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Forging a Path for Women's Rights in Customary Law

*Tamar Ezer**

INTRODUCTION

In many countries with a history of colonialism, customary law operates in parallel with statutory law, with customary and religious laws governing family or private life.[1] Customary law determines personal status and property rights and has special implications for women's role in society and ability to shape their destiny. Additionally, as the United Nations Commission on HIV and the Law recognized, customary law impacts women's health and can increase HIV risk.[2] While this article focuses on sub-Saharan Africa, particularly Anglophone countries formerly subject to British colonial rule, it is broadly relevant for other countries that espouse customary law and have plural legal systems.

Addressing customary law is a challenge as it is generally not officially recorded or uniformly applied. In addition, customary law is interpreted

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1. United Nations Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* 63 (2012), http://www.hivlawcommission.org/index.php/report. *See also* Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289, 296 (2008).

2. *HIV and the Law*, *supra* note 1; *see also* Open Society Foundations, *Securing Women's Land and Property Rights: A Critical Step to Address HIV, Violence and Food Security* (2014), http://www.opensocietyfoundations.org/briefing-papers/securing-womens-land-and-property-rights.

differently depending upon the circumstances, the person whom it is applied and the person who is interpreting the law. Although this ambiguity has led to the wide use of customary law to disempower women and promote patriarchy, customary law can also be a source of accessible justice and norms responsive to community needs. Regardless of one's opinion of customary law, it is the law governing the lives of the majority of people on the African continent,[3] and a focus on it is critical to ensure human rights protections for African women are meaningful. This essay outlines both the pitfalls and possibilities of customary law and then proposes a set of essential conditions to forge a path for women's rights, enabling communities to retain customary law's advantages, while navigating its complexity. This draws on cutting edge work with customary justice structures in Kenya and Namibia, recent groundbreaking decisions by courts in Botswana and South Africa and decisions by the U.N. Committee on the Elimination of Discrimination against Women ("CEDAW Committee").

I. THE PROBLEM OF CUSTOMARY LAW

Customary law is used to promote patriarchy and disempower women. The South African Constitutional Court described,

> [t]he [customary law] exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.[4]

The constitutions of countries such as Botswana[5] and Lesotho[6] explicitly include "clawback clauses" exempting customary law from the prohibition against discrimination.[7] Additionally, when ratifying the Convention on the

3. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 8 (Janine Ubink, Thomas McInerney, eds., 2011) (noting that customary law governs the daily lives of more than three quarters of the populations of most African countries). Moreover, most women access justice through customary and informal justice systems in developing countries. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 12, 19 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf.

4. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 78 (S. Afr.).

5. Constitution of Botswana (1966), Section 15(4)(c)(d) (exempting from the prohibition against discrimination customary law and all laws addressing "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law").

6. Constitution of Lesotho (1993), Section 18(4)(b)(c) (exempting from the prohibition against discrimination the customary law of Lesotho and all laws addressing "adoption, marriage, divorce, burial, devolution of property on death or other like matters . . . [of] personal law").

7. However, advocates are challenging the treatment of clawback clauses as wholesale exceptions to the protection of rights, positing that the exception itself should be limited. The Botswana Court of Appeal recently endorsed this view in *Ramantele v. Mmusi*, Case No. CACGB-104-12, Judgment [Botswana Court of Appeal], at para. 80 (Sept. 3, 2013).

Elimination of All Forms of Discrimination Against Women ("CEDAW"),[8] countries such as Lesotho entered reservations exempting themselves from eliminating discrimination in customary practices as they relate to inheritance and chieftainship.[9] Customary law has carved out a space where human rights protections are denied and discrimination can flourish.

Shielding customary law from human rights scrutiny strengthens the existing division of power and penalizes both African women and the most vulnerable populations. It ignores that "culture is constantly contested in a political struggle between those who wish to legitimize their power and privilege and those who need to challenge the status quo in order to redress grievances, realize human dignity, and protect well-being."[10] The South African Constitutional Court acknowledged the negative impact of customary law provisions, nothing that the brunt of such impacts "falls mainly on African women and children, regarded as arguably the most vulnerable groups in our society."[11]

This power dynamic builds on the distortion caused by customary law during the colonial era. Colonial rule "exaggerated and entrenched" customary law's patriarchal bias,[12] strengthening traditional male leaders and "[e]nthroning the male head of the household as the only true person in law, sole holder of family property and civic status."[13] This served the colonists' political and economic aims and fit with their own gender ideology.[14] In most communities, this destroyed the "strong rights of wives

8. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, http://www.unhchr.ch/html/menu3/b/e1cedaw.htm [hereinafter CEDAW].

9. Masupha v. Magistrate, 2013 (Lesotho High Court), at para. 54. Frances Raday, a former member of the CEDAW Committee, charged with its monitoring and enforcement explained, "Many of the practices defended in the name of culture that impinge on human rights are gender specific; they preserve patriarchy at the expense of women's rights." Frances Raday, *Culture, Religion, and CEDAW's Article 5(a)*, in THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 3(2007).

10. Abdullahi An-Na'im, *State Responsibility under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 173 (Rebecca J. Cook ed., 1994).

11. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 32 (S. Afr.).

12. Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACK LETTER J. 197, 201–203 ((2001).

13. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 89 (S. Afr.) (quoting Nhlapo, *African Customary Law in the Interim Constitution, in* THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 162 (Liebenberg ed., 1995).

14. *See* Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom, in South Africa*, 11 UTAH L. REV. 351, 359, 369 (2009) (referencing colonial use of indigenous custom as a way to ensure of cooperation from indigenous leaders, and the utilization of traditional law social control and a steady stream of labor in a time of growing urbanization); *see also* Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289, 297, 299–300 (2008) (pointing to the expediency for colonial authorities of customary law distortions encouraging despotism by indigenous male leaders whose cooperation they needed and to recognition of

to security of tenure and use of land"[15] and women became legally invisible.[16] The South African Constitutional Court recognized that women "were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and at the same time, denied the protection of the formal legal order."[17] In a sense, "[w]omen became 'outlaws.'"[18]

Moreover, customary law was "distorted in a manner that emphasize[d] its patriarchal features and minimize[d] its communitarian ones"[19] by divorcing authority from social responsibility. Male heirs would take over family property, but not family responsibilities, and begin evicting women and children from their home, failing "to administer their respective estates for the benefit of their father's dependents."[20] Widows were also frequently subject to property grabbing by in-laws upon their husband's death.[21]

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only African males as title holders as resonating with the British conception of the family); *see also* INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 21 (Janine Ubink, Thomas McInerney, eds., 2011) ("The colonial state system ... facilitated a strategic simplification of the land tenure system, by enabling certain male leaders to consolidate their control over land ... [T]he foreigners perceptions of property and authority enabled male leaders—who historically have been 'caretakers' of the land—to claim rights wholesale."); *see also* INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), TOWARD CUSTOMARY LEGAL EMPOWERMENT IN NAMIBIA: ENHANCING GENDER EQUALITY IN CUSTOMARY JUSTICE SYSTEMS 8 (Janine Ubink, ed., 2011) ("The colonial rulers' gender ideology was not in consonance with the existence of powerful women. Further, they perceived a strong need to maintain the authority of male elders over women and young people to ensure order and stability.").

15. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 89 (S. Afr.) (quoting Nhlapo, *African Customary Law in the Interim Constitution in* THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 162 (Liebenberg ed., 1995). *See also* Anne Whitehead & Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in sub-Saharan Africa: The Implications of Return to the Customary*, V.3(1,2) J. AGRARIAN CHANGE 73–74 (2003); Laurel L. Rose, *Women's Strategies for Customary Land Access in Swaziland and Malawi: A Comparative Study*, 49(2) AFRICA TODAY, 123, 123 (2002) ("Women's customary access and usage rights to land . . . were either ignored or subsumed under male interests.").

16. Angeline Shenje-Peyton, *Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105, 112–113 (1996) (explaining how colonialism helped lead to perpetual minority for African women).

17. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 89 (S. Afr.) (quoting Nhlapo, *African Customary Law in the Interim Constitution in* THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 162 (Liebenberg ed., 1995).

18. *Id.*

19. *Id.*

20. Magaya v. Magaya, [1999] 3 L.R.C. 36, 46 (Zimb. Sup. Ct.) (quoting Chihowa v. Mangwende, [1987] 1 ZLR 228, at 231–232). *See also* Bhe v. Khayelitsha, 2004 (CC), at 173 (Ngcobo, J., partially dissenting) (quoting Mbatha, *Reforming the Customary Law of Succession*, 18 S. AFR. J. HUM. RTS. 259, 261 (2002)) ("[Poverty and unemployment, together with the failure to look after the interests of the deceased's dependants have distorted the customary law of succession, undermined its protective value to other family members and forced members to assume the heir's responsibilities for looking after the needy, the sick and the aged.").

21. James Thomas, et al., PROTECTING THE LAND AND INHERITANCE RIGHTS OF HIV-AFFECTED WOMEN IN KENYA AND UGANDA: A COMPENDIUM OF CURRENT PROGRAMMATIC

These distortions became socially pronounced as customary law solidified in a growing number of communities in an attempt to adhere to a mythical past:

> At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalization and fossilization . . . .[22]

This ossification was partially due to the sources consulted in defining customary law as the judicial norm is to reference sociological or anthropological authorities in establishing the relevant customary law.[23] However, as noted by the Botswana Court of Appeal, "texts and articles. . . merely record the position of a given custom as it prevailed at a particular point in the life or history of a tribal community but not subsequently."[24] For instance, in *Magaya v. Magaya*, the Zimbabwe Supreme Court turned to two South African treatises to determine Shona customary law—neither of which were written by Shona members or even black Africans.[25] These interpretations are quite removed from the customary practices the court is so concerned about preserving.

The Zimbabwean courts' static notion of customary law differs sharply from the flexible oral tradition it is interpreting. The South African treatise authors acknowledge that the principles and practice of customary law are "subject to variation and differences."[26] This is the case since "indigenous law

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AND MONITORING AND EVALUATION APPROACHES, (Measure ed. 2013); Human Rights Watch, HIDDEN IN THE MEALIE MEAL: GENDER-BASED ABUSES AND WOMEN'S HIV TREATMENT IN ZAMBIA (Dec. 2007); Human Rights Watch, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS-RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA, December 2003; Tamar Ezer, *Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters*, 7 GEORGETOWN JOURNAL OF GENDER AND THE LAW, 599–662 (2006).

22. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 90 (S. Afr.).

23. Jill Zimmerman, *supra* note 11, at 213; Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries*, 41 HARV. INT'L L.J. 381, 414 (2000); *see also* Ramantele v. Mmusi, 2013 (Botswana Court of Appeal), at 79 ("The respondents counsel has drawn the Court's attention to an account of a socio-economic study of the Ngwaketse carried out in 1980 by Ørnulf Gulbrandsen from the University of Bergen, Norway.").

24. Ramantele v. Mmusi, 2013 (Botswana Court of Appeal), at para. 77 (Sept. 3, 2013).

25. Magaya v. Magaya, [1999] 3 L.R.C. 36, 40 (Zimb. Sup. Ct.) (quoting GELFAND & GOLDIN, AFRICAN LAW AND CUSTOM IN RHODESIA 284 and BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 126).

26. *Id.* (quoting GELFAND & GOLDIN, AFRICAN LAW AND CUSTOM IN RHODESIA 284). Likewise, in Kenya, "the details of the cultural aspects that come into play on any issue . . . vary from community to community. Even in a community they may vary from one family to another." KELIN, *Accessing Justice and Protecting the Rights of the Vulnerable through*

is not a fixed body of formally classified and easily ascertainable rules. By its nature it evolves as the people who live by its norms change their patterns of life and "[i]t has throughout history 'evolved and developed to meet the changing needs of the community.'"[27] Similarly, the Botswana Court of Appeal noted that, customary law "develops and modernizes with the times, harsh and inhumane aspects of custom ... discarded" and "more liberal and flexible aspects ... continuously modified."[28] Thus, customary law, as applied in African communities, is meant to change with a community's needs and evolving social practices of the people to whom it is applied.

However, court interpretations of customary law have not allowed for this flexibility and dynamism. As a result, official customary rules have become "increasingly out of step with real values and circumstances of the societies they were meant to serve."[29] As African society has modernized and urbanized, this gap has continued to grow. As Justice Ngcobo explained:

> The cattle-based economy has largely been replaced by a cash-based economy. Impoverishment, urbanization and the migrant labor system have fundamentally affected the traditional family structures. The role and status of women in modern urban, and even rural, areas extend far beyond that imposed on them by their status in traditional society. Many women are de facto heads of their families. They support themselves and their children by their own efforts. Many contribute to the acquisition of family assets.[30]

Thus, the status of women under customary law is often at odds with reality because of the changing roles of women in the modern world. Moreover, with the restructuring of families along nuclear lines, an heir does not always live with all his extended family. He may, therefore, not be best suited to take on the customary social responsibilities that come with the family property even if he wanted to. Instead, he "often simply acquires the estate without assuming, or even being in a position to assume any of the deceased's responsibilities."[31]

The complexity of customary law is marked both by its definition as well as its application. Primarily, the lack of codification has led to inconsistent interpretations of what truly is customary law. As the South African

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Cultural Structures: A Tool on Working with Elders in a Community 2, http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf.

27. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 81 (S. Afr.) (quoting Alexkor Ltd. v. Richtersveld Cmty., 2003 (BCLR) 1301 (cc) at 53 (S. Afr.).

28. Ramantele v. Mmusi, Case No. CACGB-104-12, Judgment [Botswana Court of Appeal], at para. 77 (Sept. 3, 2013); *see also id.* at para. 26 (Kirby, J., concurring) ("There are two outstanding characteristics of customary law, namely its evolutionary nature and its flexibility."); Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 511(2002) (pointing to the flexibility and adaptability of African customary law).

29. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 82(S. Afr.).

30. *Id.* at para. 221 (S. Afr.) (Ngcobo, J., partially dissenting).

31. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 80 (S. Afr.).

Constitutional Court described, local adaptations are "ad hoc and not uniform."[32] Meanwhile, "magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society."[33]

Further, the state-enforced application of customary law to specific groups is often discriminatory. This is largely because the application relies on choice of law provisions that channel black Africans into a separate and discriminatory system, perpetuating ghettoization under colonial rule. As the South African Constitutional Court explained, "[P]eople are still treated as 'blacks' rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin and skin colour."[34] In Tanzania, statutes require that customary law regulate succession for "a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted."[35] Thus, women of African origin are deprived of inheritance based on their gender and ethnicity. In Lesotho, discrimination against Africans is even more explicit. Africans cannot write a will and decide on the administration of their estates unless they can show that they "have abandoned tribal custom and adopted a European mode of life."[36] Such choice of law provisions are "specifically crafted to fit in with notions of separation and exclusion of Africans from people of 'European' descent."[37] This forms a kind of legal apartheid where the state forces discriminatory and ossified customs upon black Africans, and customary law becomes "an instrument of segregation and domination."[38]

Discriminatory choice of law provisions that mandate the application of customary law to specific groups are further not saved by the option to write a will. As the South African Constitutional Court pointed out, this would only allow "those with sufficient resources, knowledge, education or opportunity" to "extricate themselves" and benefit from this option.[39] Moreover, a well-established principle of equal protection is the insufficiency of the ability to opt out if a discriminatory law is in question. In *Kirchberg v. Feenstra*, the United Sates Supreme Court struck down a statute enabling the husband to unilaterally dispose of joint property unless the wife takes certain steps to protect her interests, highlighting that "the absence of an insurmountable barrier will not redeem an otherwise

32. *Id.* at para. 87 (S. Afr.).

33. *Id.*

34. *Id.* at para. 64 (S. Afr.) (quoting Mosenke v. The Master, 2001 (2) SA 18 (CC), at para. 21).

35. Tamar Ezer, *Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters*, 7 GEO. J. GENDER & L. 599, 607 (2006).

36. Masupha v. Magistrate, Case No. 5/2010, Judgment [Lesotho High Court], ¶ 40 (May 3, 2013) (citing Administration of Estates Proclamation 19 of 1935).

37. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 82 (S. Afr.).

38. Evadné Grant, *Human Rights, Cultural Diversity and Customary Law in South Africa*, 50 JOURNAL OF AFRICAN LAW 1, 15 (2006).

39. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 66 (S. Afr.).

unconstitutionally discriminatory law."[40] Discriminatory customary law also faces women with an untenable choice, as articulated by Abdullahi An-Na'im, "between enduring inequality and discrimination in order to enjoy many vital benefits of membership in their own communities, or abandoning all that by opting-out of the community in order to enjoy equality and freedom from discrimination with the wider state society."[41]

Additionally, the application of customary law raises critical questions as to who interprets it and the boundaries of their authority. In 2012, the South African government introduced a Traditional Courts Bill, which would have bestowed vast powers on local chiefs as presiding officers in traditional courts, providing them with jurisdiction over a wide range of issues, including criminal offenses; permitting them to enforce sanctions, such as forced labor; leaving little room for community involvement in dispute resolution; and allowing for only limited appeal and no opt out provision.[42] In effect, this would have created a separate legal system for 17 million people living in rural South Africa. Not surprisingly, it was widely criticized as unconstitutional for entrenching the autocratic power chiefs had under apartheid at the expense of women and other vulnerable groups and was finally withdrawn.[43] As this reflects, procedure is as important as substance in preventing abuse and protecting women's rights.

II. THE POTENTIAL OF CUSTOMARY LAW

Despite the difficulties with customary law, it also has some important advantages. Customary law is flexible and sensitive to context and can be a creative source of norms and practices responsive to community needs.[44] At its heart, it promotes communal values, creating "a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and belonging to its members."[45] It can thus fill gaps in the formal legal system, complementing and strengthening it.

In addition to its substantive provisions, customary law brings with it

40. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

41. Abdullahi An-Na'im, *State Responsibility under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 180 (Rebecca J. Cook ed., 1994).

42. The Republic of South Africa, Traditional Courts Bill [B1-2012], http://www.justice.gov.za/legislation/bills/2012-b01tradcourts.pdf.

43. "Traditional Courts Bill is Dead!" Media Statement by the Alliance for Rural Democracy, Feb. 21, 2014, http://www.customcontested.co.za/traditional-courts-bill-dead/; *see also* The Traditional Courts Bill: Examining the Gaps, 14(1) LOCAL GOVERNMENT BULLETIN 16 (2012).

44. Mayelane v. Ngwenyama, 2013 (4) SA 415 (CC), at para. 24 (S. Afr.); INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 20 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf.

45. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 45 (S. Afr.); *see also* Ramantele v. Mmusi, 2013 (Botswana Court of Appeal), at para. 28 (Kirby, J., concurring) (pointing to the "overall objective" of customary courts "to achieve reconciliation and consensus among the disputants.").

community justice structures useful for resolving disputes. Courts are not the best solution for most disputes.[46] They are expensive, time consuming, and hard to reach outside city centers. Court cases are also inherently adversarial, exacerbating tensions.[47] For instance, Kenya Legal and Ethical Issues Network on HIV and AIDS ("KELIN"), which works with HIV affected widows who have been kicked of their land in western Kenya, reports that even with a positive court decision, it is difficult for a widow to come back and live with her family.[48] Customary justice structures, by contrast, emphasize amicable resolution and the restoration of harmony. As the South African Constitutional Court explained, "Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements."[49]

III. CHARTING A WAY FORWARD

Effectively navigating the complexities of customary law can turn it into an asset. In order to benefit from customary law's advantages, while avoiding its pitfalls, it must operate within a human rights framework with careful attention to its definition, development, and application.

A. CUSTOMARY LAW AND HUMAN RIGHTS

Critically, customary law must engage with human rights norms. There needs to be a dialogue between local culture and international human rights standards, enriching both and engaging "all cultural traditions in the process

46. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf. Even in settings like the United States, there is a need for more cost effective and efficient resolution of disputes at community level or through small claims courts with the option of a court case as a last resort.

47. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 16–17 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf; INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 8 (Janine Ubink, Thomas McInerney, eds., 2011).

48. Tamar Ezer, *Innovating Justice for Widows in Kenya*, Open Society Foundations, http://www.opensocietyfoundations.org/voices/innovating-justice-widows-kenya (Sept. 21, 2012); Catherine Muyeka Mumma, *Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures: A Tool on Working with Elders in a Community*, KELIN, 4 (2010), http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf; *see also* INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 16 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf (noting that "when a woman succeeds in court, she may subsequently face threats of violence, altercations, beatings and murder").

49. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 45 (S. Afr.); *see also* Mayelane v. Ngwenyama, 2013 (4) SA 415 (CC), at para. 24 (S. Afr.).

of promoting and sustaining" a global human rights consensus.[50] Custom should not be seen as a separate sphere based on a flawed distinction between public and private space. As the women's movement has proclaimed, "the personal is political."[51]

Thus, culture cannot be used as an excuse to justify discrimination and deny certain people basic human rights protections. CEDAW calls on states "[t]o take all appropriate measures . . . to modify or abolish . . . customs and practices which constitute discrimination against women,"[52] including addressing "the social and cultural patterns of conduct of men and women."[53] This is echoed in the African human rights system by the Maputo Protocol, requiring states to "commit themselves to modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."[54] The African Charter on the Rights and Welfare of the Child likewise mandates "all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child . . . ."[55]

Just this March 2015, the CEDAW Committee, the U.N. body responsible for monitoring state compliance with CEDAW, decided *E.S. and S.C. v. Tanzania*, its first case on discriminatory customary law denying women equal access to property and inheritance rights. This landmark case, brought by two Tanzanian widows, challenged discriminatory provisions of Tanzanian customary law codified in 1963 and in force in 30 districts. The Committee held that "by condoning such legal restraints on inheritance and property rights," the State "has denied the authors' equality in respect of

50. Abdullahi An-Na'im, *State Responsibility under International Human Rights Law to Change Religious and Customary Laws*, *supra* note 41, at 173. Abdullahi An-Na'im further describes the relationship between international human rights standards and local culture as "a genuinely reciprocal global collaborative effort." *Id.*

51. Linda Napikoski, *The Personal Is Political*, http://womenshistory.about.com/od/feminism/a/consciousness_raising.htm; *see also* Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries*, 41 HARV. INT'L L.J. 381, 391 (2000) (explaining how feminists have challenged the public/private distinction, "noting that violations against women occur mainly in the private sphere, and refusal to intervene perpetuates structures that deny women equal enjoyment of rights"); *see also* Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289, 316–320 (2008) (describing the flawed public/private dichotomy and how it has harmed women).

52. CEDAW, Art. 2(f).

53. CEDAW, Art. 5(a).

54. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 2(2), July 11, 2003, http://www.au.int/en/sites/default/files/Protocol%20on%20the%20Rights%20of%20Women.pdf (last visited Oct. 4, 2015) [hereinafter Maputo Protocol].); *see also id.* at art. 17(1) ("Women shall have the right to live in a positive cultural context.").

55. African Charter on the Rights and Welfare of the Child, art. 21(1), Nov. 29, 1999, http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf (last visited Oct. 4, 2015).

inheritance and failed to provide them with any means of economic security or any form of adequate redress."[56]

Customary law is similarly subject to constitutional scrutiny and, in fact, derives official authority from a country's constitution. For instance, under the South African Constitution, "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community . . . to enjoy their culture, practice their religion and use their language" but these rights "may not be exercised in a manner inconsistent with any provision of the Bill of Rights."[57] Thus, as the South African Constitutional Court clarified, "as with all the law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."[58] Kenya's Constitution echoes these principles as well.[59] In fact, in its 2015 report, the U.N. Working Group "on the issue of discrimination against women in law and in practice," highlights the benefits of formal constitutional recognition of indigenous law and courts, "requiring the legal systems of indigenous communities to respect and enforce women's rights."[60] As a result, a country's constitution both establishes the authority of customary law, and yet, also limits its application.

Customary law requires development to comply with human rights and constitutional provisions and respond to the current needs of communities. The South African Constitution specifically calls upon "every court, tribunal or forum" to develop both common and customary law in accordance with "the spirit, purport and objects of the Bill of Rights."[61] Thus, rather than simply striking down customary law, when possible, as Justice Mokgoro explained, the tension between customary law and the right to equality is eased "by a harmonization process that draws from our rich cultural values."[62] This avoids the development of parallel legal systems—a formal

56. Comm. on the Elimination of Discrimination Against Women, E.S. and S.C. v. Tanz., U.N. Doc. Tanzania, CEDAW/C/60/D/48/2013, at para. 7.9 (2015).

57. Const. of the Republic of S. Afr., May 8, 1996, sec. 31; *see also id.* at sec. 31; South Africa Constitution, Section 30 ("Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.").

58. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 46 (S. Afr.); *see also* Mayelane Ngwenyama, 2013 (4) SA (415) ("[L]iving customary law reflects the rights and values of the Constitution from which it draws its legal force.").

59. Const. of Kenya Aug. 27, 2010, art. 2(4) ("Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."). The Constitution further clarifies that "[t]raditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights" or is "inconsistent" with the Constitution or any written law. *Id.* at art. 159(3).

60. Rep. of the Working Group on the issue of discrimination against women in law and in practice, U.N. GAOR Hum. Rts. Council, U.N. Doc. A/HRC/29/4056, at para. 56 (Apr. 2, 2015).

61. Const. of the Republic of S. Afr., May 8, 1996, sec. 39(2).

62. Justice Yvonne Mokgoro, *The Impact of South Africa's Constitutional Court on Gender Equity: A Case Law Approach*, Presentation at Congressional Breakfast on the Impact of South Africa's Constitutional Court on Gender Equity (Apr. 13, 2005) at 16; *see also* Frances Raday, *Culture, Religion, and CEDAW's Article 5(a)*, The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination against Women, at p. 3 (Hanna Beate

legal system recognizing women's equality but not applied in practice and an informal, discriminatory system, which is actually applied.[63]

Customary justice structures thus also have an important role in protection of human rights. In 2009, KELIN pioneered a new approach partnering with customary justice structures in Homabay and Kisumu Counties in Kenya, high HIV prevalence areas where many young widows are kicked off their land and left homeless and destitute by their in-laws. KELIN helped reconstruct community-based mediation systems so that they respect human rights and Kenyan law and could reinstate property to widows. Human rights trainings for both community elders and widows are a core component of this project. KELIN's trainings were particularly well-received by the Luo Council of Elders, which now seeks to incorporate a human rights perspective in their work and transform practices that negatively impact on women and conflict with Kenyan laws. Over the past six years, KELIN has taken on 299 cases involving disinheritance, of which the 216 have been successfully resolved with women and children back on their land. Cases on average take only three months to resolve, compared to three years and the unpredictable outcomes of court cases.[64] The United Nations Global Commission on HIV and the Law applauded KELIN's groundbreaking work, noting, "Perhaps the most promising route to change is adaptation of traditional legal systems to promote equality for women and their children and recruitment of respected community members to mediate inheritance disputes between widows and their in-laws."[65] To share this approach and hopefully lead to broader change, KELIN has developed a tool providing step by step guidelines on how to engage customary structures in advancing human rights.[66]

One critical aspect of KELIN's approach is the provision of human rights trainings to both community elders and widows. Community elders are often eager for training and development, providing an opening for human rights engagement.[67] The community shapes the environment in which customary

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Schöpp-Schilling & Cees Flinterman eds., 3 (2007)) ("The traditionalist cultures accord with a perception of culture as a relatively static and homogeneous system, bounded, isolated, and stubbornly resistant. The contrasting view regards culture as adaptive, in a state of constant change, and rife with internal conflicts and inconsistencies. Where an adaptive culture accepts the human rights demand for gender equality, there will be a process of interactive development rather than confrontation.").

63. Lorenzo Cotula, *Gender and Law—Women's Rights in Agriculture*, 76 Food and Agric. Org. of the U.N. Rome, 2002 at 166.

64. Tamar Ezer, *supra* note 48; *see also* BRINGING JUSTICE TO HEALTH: THE IMPACT OF LEGAL EMPOWERMENT PROJECTS ON PUBLIC HEALTH 16-17 (Sebastian Krueger ed., 2013), http://www.opensocietyfoundations.org/reports/bringing-justice-health.

65. United Nations Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012), http://www.hivlawcommission.org/index.php/report.

66. Catherine Muyeka Mumma, *Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures: A Tool on Working with Elders in a Community*, KELIN, 4 (2010), http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf. [hereinafter KELIN]

67. *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*,

justice structures operate and plays an important role in their monitoring and accountability, requiring knowledge of basic rights.[68] This is captured as a key lesson in IDLO's (International Development and Law Organization) reflections on access to justice projects for women: "When women are informed of their rights and encouraged to discuss and challenge informal laws and practices, they can put pressure on customary justice systems to better protect basic rights. In turn, this can reduce power imbalances and elite capture and improve the transparency of local government decision-making."[69] In *E.S. and S.C. v. Tanzania*, the CEDAW Committee recognized this importance of human rights training, recommending both relief to the individual applicants, as well as "mandatory capacity-building for judges, prosecutors, judicial personnel, and lawyers" and "awareness-raising and education measures to enhance women's knowledge of their rights."[70] These measures are essential to ensure good law and court decisions actually impact the reality of women's lives.

B. DEFINING CUSTOMARY LAW

However, the foundational question is how customary law is defined in the first place. This is fundamentally a task for communities, respecting their agency and right to self-determination, as recognized by the African Human Rights Charter.[71] Moreover, as Sanele Sibanda explains, "If customary law is rightly conceptualized in cultural terms, then there is the need to democratize . . . it . . . so that those closest to it have the means to determine its content and its relevance to their lives, or equally to reject it when it no longer resonates with their sense of self."[72]

The community must thus undertake some way of indicating its essential customs. Before KELIN could start work with community justice structures to reinstate land to widows, they held a series of community dialogues to

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UNITED NATIONS, 23 (2012), http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf.

68. KELIN's methodology "emphasizes participatory and people centered approaches where the vulnerable are empowered to know their rights and demand or negotiate for protection against violations." Mumma, *supra* note 66, at 7.

69. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 8 (2013), http://ww.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf; *see also* INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 15 (Janine Ubink, Thomas McInerney, eds., 2011).

70. Comm. on the Elimination of Discrimination Against Women, E.S. and S.C. v. Tanz., U.N. Doc. Tanzania, CEDAW/C/60/D/48/2013, at para. 7.9 (2015).

71. African Charter on Human and Peoples' Rights, art. 20(1), June 27, 1981, http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf (last visited Oct. 4, 2015).

72. Sanele Sibanda, *When is the Past Not the Past? Reflections on Constitutional Law under South Africa's Constitutional Dispensation*, 17 HUM. RTS. BRIEF 31, 34 (2010); *see also* Johanna E. Bond, *Gender Discourse and Customary Law in Africa*, 83 S. CAL. L. REV. 509, 6 (2010) (pointing out that in addition to being dynamic, customary law is highly contested, which makes it well-suited for democratic deliberation).

identify core community values and the practices that should apply in these cases. These dialogues involved the elders, as wells as the widows themselves and other community leaders.[73] Similarly, when Owambo traditional communities in Namibia set about codification of their customary law, they engaged in a process of assessment and reflection, harmonizing their laws and ensuring they met constitutional requirements.[74] As part of this process, they unanimously affirmed widows' right to their land and homes and abolished property grabbing.[75]

There is debate as to whether the codification of customary law is fundamentally good or bad. The South African Constitutional Court characterizes customary law as fundamentally unwritten,[76] drawing a distinction between living customary law and the customary law encapsulated in textbooks, codes, and court cases.[77] Because official customary law fails to account for the dynamism and change in society, it is "generally a poor reflection, if not a distortion of the true customary law."[78] Courts are thus tasked with determining "whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency."[79]

However, this is not an easy task for a court not well versed in the particular customs it is determining. Consequently, interpretations may differ depending on the judge, leading to arbitrary and unjust differences. This undermines the legitimacy of authority, which requires predictability, or "a reasonable expectation that the rules of tomorrow are going to be roughly the same rules as today."[80] Even while the South African Constitutional Court rejects codification, the Court acknowledges "the need for flexibility and development must be balanced against the value of legal certainty" and "respect for vested rights."[81] Moreover, when a court relies on local experts for assistance, their impartiality may be difficult to assess, particularly when norms are contested and variations exist.[82] In fact, studies

73. Tamar Ezer,*supra* note 48; KELIN, *Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures: A Tool on Working with Elders in a Community* 7–15, http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf.

74. Janine Ubink, *Toward Customary Legal Empowerment in Nambia; Enhancing Gender Equality in Customary Justice Systems*, INT'L DEV. AND L. ORG. 15 (2011).

75. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 27, 33 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf.

76. Alexkor Ltd. v. Richtersveld Cmty., Constitutional Court of South Africa, ¶ 53 (Dec. 14, 2003), http://www.saflii.org/za/cases/ZACC/2003/18.pdf (BCLR).

77. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 86–87 (S. Afr.).

78. *Id.* at para. 86.

79. *Id.* (quoting BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 64 (Juta & Co., Ltd., Cape Town 1997)).

80. MALCOLM GLADWELL, DAVID & GOLIATH: UNDERDOGS, MISFITS AND THE ART OF BATTLING GIANTS 208 (2013).

81. Mayelane v. Ngwenyama, 2013 (4) SA 415 (CC), at para. 45 (S. Afr.).

82. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 13 (Janine Ubink, Thomas McInerney, eds., 2011).

show that in colonial Kenya, information provided by elders on customary law in expert panels led to the institution of rules that permanently favored them to the disadvantage of women and junior men.[83]

Additionally, the lack of codification is particularly problematic for women. When customary law is not well defined, conflicts between customary law and human rights requirements are difficult to identify and address. With fewer resources than men to push for realization of their rights, women are particularly disadvantaged by ambiguity in customary law.[84]

Thus, codification can be quite valuable, as long as a few conditions are met: (1) it complies with human rights, as discussed above, (2) it is rooted in community engagement, (3) the focus is on core values, and (4) there is a process for customary law's ongoing development. Codification should incorporate a human rights analysis and the rights-based principles of participation, accountability, nondiscrimination, and empowerment.[85] True community engagement in defining customary law is critical to allow for input from multiple perspectives, including women, the marginalized, and youth.[86] Indeed, under the Maputo Protocol to the African Human Rights Charter, women have the right "to participate at all levels in the determination of cultural policies."[87] Relying only on chiefs and other elites may lead to biased representation, and hence, leave out many voices and edit out customary law's variety.[88] Moreover, the role of traditional leaders should not be overplayed—they may not actually enjoy the power they

83. *Id.*; *see also* Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289, 298 (2008) (describing how witnesses, who were usually male elders, offered interpretations favorable to their position).

84. Andrew P. Kult, *Intestate Succession in South Africa: The "Westernization" of Customary Law Practices within a Modern Constitutional Framework*, 11 IND. INT'L & COMP. L. REV. 697, 710–11 (2001) (describing how ambiguity in customary law can work against women and particularly widows, "rarely in apposition to enforce their rights"); *see also* Laurel L. Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation*, 13 TEX. J. WOMEN & L. 197, 250 (2004) (describing the difficulties for women caused by legal uncertainties in customary law).

85. FXB CENTER FOR HEALTH AND HUMAN RIGHTS & OPEN SOCIETY FOUNDATIONS, HEALTH AND HUMAN RIGHTS RESOURCE GUIDE 1.31 (2013) (defining the key elements of the human rights-based approach), http://fxb.harvard.edu/wp-content/uploads/sites/5/2013/09/HHRRG-master.pdf.

86. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 8 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf (explaining how when "women are provided with a forum to discuss and [re]interpret cultural or legal rules," this can lead to "positive transformation").

87. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 17(1). In *E.S. and S.C. v. Tanzania*, the CEDAW Committee recommended dialogue and consultations between civil society, women's organizations, and local authorities, including traditional leaders, to reform customary law and remove discriminatory provisions. CEDAW/C/60/D/48/2013, at para. 9(v) (March 2015).

88. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 11 (Janine Ubink, Thomas McInerney, eds., 2011); Jill Zimmerman, *supra* note 11, at 203.

claim.[89] In this way, codification should not be a mere anthropological exercise or an attempt to reclaim a mythical past. Rather, it is an opportunity for a community to delineate its values and the society it would like to be, as in the Owambo example. Forgoing community engagement, codifications of customary law can exacerbate inequalities. Indeed, this was the case with the colonial codification project. Under colonial rule, male heirs and chiefs consolidated their authority at the expense of women and other family members.[90] As Jill Zimmerman explains, these codifications were "produced through processes that privileged elite male responses ... as singularly culturally 'authentic,'" leaving out "the competing cultural experiences of women and youth."[91] The codification of Tanzanian customary law, which provides for guardianship over adult women, is a case in point.[92] For instance, under one egregious provision, "The widow has no share of inheritance if the deceased left relatives of his clan. Her share is to be cared for by her children."[93] Women are thus denied property in their own right and relegated to the position of minors. These codifications not only exacerbated inequalities, but failed at their very aim of capturing a community's guiding customs, creating a gap between official records and practice.

This is in sharp contrast to self-codification projects, such as that undertaken by the Owambo. The Owambo codification project impacted practice and actually reflects the principles currently guiding dispute resolution.[94] In a study, almost all respondents agreed that the recording of customary law made traditional court decisions fairer, enhancing certainty, predictability, and harmonization among various courts.[95] Traditional

89. "Many of the supposed tents of African land tenure, . . . the place of chiefs and elders, have been shown to have been largely created and sustained by colonial policy." Anne Whitehead & Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in sub-Saharan Africa: The Implications of Return to the Customary, V.3* (1, 2) J. AGRARIAN CHANGE 75 (2003); *see also* Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 UTAH L. REV. 351, 369 (2009); Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289, 299–300 (2008).

90. Zimmerman, *supra* note 11, at 200–04 (describing codification in the British Colony of Natal in 1878 by an all-white board which "explicitly strengthened patriarchal leaders and the vertical bonds of hierarchy that supported and legitimated their rule").

91. Zimmerman, *supra* note 11, at 203.

92. Tamar Ezer, et al., *Child Marriage and Guardianship in Tanzania: Robbing Girls of Their Childhood and Infantilizing Women*, 7 GEO. J. GENDER & L. 357 (2006).

93. Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, sched. 2, Laws on Inheritance [Sheria za Urithi], *in* Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358 R.E. 2002], rule 27.

94. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 24, 132–133 (Janine Ubink, Thomas McInerney, eds., 2011); INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), TOWARD CUSTOMARY LEGAL EMPOWERMENT IN NAMIBIA: ENHANCING GENDER EQUALITY IN CUSTOMARY JUSTICE SYSTEMS 34-35 (Janine Ubink, ed., 2011).

95. IDLO, CUSTOMARY JUSTICE, *supra* note 94, at 141–142; INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), IDLO, TOWARD CUSTOMARY LEGAL EMPOWERMENT, *supra* note 94, at 30, 35.

leaders reported that the written laws increased the legitimacy and acceptability of their decisions.[96] An additional effect of the codification project was the "significantly enhanced legal knowledge of local villagers."[97]

Additionally, in defining customary law, the focus should be on core concepts and values and the rationale behind particular rules and practices. Practices, in any case, are generally not uniform, and a custom "may have one of various acceptable manifestations."[98] With its diversity, customary law itself can serve as a source of "untapped richness" for its further development.[99] This is because customary laws "are less rule frameworks than sets of principles tailored to specific contexts and malleable in changing circumstances."[100] Communities should thus focus on defining key principles to guide dispute resolution. In the Owambo project, the aim was not comprehensive codification, but rather the recording of substantive and procedural norms considered of particular importance.[101]

Finally, there must be provision for customary law's continuing reform and development. Codification does not signify immutability, inscribing customary law into stone. It is not codification alone, but codification without a process for change, that is dangerous. Even codified Tanzanian customary law at least clarifies rights, providing an opening for human rights challenges and evolving customs discriminating against women. In fact, two Tanzanian women did exactly that in *E.S. and S.C. v. Tanzania*, taking their case all the way up to the CEDAW Committee, which found these discriminatory customary provisions in violation of human rights norms and Tanzania's obligations.[102]

C. DEVELOPING CUSTOMARY LAW

Over the last few years, a number of interesting initiatives focusing on customary law's development have emerged. These initiatives point to roles for both the community and its institutions in shaping customary law, a core component of a society's heritage.

As the KELIN and Owambo examples show, the community can play an important role in developing customary law. The African Human Rights Charter explicitly recognizes the rights of all people to social and cultural development.[103] Indeed, at critical moments, communities may decide to take stock and set up a process to steer the development of their customary law.

However, on a daily basis, customary justice structures are best placed to

96. IDLO, CUSTOMARY JUSTICE, *supra* note 94, at 142–143; IDLO, TOWARD CUSTOMARY LEGAL EMPOWERMENT, *supra* note 94, at 31, 35.

97. IDLO, CUSTOMARY JUSTICE, *supra* note 94, at 142–143.

98. Mayelane v. Ngwenyama, 2013 (4) SA 415 (CC), at para. 51 (S. Afr.).

99. *Id.* at para. 50.

100. IDLO, CUSTOMARY JUSTICE, *supra* note 94, at para. 5.

101. *Id.*; IDLO, TOWARD CUSTOMARY LEGAL EMPOWERMENT, *supra* note 94, at para. 10.28.

102. E.S. and S.C. v. Tanzania, CEDAW/C/60/D/48/2013 (March 2015), http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/JurisprudenceSession60.aspx.

103. African Charter on Human and Peoples' Rights, art. 22(1), June 27, 1981, http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf (last visited Oct. 4, 2015).

develop customary law. Steeped in the relevant culture and close to community needs, their resolution of diverse cases should be a creative source of norms and solutions responsive to the times. For this to occur, however, there needs to be a mechanism for capturing their decisions and analyzing them to identify trends. Furthermore, a documentation component would critically enable monitoring of decisions to ensure respect for human rights.[104]

Additionally, as discussed above, the courts can help develop customary law. As the Botswana Court of Appeal instructed, prior to declaring a customary law unconstitutional, a court "must first consider whether no proper construction which is consistent with the Constitution can be given to that law."[105] Justice Ngcobo from South Africa elaborated on the importance of this role:

> Where a rule of indigenous law deviates from the spirit, purport and object of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation. This obligation is especially important in the context of indigenous law. Once a rule of indigenous law is struck down, that is the end of that particular rule. Yet there may be many people who observe that rule, and who will continue to observe that rule. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law.[106]

Two recent groundbreaking decisions in South Africa and Botswana show how this could work. In 2013, the South African Constitutional Court developed customary law for the first time. In *Mayelane*, it developed Xitsonga customary law to include a requirement of a first wife's consent for the validity of a husband's marriage to subsequent wives "in accordance with the dignity and equality demands of the Constitution."[107] In *Ramantele*, also decided in 2013, the Botswana Court of Appeal held that Ngwaketse

104. Report of the UN Working Group on the issue of discrimination against women in law and in practice, A/HRC/29/40, at para. 58 (Apr. 2, 2015) ("To ensure more effective application of the principle of equality, State monitoring and oversight bodies must be put in place, as has been done in Canada, Colombia and South Africa.")

105. Ramantele v. Mmusi, Case No. CACGB-104-12, Judgment [Botswana Court of Appeal], at para. 58 (Sept. 3, 2013); *see also* Manu Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 87, 92 (2011) (pointing to the potential crucial role to be played by courts in interpreting customary law in accordance with human rights norms).

106. Bhe v. Khayelitsha, 2004 (1) SA (CC), at para. 215 (S. Afr.) (Ngcobo, J., partially dissenting). In the landmark *Bhe* case, the Court took a different route and struck down customary intestate succession laws, which limited inheritance to the eldest male descendent, as unconstitutional and violating equality and dignity.

107. Mayelane v. Ngwenyama, 2013 (4) SA 415 (CC), at para. 13 (S. Afr.). However, the court failed to consider that in practice men marry more than one wife, and in many cases, a wife does not know that she is in a polygamous marriage. While encouraging the development of customary law through the courts, it is important to reflect on how this filters through to women's lived reality.

customary law allows for inheritance by girls.[108] In reaching this decision, the Court referred to current equality values and "the increased leveling of the power structures with more and more women heading households and participating as equals with men," resulting in "no rational and justifiable basis for sticking to the narrow norms of days gone by."[109] This decision is particularly significant given the clawback clause in the Botswana Constitution exempting customary law from non-discrimination. Nonetheless, the court held that such exemptions could not be "unchecked" and contrary to constitutional core values.[110] Rather, as the concurring opinion explained, "[a]ny customary law or rule which discriminates in any case against a woman unfairly solely on the basis of her gender would not be in accordance with humanity, morality or natural justice. Moroever, it would not be in accordance with the principles of justice, equity and good conscience."[111]

While some argue that formal courts are too far removed from communities and do not have the legitimacy to develop customary law, courts have particular expertise in human rights and constitutional law and through their decisions can provide the community with important guidance. This allows the community to then have an opportunity to react and reshape practices, engaging in dialogue with the court in the same way as a legislature. The courts' focus, however, must be on fundamental rights. Unlike the community or a legislature, a court is not well-placed to set out detailed provisions developing customary law, but rather, is positioned to judge a particular case before it. Courts have a special role to play when it comes to basic rights rooted in human dignity that cannot be abrogated by legislature or referendum. They are the guardians of a supra-majority that transcends time and place, protecting constitutional values agreed upon in advance and placed outside the control of the majority and powerful interests at any specific moment. As the South African Constitutional Court recognized, "development of customary law by the courts is distinct from its development by a customary community," and the courts should focus attention on protecting constitutional rights.[112]

Beyond the courtroom, the legislature has failed to significantly develop customary law. The legislature through statutory law can set a basic framework within which customary law functions. However, rather than operating in parallel with customary law, statutory law fails to complement it as it should. For this balance to occur, there needs to be "wide consultation before the promulgation" of a new law, as well as wide dissemination. [113] Further, customary law can be a source of enrichment for statutory law, and customary law norms can strengthen the formal legal system. As the South African Constitutional Court explained, "customary law 'feeds into,

108. Ramantele v. Mmusi, Case No. CACGB-104-12, Judgment [Botswana Court of Appeal], at para. 105 (Sept. 3, 2013).

109. Ramantele v. Mmusi, *supra* note 108, at para. 80.

110. *Id.* at para. 71.

111. *Id.* at para. 36 (Kirby, J., concurring).

112. Mayelane v. Ngwenyama, 2013 (4) SA 415 (CC), at para. 45 (S. Afr.).

113. Magaya v. Magaya, [1999] 3 L.R.C. 36, 50 (Zimb. Sup. Ct.).

nourishes, fuses with and becomes part of the amalgam'" of national law.[114]

D. APPLYING CUSTOMARY LAW

While customary justice structures provide a good alternative to courts in many cases, customary justice is not always the answer and should never be forced on someone.[115] In other words, both parties must agree to resolution by customary justice structures and should have the opportunity to opt out and seek recourse from the formal court system.[116] Additionally, there are certain cases that are not appropriate for the customary justice system, such as those involving the criminal law[117] or violations experienced by children.[118] By officially recognizing mediation through customary justice structures, the formal legal system can also provide guidance on how customary justice should function, including appropriate issues to address and the process by which to appeal decisions.[119]

Moreover, just as the content of customary law requires development so does its application. Specifically, customary justice structures themselves must be reformed so that their membership includes women leaders in the community. Through the KELIN project and Kenya's new Constitution, reforms are starting in Kenya. For instance, the number of female elders in the communities where KELIN is working has tripled, now making up one quarter to two thirds of the total composition, depending on the community. Likewise, in Namibia, a key element of reforming customary justice structures so that they respond to women's needs included appointing women at various levels of traditional leadership and as representatives in

114. Mayelane v. Ngwenyama, *supra* note 112, at para. 23 (quoting Alexkor Ltd v. Richtersveld Community and Others 2004 (5) SA 460 (CC), at para. 51).

115. Voluntariness, or the free and informed consent of both parties, is a key principle in KELIN's work with customary justice structures. KELIN, *supra* note 66, at para.12.

116. According to some, "customary dispute resolution can only work if it is backed up by state law and if there is a possibility of state law as a last resort." INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 9 (Janine Ubink, Thomas McInerney, eds., 2011); *see also id.* at para. 23.

117. By definition, states have an interest in enforcement of criminal provisions, and the accused are entitled to the procedural protections of a formal court case. In working with customary justice structures, KELIN ensures that they are aware of the boundaries of their authority and that they cannot adjudicate over criminal matters, but can only assist victims in accessing the formal justice system. KELIN further advises them to "discourage local or private family negotiations rather than reporting to law enforcement authorities." KELIN, *supra* note 66, at 12.

118. Children are not in a position to represent themselves in mediation without procedural protections, and there is the danger of their interests bargained away for gains by the family.

119. In its 2015 report, the U.N. Working Group on the issue of discrimination against women in law and in practice highlights as a good practice formal recognition of parallel systems and "[t]he right to appeal, before the State courts, discriminatory decisions of indigenous courts, tribunals or arbiters." U.N. GAOR Hum. Rts. Council, *supra* note 60, at 57. The Kenya Constitution specifically declares, "alternative forms of dispute resolution including ... traditional dispute resolution mechanisms should be promoted." Const. of Kenya Aug. 27, 2010, art. 159(2)(c). However, it only provides limited guidance, requiring that traditional dispute resolution methods not contravene the Bill of Rights, comply with the Constitution and any written law, and not be "repugnant to justice or morality." *Id.* at art. 159(3).

village court cases.[120] Studies subsequently found, "Having women in visible leadership positions has a positive impact for improving both women and men's views on the capabilities of women as community leaders and improving justice outcomes for women."[121]

In other parts of Africa, women are still struggling to lead cultural institutions. For instance in Lesotho, Senate Masupha, the first born daughter of a chief, is challenging women's inability to assume a chieftainship based solely on their gender.[122] After a loss in Lesotho's highest court,[123] she is now taking the case on appeal to the African Commission on Human and Peoples' Rights. She explained, "This case is not just about me but about all women in Lesotho. It is aimed at ending women's second-class status and ensuring we have equal access to all aspects of Lesotho life."[124] Indeed, the Maputo Protocol to the African Human Rights Charter directs: "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."[125] Hopefully, this will soon be a reality.

IV. CONCLUSION

Customary law should neither be demonized nor romanticized. As Vivek Maru writes, "[C]ontempt of traditional institutions and norms makes as little sense as sanguine romanticization."[126] Rather, it is critical to engage with both traditional and modern legal regimes, "building bridges between them and . . . advocating for the positive evolution of each."[127]

Customary law can further women's rights if the following conditions are put in place:

- Customary law and justice structures incorporate human rights norms;
- Human rights trainings are provided for both customary justice structures, as well as the larger community, including women and the marginalized;
- A process for defining customary law based in the human rights principles of participation, accountability, non-discrimination, and empowerment is established;

120. INTERNATIONAL DEVELOPMENT AND LAW ORGANIZATION (IDLO), ACCESSING JUSTICE: MODELS, STRATEGIES AND BEST PRACTICES ON WOMEN'S EMPOWERMENT 26-27 (2013), http://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf.

121. *Id.* at 32; *see also* IDLO, TOWARD CUSTOMARY LEGAL EMPOWERMENT, *supra* note 95, at 10, 34.

122. Lesotho Chieftainship Act of 1968, sec. 10.

123. Masupha v. Magistrate, 2014 (Lesotho Court of Appeal).

124. *News Release: Lesotho Chieftainship Case Goes to the African Commission*, S. AFR. LITIG. CTR. (Sept. 9, 2014), http://www.southernafricalitigationcentre.org/2014/09/09/news-release-lesotho-chieftainship-case-goes-to-the-african-commission/.

125. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 17(1).

126. Vivek Maru, *Allies Unknown: Social Accountability and Legal Empowerment*, 12(1) HEALTH AND HUMAN RIGHTS 83, 85 (2010).

127. *Id.*

- Communities, including women, youth, and marginalized voices, play an active role in defining their customary law, focusing on core values;
- Customary law continues to develop, primarily through the work of customary justice structures, but also through guidance from the courts on fundamental rights and in interactions with the legislature;
- A mechanism exists for capturing, analyzing, and monitoring the decisions of customary justice structures;
- Individuals have the possibility to opt out from customary justice and seek recourse from the formal court system;
- A governing framework defines areas inappropriate for customary law and justice;
- Customary justice structures include women leaders in the community.

In this way, customary law has the potential to serve as an important vehicle for justice and advancement of rights.