

39 M Chanock 'Human rights and cultural branding: Who speaks and how' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) at 41-42 as cited in Banda (n 37) 15.

40 Nzegwu (n 33) 21.

basis is fictive.⁴¹ This idea is in line with the very nature of culture, which is fluid as opposed to static and immutable.

Culture's gendered potential for bias alongside its propensity to propagate women's subjugation has over time led to the perceived incompatibility of "culture" and "rights", casting these two notions as polar opposites with the latter taking on a hegemonic stance globally. Accordingly, a contextualised African response which proposes a positive cultural context must confront this predicament from the outset.

There are various reasons why the paradigm of culture and rights is an essential discussion in the African context. To begin with, the emancipatory potential of human rights must necessarily be examined against culture, which is ubiquitous and dictates the lived realities of women in Africa. Tamale captures the heart of the controversy best when she advances:⁴²

If, however, the concepts of 'rights' and 'culture' continue to be viewed as being at odds, it would mean that African women would have to first strip themselves of culture before enjoying their rights.

It is then apparent that in order to strike a balance between gender equality and cultural identity, a contextually African response must reconcile rights with culture. Cowan and others take on this hypothesis from an anthropological perspective with useful insights. When they highlight how 'local concerns continue to shape how universal categories of rights are implemented, resisted and transformed',⁴³ they validate the need for the present discussion. They further illustrate how rights and culture have largely been positioned and debated in binary opposition and warn that 'the debate has tended to exaggerate the irreconcilability of the terms "rights" and "culture"'.⁴⁴ They propose instead other varying positions including: a right to culture, rights as culture, and culture as analytic to rights. These alternatives create a new path and move 'from a focus on supposedly irreconcilable worldviews to that of the inherent tensions between an abstract ideal [rights] and its implementation in the real world [culture], between principle and practice'.⁴⁵

41 As above.

42 Tamale (n 8) 55.

43 JK Cowan, MB Dembour & RA Wilson (eds) *Culture and rights: Anthropological perspectives* (2001) at 1.

44 Cowan, Dembour & Wilson (n 43) at 8.

45 As above.

Cowan and others' concept of a "new path" to reconcile culture and rights is supported by African feminists. Nyamu poses the question: 'Are local norms and practices fences or pathways?'⁴⁶ As if in answer, Tamale asserts that: 'Culture is a neglected pathway to women's justice.'⁴⁷ In an earlier work, Nyamu articulates how human rights can respond to the cultural legitimisation of gender hierarchy.⁴⁸ She cautions against abolitionist approaches that simply call for the abolition of cultural practices that offend human rights and replacing them with international human rights norms. Such an approach is also criticised by African scholars such as Nhlapo who in discussing "culture v human rights", takes issue with an abolitionist approach which presumes that women's rights do not exist in African customary law and inversely that women's rights would only thrive under international human rights law.⁴⁹ In similar vein, Nyamu argues in a subsequent body of work that 'the assumption that local practices offer no basis for women's human rights pre-empts an open-minded assessment of local practice',⁵⁰ an assessment which she believes could 'lead to the recognition and utilization of whatever positive openings are presented by general principles of fairness and justice in a community's value system'.⁵¹ Tamale also cautions that a narrow view that presents culture and rights as invariably opposed and antagonistic, ignores 'the emancipatory potential of culture to enhance the quality of women's lives in Africa'.⁵²

Having established the need to reconcile the concepts of culture and rights as central to advancing women's rights in Africa, a methodology then begs. This calls for the development of the concept of a "positive cultural context" that is the subject of the present discussion. This concept is selected because it intrinsically embraces the reconciliation of culture and rights. How so? On "culture", the concept at first glance propagates the

46 C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' societies' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 126-150.

47 Tamale (n 8) 55.

48 C Nyamu 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41 *Harvard International Law Journal* 381-418.

49 T Nhlapo 'Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South African constitutional debate' (1995) 9 *International Journal of Law and the Family* at 216. For further criticism of the abolitionist approach see AA An-Na'im 'Promises we should all keep in common cause' in J Cohen, M Howard & MC Nassbaum (eds) *Is multiculturalism bad for women?* (1999).

50 Nyamu-Musembi (n 46) 126.

51 As above.

52 Tamale (n 8) 48.

retention or utilisation of culture, which has been established as essential. On “rights”, the concept already exists as a human-rights norm in the African context. In article 17, the Maputo Protocol provides that ‘women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies’.⁵³ A positive cultural concept therefore embraces the ideas of a “right to culture”, “rights as culture” or “culture as analytic to rights” which were earlier proposed as alternatives for reconciling the unworkable “culture v rights” viewpoint.

In developing the model for a positive cultural context, the various seminal works of An-Na'im are instrumental and offer great insights and nuanced discussions of the dynamic between culture and human rights.⁵⁴ In discussing cultural transformation and human rights in African societies, An-Na'im begins by elaborating on what he refers to as the “human rights paradigm”.⁵⁵ Essentially, this paradigm is premised on the idea of international supervision of domestic human rights protection, together with the normative and institutional arrangements for such supervision. This paradigm came about because states cannot be fully trusted to limit their own power in favour of their citizens. International protection, therefore, will ensure bare minima for human rights protection.⁵⁶

In the context of this chapter, this human rights paradigm is represented by the African human rights system with its various norms and institutional arrangements – notably the African Commission on Human and Peoples' Rights (African Commission). The human rights paradigm encounters challenges in the sense that even though it is an international means of ensuring the promotion and protection of human rights at the domestic level, it cannot do so without the co-operation of the state. This is indeed the case in the African human rights system. Despite a proliferation of regional human-rights norms and implementing institutions, states have

53 Maputo Protocol (n 2) art 17(1).

54 See generally: AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990); AA An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1992); AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002); AA An-Na'im 'State responsibility under international human rights law to change religious and customary laws' in RJ Cook *Human rights of women: National and international perspectives* (1994); and AA An-Na'im 'Promises we should all keep in common cause' in Cohen (n 49).

55 AA An-Na'im & J Hammond 'Cultural transformation and human rights in African societies' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 14.

56 As above 14-15.

largely ignored this human rights paradigm⁵⁷ and consequently women's lived realities, as earlier illustrated, still do not reflect the richness of the system. An-Na'im and others propose that a possible solution is to work through cultural transformation. Cultural transformation is defined as:⁵⁸

The dynamics of change as internal processes of societal adaptation by a variety of actors in response to a wide range of stimuli at different levels, rather than simply the product of internal hegemony or external imposition.

The process of cultural transformation is one of simultaneous interaction between the elements of An-Na'im's approach of 'internal discourse' and 'cross-cultural dialogue'. In internal discourse, 'proponents of an internationally recognized human right seek to justify and legitimize that right in terms of their own culture'.⁵⁹ Internal discourse results in deliberations on cultural legitimacy and is premised on the ability of human beings to change their culture. In contrast, those in favour of abolitionist approaches are guided (or misguided) by the belief that local settings where African culture is widely followed are 'the repository for unchanging patriarchal values and ... local norms as bounded, immutable and well settled'.⁶⁰ In fact, the reverse is true – culture is anything but bounded and static. An-Na'im states that 'every culture is constantly changing through the interactions of a wide variety of actors and factors at different levels of society'.⁶¹ In similar vein, Cowan and others advance the following:⁶²

The popular conception that a group is defined by a distinctive culture and that cultures are discrete, clearly bounded and internally homogeneous, with relatively fixed meanings and values – what we call an *essentialist* view of 'culture' – echoes what was until recently a dominant... understanding of 'culture'.

57 See eg GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* at 465-492 and F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1-2 where they highlight states' non-compliance with the findings of the African Commission.

58 An-Na'im (n 55) 13.

59 An-Na'im 1994 (n 54) 179.

60 Nyamu-Musembi (n 46) 145.

61 An-Na'im (n 55) 13.

62 Cowan and others (n 43) 3.

In offering human rights as cultural practice,⁶³ Nyamu-Musembi, another anthropological scholar, also proposes that culture should not be viewed as a bounded element, but rather as fluid and more so as a practice that is embedded in people's lived realities. In showing that culture is multi-vocal, she advances, by way of example, Botswana's celebrated 1990s *Unity Dow* case.⁶⁴ This case elicited mixed reactions and demonstrated that even within a single country, there is no agreement on what amounts to "culture". The unbounded and multi-vocal nature of culture and its dynamic with rights is excellently captured where she asserts:⁶⁵

This culture is itself being vehemently contested, negotiated, and debated. This suggests that the numerous disagreements and conflicts within this debate are not simply unpleasant, external disturbances to an otherwise stable and harmonious "Botswana culture," but rather, constitutive of it. Disagreement and conflict are culture, and in this particular case, the culture of human rights.

Nyamu advances that the understanding of culture as flexible is crucial 'in order to challenge the arguments that deploy culture as a justification for gender inequalities'.⁶⁶ Tamale similarly asserts that cultures are fluid and interactive and that because 'the institution of gender is constructed within the context of 'culture' ... [this] requires that African feminists work within the specificities of culture to realise their goals'.⁶⁷

The discussion above has analogous implications for customary law in legally-plural contexts. Just as in the evolving ideology of culture, the recommendation is to move 'beyond a narrow statist construction of customary law to embrace the actual day-to-day practice of people',⁶⁸ as suggested by Banda. This reconstruction and transformation of culture and customary law can be achieved through internal discourse within each culture. This approach is in harmony with a contextualised African response that seeks to respond to the lived realities of women in Africa.

Cross-cultural dialogue, for its part, can be said to be the process of promoting and sustaining cross-cultural legitimacy for an international

63 AS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 286-315.

64 *Unity Dow v Attorney-General* (1991) BLR 233 HC.

65 As above 305.

66 Nyamu (n 48) 382.

67 Tamale (n 8) 54.

68 Banda (n 37) 11.

system of human rights.⁶⁹ In further reconciling culture and rights, the organs of the African human rights system, such as the African Commission, are called to engage in cross-cultural dialogue. In fact, in this regard, An-Na'im asserts: 'It is neither possible, nor desirable in my view, for an international system of human rights standards to be culturally neutral.'⁷⁰ He warns that cultural neutrality breeds two further difficulties. First, without interpreting human-rights norms with cultural circumstances in mind, it will be challenging for human rights norms to take hold in non-Western societies. Second, where culture is not tested against human rights norms, regressive practices are likely to be retained or propagated.⁷¹ Barring any potential disagreement, therefore, cross-cultural dialogue is undeniably a pragmatic response that provides a suitable pathway to avoid these two unfavourable consequences.

In rejecting cultural neutrality, a question then begs: 'Since different cultures embody different varied moral views, would it not be a form of cultural imperialism to use the standards of one culture to judge another?'⁷² An-Na'im advances the following solution:⁷³

The only way to avoid that charge ... is by developing and applying a collaboratively constructed set of standards that are at least not peculiar to a specific culture, if not equally valid for all cultures. This is what the human rights paradigm should seek to achieve, and is capable of achieving.

To be effective, cultural transformation involves using both internal discourse and cross-cultural dialogue interactively. External actors, such as international human rights actors, state machinery, or civil society can support internal discourse through cross-cultural dialogue with a caveat to neither undermine nor make impositions on the process.⁷⁴

In view of the foregoing, this chapter adds an important caveat from Chaloka Beyani:⁷⁵

69 An-Na'im (n 54) 173-174.

70 An-Na'im (n 54) 173.

71 An-Na'im (n 54) 174.

72 An-Na'im (n 55) 34.

73 As above.

74 An-Na'im (n 54) 179.

75 C Beyani 'Toward a more effective guarantee of women's rights in the African human rights system' in RJ Cook *Human rights of women: National and international perspectives* (1994) 299.

Without recourse to standards of human rights as a guide for modifying custom, the danger is inherent that the general process of modifying custom will largely depend on power relations that disadvantage women in African societies. This is due to the fact custom has traditionally reflected male interests, dominance and power over women.

Admittedly, cultural transformation may not always be feasible in light of its non-hegemonic stance or in instances where there is total irreconcilability of human rights and culture. With respect to the latter, Chanock notes that 'there are features of post-colonial African "cultures" that do not conform with the universalized version of rights rhetoric'.⁷⁶ An-Na'im, while making a strong case for cross-cultural dialogue, nevertheless concedes that where such a dilemma exists, 'consideration can therefore be given to insights gained from other experiences of discourse and dialogue in adjusting and adapting the proposed approach to the circumstances and context of each case.'⁷⁷

Overall, a positive cultural context should enhance the cultural legitimacy of human rights through cultural transformation or other suitable approaches. An-Na'im proffers the feasibility of such a project when he observes:⁷⁸

[T]he increasing availability of human rights norms and institutions as part of the present tool kits of African societies can enhance the possibilities of building strategies of action to promote and protect these rights as a culturally sanctioned objective.

It must also be noted that a positive cultural context as has been developed here goes beyond universalist versus relativist positions. This chapter situates itself in neither school of thought and adopts the stance offered by Cowan and others when they propose:⁷⁹

Rather than seeing universalism and cultural relativism as alternatives one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms.

76 M Chanock 'Human rights and cultural branding: Who speaks and how' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 44.

77 An-Na'im (n 54) 181.

78 An-Na'im (n 55) 25.

79 Cowan and others (n 43) 6.

A similar view by Tamale brings this home when she advises: ‘African feminisms cannot afford the luxury of donning either the universalist garb or the relativist one.’⁸⁰ Accordingly, a positive cultural context traverses this binary in a nuanced manner and employs a delicate balance. On the one hand, wary of the temptation to associate all unexamined African culture with harm, while on the other hand cognisant of the guise under which culture has been deployed by societies and states as a means by which to circumvent women’s rights.

Finally, any lingering scepticism that gender equality can permeate African culture is perhaps reasonable owing to the historical injustices dealt to women while supposedly propagating culture. A useful rejoinder in this regard is offered by Chanock who reminds us that: ‘Gender equality ... could just as well have been described as alien to Western cultures as to non-Western ones ... It is the product of intense political struggle and cultural work, not immanence.’⁸¹

4 Conclusion

In summary, a contextualised African response considers the experiences of women in Africa and promotes the use of a positive cultural context for the realisation of women’s rights. It must also be underscored that the term contextualised “African” response is used here to communicate the idea in principle. In examining gender responsiveness, the analysis of what is “African” should be highly nuanced, taking into account the continent’s multi-state, multi-cultural, and multi-ethnic social structure, and accommodating the diversity of perspectives that often result in intersectional identities for women in Africa.

Further, a contextualised African response to gender responsiveness necessitates human-rights treaty bodies, governments, and other stakeholders advocating for women’s rights in Africa, to make efforts to promote the cultural legitimacy of rights. This approach is in fact sanctioned in a binding treaty – the Maputo Protocol bestows on women the right to a positive cultural context. A contextually African response should accordingly reconcile rights and culture. Human rights actors can achieve this through cultural transformation. As has been argued, such an approach would facilitate women enjoying human rights while not necessarily stripping themselves of their cultural identities.

80 Tamale (n 8) 55.

81 Chanock (n 76) 43.

Overall, my conclusion is that a genuine implementation of gender responsiveness from a contextualised African response, could result in a positive transformation of the practice of human rights in women's rights protection and promotion in Africa.