Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

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ALESSANDRA MIGNOLLI*

NOTES ON WOMEN'S RIGHTS IN AFRICA. THE IMPLEMENTATION OF THE MAPUTO PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA IN RECENT DOMESTIC AND REGIONAL DECISIONS

1. *Introduction. Legal background*

Non-discrimination and equality of women and girl children in all aspects of life is something that is far from achieved in all continents and at all latitudes, although international human rights law has provided over the years a complete corpus of norms establishing such principles. This article tries to address the challenges and achievements in the process of enhancement of women's rights and women's empowerment in the African continent, analyzing some of the specific legal features of that area. Africa is an enormous continent, rich in diversity of cultures, including legal traditions, with a plurality of religions and languages, and divided into a large number of States. As a consequence, it is nearly impossible to draw a comprehensive picture that encompasses all the diversities and complexities of the problem of the position of women in African societies. In order to provide at least a common ground, and a backbone for the narrative, the article is focused on the 2003 Maputo Protocol, the most important international legal instrument for the protection of women and girls' rights in Africa, and one of the most innovative globally, and on its application by the courts at domestic and regional level, following a few "red threads" that have been identified on the basis of their significance in the particular context of a

* Associate Professor of European Union Law, Sapienza University of Rome.

hypothetical "African" society and in the framework of the often conflictual dialectics between human rights law and customary and religious law.

The evolution of the protection of women and girls' rights in the African continent is perceived, maybe even more than elsewhere given the complexity of the legal system and of the society, as an ongoing choral effort, that involves States, communities with their traditional systems of governance, human rights advocates and NGOs, domestic courts together with regional courts and bodies such as the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the ECOWAS Community Court of Justice and, most importantly, the commitment of brave women who put themselves on the line for the advancement of rights and for the empowerment of women and girls in a changing society. It is an effort that needs to address the complexities of the African legal systems, where traditional customary law, legal systems based on religion, and constitutional systems continue to intertwine. Above all this, international law of human rights, both at global and regional level, provides a comprehensive body of norms aimed at the protection of the fundamental rights of women and girls and at the fight against, and eradication of, all forms of discrimination based on gender. The picture that results is, as this article will try to clarify, a multilevel system of protection, but where the various levels, community and local, national and regional, continue to intersect and overlap.

The lenses that this article uses in order to look at this picture are the jurisprudential rulings of African courts, at regional and domestic level. Several selected recent judgments will be analyzed, including a decision delivered by the High Court of Kenya in March 2021[1], which stands for the beautifully written considerations on the notions of culture, consent to harmful traditional practices, and human dignity, expressed by the justices that had been called to decide on the compatibility with the Kenyan Constitution of the Act that prohibits female genital mutilations (FGM) in the country[2]. This ruling, together with other landmark decisions, provides a perfect opportunity to open a window on the many complexities that surround the establishment of a comprehensive environment of equality and non-discrimination for African women and girls while at the same time respecting and enhancing cultural diversity.

Before getting into the description of the relevant case-law, it is useful to briefly set the legal background, with particular regard to the interweaving of different legal sources that I mentioned before and to the regional instruments that regulate the protection of women's rights in the African continent. It will be necessary to schematize and simplify an extremely complex legal fabric, which is the outcome of a long history of intersections and cross-contaminations. A legal fabric whose pattern changes not only among the different States of the continent, but also within each State, according to ethnic groups and religious communities. With these warnings in mind, it is possible to follow a few red threads in the fabric, that help understand the general picture. The red threads that have been chosen are access to justice (and responsibility of the States for failing to guarantee access to justice), access to property and inheritance, female genital mutilations and other harmful practices, marriage and education. All these issues, that will be analyzed along the lines of a conflict between, and coexistence of, customary and religious law, constitutional law and international human rights law (especially the regional dimension enshrined in the Maputo

[1] Constitutional Petition No. 244 of 2019, *Dr. Tatu Kamau v. The Hon. Attorney General and Others*, High Court of Kenya, Judgment of 17 March 2021: see *infra*.
[2] It is the Prohibition of Genital Mutilation Act (No. 32 of 2011).

Protocol), serve as elements to uncover the ongoing fight for achieving dignity, equality and non-discrimination for African women and girls.

Of course, many other issues could have been considered. In particular, in time of coronavirus pandemic, the thought goes to the discriminations and disadvantages women have suffered and still are suffering in relation to the HIV/AIDS epidemic that has ravaged the African continent for decades. Before the Kenyan High Court in Nairobi a case is pending on a petition[3] filed by four women living with HIV, supported by NGOs active in the field, who claim to have been forcefully sterilized, through tubal ligature, without having expressed their informed consent to the procedure. This is a generalized practice in Africa (although it has been reported also in other contexts, such as Central America) aimed at preventing HIV-affected women from having children to whom the disease could be transmitted if proper treatment is not administered during pregnancy[4]. According to the mentioned petition, forced sterilization is allegedly a State-sanctioned practice, but what is also troubling is the fact that among the respondents who allegedly have materially carried out pressures on the women and performed the procedure, are esteemed organizations such as Médécins sans Frontières and Marie Stopes International. The High Court, which has the task of establishing the facts and of determining the constitutionality of the practice, will deliver its ruling by the end of the year.

The choice of the aforementioned red threads is based on the consideration that the selected matters are crucial not only for the process of establishing a favorable legal and social environment for women and girls, but also, and especially, because those matters are at the crossroads of international (and constitutional) Bills of Rights and traditional customary and religious law. They are the places where conflict is more evident, direct and impactful on the condition of African women.

This article refers exclusively to the regional courts (African Court of Human and People's Rights and ECOWAS Community Court of Justice) and to the domestic courts of some sub-Saharan countries, especially anglophone, although the legal systems of francophone African countries follow similar patterns[5], that in recent years have adopted the most relevant decisions on the protection and enhancement of women's rights. The situation of some francophone countries appears, indirectly, when regional courts' rulings refer to a francophone State's legal system. The article does not take into consideration the particular features of Northern African countries, although they are also members of the African Union and many of them are signatory of the conventions and protocols on human rights that have been adopted in that institutional framework.

Decisions delivered by domestic and regional jurisdictions are analyzed side by side in the following pages. The ratio behind this choice is twofold: On the one hand, it pictures the converging approaches of the two jurisdictional levels in the adjudication of cases involving the application of human rights law in situations of conflict with customary or religious law. On the other, it also reveals the multilevel character of human rights adjudication and the

[3] Petition No. 605/2014, *S. W. K. & 5 others* v *Medecins Sans Frontieres- France & 10 others*, available at http://www.kelinkenya.org/wp-content/uploads/2017/06/PETITION-No.-605-of-2014.pdf.

[4] See UNAIDS, *Statement on the Forced and Coerced Sterilization of Women Living with HIV*, February 28th, 2020 (text available at https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/february/forced-sterilization-women-living-with-hiv).

[5] See J. NGUEBOU TOUKAM, *Les droits des femmes dans les pays de tradition juridique française*, in *L'Année sociologique*, 2003, p. 89 ff., for an overview.

subsidiary role the regional courts play with respect to domestic courts. A distribution of roles that is more substantial than formal, as will be clarified later, since it is based on a large amount of flexibility in the assessment of the willingness and the capacity of State courts to effectively enforce human rights norms.

2. *Different legal systems, complexities and a difficult harmonization*

Sub-Saharan Africa has been characterized, in its history, by the bulky presence of Western peoples, first through colonization, later through economic and political imperialism. The law was not spared from the intrusive influence of the West. European colonizers adopted different methods of governance for their colonies, but all of them tolerated the coexistence of the indigenous law of the many different African ethnic groups and religious communities with the law imposed by the colonizers, be it civil law (French) or common law (British). The general rule was that the customary indigenous law was applied only to Africans[6]. But, as Muna Ndulo, who has extensively studied the African legal dynamics and history, explains very well, customary law had to respect two conditions in order to be applied: It had to be established, by colonial courts, that a given rule of customary law was not repugnant to justice, equity and good morality[7], and that it didn't conflict with any written laws[8]. This patriarchal and self-righteous attitude is at the origin of the so-called "repugnancy test", that has accompanied the African customary law well beyond the independence of the former colonies, giving origin to a subterranean conflict and a sentiment of suspicion around all legal principles and values perceived as "Western" and, for this very reason, "imperialistic". Indeed, the repugnancy test is still applied by domestic courts to conflicts between customary law rules and international human rights norms, in order to brutally strike down all customary rules that are considered repugnant to the universal system of human rights[9]. It must be pointed out, though, that the most recent judicial decisions try to avoid the use of the repugnancy test, preferring to rely on criteria that are more respectful of the cultural traditions of the communities, such as the flexibility of customs and their need to adapt to societal changes and to become part of a composite legal system under the Constitution. Besides, the repugnancy test is typically the expression of a moralistic and moralizing attitude, while equality and non-discrimination should be affirmed on the basis of strictly legal interpretation criteria, that make the whole process more coherent and less

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[6] To learn more about the historic developments, it is useful to read M. B. NDULO, *African Customary Law, Customs, and Women's Rights*, in *Indiana Journal of Global Legal Studies*, 2011, p. 87 ff.

[7] It has been pointed out that the "justice, equity and good morality" standards were necessarily established by the Western colonial powers, determining the superiority of European legal values and principles on the indigenous customs (M. B. NDULO, *African Customary Law*, cit., p. 95). And that, ironically, especially in the British colonies, the Victorian moral norms were certainly not particularly protective of the independence and rights of women.

[8] *Ibidem*., p. 94 ff.

[9] See, on the controversial issues of woman-to-woman marriage and posthumous procreation, that I will discuss later, the interesting studies of C. G. NNONA, *Woman-to-Woman Marriage and Cognates in Nigerian Law: An Easy Coalition between Customary Law and Human Rights*, in *Commonwealth Law Bulletin*, 2016, p. 375 ff.; U. EWELUKWA, *Posthumous Children, Hegemonic Human Rights, and the Dilemma of Reform. Conversations Across Cultures*, in *Hastings Women's Law Journal*, 2008, p. 211 ff. and the case-law the authors refer to, where the repugnancy test was systematically applied by courts, especially in Nigeria, to strike down most of these practices.

dependent on the changing "moral" sensibilities of the times, and more respectful of the principles of the rule of law.

In addition to customary law, many States and communities within States include the possibility to apply systems of law with a religious origin. This is particularly the case of the Sharia legal system, widely applied by Muslim communities in various African countries, and accepted by many national Constitutions as part of the legal system of the country. Also from this point of view, there are significant situations of (potential) conflict between traditional Islamic legal rules and women's rights and equality[10].

The picture is completed by national Constitutions and international conventions. As regards the Constitutions, they generally include a Bill of Rights. Some of them, though, especially those adopted in the immediate aftermath of decolonization, used to include also a clause that "immunized" customary and religious law from the effects of the constitutionally guaranteed human rights, in order to preserve the cultures and traditions of the population. The immunization clauses have worked as a sort of reservation to the Constitutions, that permitted the application of customary rules even when they entailed a discriminatory treatment of women and girls, typically in cases involving marriage, access to property and inheritance. In democratic Constitutions adopted more recently, though, the immunization clause has been replaced with clauses that affirm the respect and the protection by the State for the traditional cultures of the communities and the right and liberty of the citizens to practice their traditions and their religion or belief, but only if, and to the extent that, the traditional practices are consistent with the Bill of Rights. This is the case of the 2010 Kenyan Constitution, on which the High Court's decision on FGMs is based, and of the 1996 South African Constitution, at the center of the *Bhe* case on intestate succession and inheritance, analyzed in the following pages, but also of the Constitutions of Uganda, Ghana, Malawi and other African countries[11].

The new clauses reverse the constitutional approach to customary and religious rules, conferring primacy on the Bill of Rights in the Constitutions, which in turn is also in line with the international obligations deriving for the States from the international human rights conventions of which they are contracting parties, but do not radically eliminate the possibility of conflicts and frequent violations. This happens for many reasons, but among the most important ones is the still strong presence of traditional authorities that have pervasive decision-making and quasi-judicial powers in the communities, especially in rural areas. This is certainly due to the importance of traditional forms of governance for the culture of the communities, but also to the weakness of the institutions in many African States, that makes it very difficult to effectively enforce the law if it is not supported by the public opinion and by the traditional communities. The councils of elders decide on marriage issues, on divorce, on the treatment of widows, on inheritance, and they apply the old customary rules, not the Constitution or the laws of the State. A woman, especially if she is a girl, or a widow, or a non-married woman (the most vulnerable situations), encounters many difficulties, social stigma and economic costs, if she brings her case to the courts, with

[10] To grasp the magnitude of the problem, suffice it to read the reservation posed by predominantly Islamic States to the Convention on the Elimination of All Forms of Discrimination Against Women (available at https://www.un.org/womenwatch/daw/cedaw/reservations.htm). The reservations address in particular the Convention's norms on marriage, nationality, family, inheritance, which, as will be discussed later, are at the core of the discrimination against women and girls in Africa.

[11] M. B. NDULO, *African Customary Law*, cit., p. 98.

the consequence that many family matters are still decided by the elders (males) according to customary law[12].

It is clear from the outset that the study of the implementation of human rights law in a context so legally complex as sub-Saharan Africa challenges the deep-rooted convictions on the universality and necessarily universal and uniform application of human rights. In fact, while human rights and, especially, the underlying values they represent are expression of universally accepted principles, the question arises whether their scope or application is – or should be – subject to change on account of the societal, legal and political context in which they have to be applied (and enforced); this question is especially challenging if one considers the difficulty in trying to dictate norms that have been crystallized in international conventions and declarations to societies that for centuries have practiced their own traditional customs and have suffered the imposition of external rules by foreign invaders, without allowing those societies and communities to deeply accept those principles and norms as their own, as corresponding to their own needs.

This is not the place for an in-depth analysis of the issue of universality of human rights[13], one of the most discussed topics in the human rights discourse[14], but it is important to stress the necessity of the involvement and participation of the different cultures, religions, ideologies that coexist in the world in enhancing the development of human rights law[15]. The

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[12] Data provided by the Kenyan NGO KELIN (Kenya Legal & Ethical Network) show that in Kenya 99% of land property rights cases are still resolved through alternative dispute resolution in the framework of the communities, and as a result, only 1% of land titles are owned by women, while an additional 5% are owned jointly by a woman and a man and 94% of land titles are held by men only. See SYFF (Securing Your Family's Future), a nationwide campaign for the promotion of the possibility for women to inherit and own property, at https://securingyourfamilysfuture.or.ke, last accessed on 28 April 2021. This campaign, as many others promoted by NGOs all over the continent, aims at raising awareness in the communities of the need to guarantee that women have the same access to land property as men. The approach they adopt is interesting, as it is based on tradition. As will be better explained in the following pages, the customary law on succession as it was conceived in the past protected women, who could not be evicted from the family house, even if the successor to the deceased family head was always a male heir. Regrettably, the rule of male primogeniture in succession has been incorporated with the Western notion of property as a right of exclusive ownership, and many widows are being left homeless as a result. So, in a way, similar campaigns go in the direction of reforming the customary rule on inheritance by rediscovering the original spirit of the rule, which was the protection of widows and children, and dressing it in new clothes, that take the form, *inter alia,* of encouraging couples to register customary marriages, of encouraging fathers and husbands to write a valid will that includes wives and daughters, and training community leaders and elders in the values and norms based on gender equality and non-discrimination. It is a nice example of the bottom-up approach to reform that necessarily has to go hand in hand with the action of the courts and the legislators.

[13] *Ex multis*, see C. TOMUSCHAT, *Universal and Regional Protection of Human Rights: Complementarity or Conflicting Issues?*, in R. WOLFRUM (Ed.), *Strengthening the World Order: Universalism v. Regionalism. Risks and Opportunities of Regionalization*, Berlin, 1990, p. 173 ff.; ID., *Human Rights: Between Idealism and Realism*, 3rd Edition, Oxford, 2014; S. YEE, J.-Y. MORIN (Eds.), *Multiculturalism and International Law: Essays in Honor of Edward McWhinney*, Leiden/Boston, 2009.

[14] A. CONSTANTINIDES, *Questioning the Universal Relevance of the Universal Declaration of Human Rights*, in *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, 2008, p. 49.

[15] *Ibidem*, p. 55. The author concludes that any discussion about rights cannot escape from the given time and the specific cultural and historical circumstances surrounding it. As he sees it, current human rights ideas are the product of a particular moment and place: post-enlightenment, rationalist, secular, Western, modern, capitalist. What is particularly interesting in this analysis is that one of the "birth defects" he identifies of the international human rights system we know is the excessive promotion of individualism and individual rights over community and duties. This is particularly relevant, as will be explained later in the text, for the structure of the traditional African society, deeply rooted in the community and in extended families. It's not a case if

risk otherwise is, as will become clear reading the following pages, that the communities continue to perceive human rights as an alien creature with no roots in the traditions of the local cultures. It is mostly a problem of method, rather than acknowledgement of cultural relativism[16]. Context counts in the application of human rights law, and accepting the relevance of context means accepting that humanity is rich in diversity and that all cultures can provide their contribution to the development of a truly universal system of human rights. In this perspective, it is appropriate not to passively accept the difficulty in solving conflicts between traditional practices and human rights standards in a determined social context, but to acknowledge the fact that before trying to enforce human rights standards it is necessary to deeply understand the underlying reasons and historical and social context which lie at the basis of each traditional rule or practice that appears to be at odds with human rights norms, and it is equally necessary that the communities themselves start their own process of interiorization of human rights norms and values, so to start at the same time a process of evolution and change of customs and traditions, that accompanies the evolution and change of society. Customs, as will be stressed later, are indeed neither frozen nor static, but are subject to constant change.

Similarly, in the effort to reconcile customary law and human rights standards, it is not always useful to rely on an arbitrary distinction between rights that cannot be derogated and rights that can be limited or restricted as a possible criterion for the identification of harmful practices or more in general of traditional practices that are at odds with international human rights law: As an example, in the case of African traditions that are harmful for the wellbeing of women and girls, one of the core issues is access to property and inheritance. Normally, talking about non-derogable human rights, property is not the first one that comes to mind. Yet, in the particular context we are considering, it is crucial, as it impacts on the life, education, independence of women and girls. This example is a further confirmation of the indivisibility of human rights, as it shows how all rights are connected to one another and dependent from one another and how the relative weight of each one can be dependent on the historical, economic and social context in which they have to be applied.

Anticipating the conclusions of this study, an analysis of the dynamics of human rights (and in this case of women's rights in particular) shows that the only way to achieve equality and non-discrimination of women in African societies is a bottom-up process of change of those customary rules and religious traditions that are only with difficulty and very slowly adapting to the changes in the society. It is what has been called a holistic approach, that necessarily has to involve all the stakeholders in the effort to build awareness on human rights and on how to achieve a reform of cultural traditions in harmony with human rights standards[17]. A bottom-up and holistic approach is important and necessary because it allows a gradual modification of customary law from the inside, through an extensive action of education and training of the elders on the Constitution and also on international human rights principles and values, especially on the values of equality and dignity of all human beings. It is particularly necessary to explain why practices that, as will be clarified later, were originally conceived for the protection of vulnerable family members (women and children)

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the African Charter of Human and Peoples' Rights considers peoples and not only individuals, and also includes duties, that go hand in hand with rights.

[16] See the interesting considerations on this point in A. CHECHI, *When Culture and Human Rights Collide: The Long Road to the Elimination of Gender-Based Harmful Traditional Practices*, in *OIDU*, 2020, p. 839 ff., at p. 850 f., also for the literature and the sources on the practice of international bodies.

[17] A. CHECHI, *When Culture*, cit., p. 857 f.

in an archaic society are to be considered a violation of the women's dignity in modern society and how traditional approaches may be changed. This is possible, as has been demonstrated by numerous initiatives that go in this direction, precisely because the communities are aware that customs are not immovable and unmodifiable, and that it is in their nature to evolve and adapt to the modernization of society[18]. It is a long process that requires dedication, respect and involvement, but it is proving to be fruitful, especially if combined with a strong action by the legislators and the courts, necessary to achieve a harmonization in the multilevel legal system.

3. *The 2003 Maputo Protocol on the Protection of Women's Rights in Africa*

Turning our attention to the international legal framework, besides the many, well known conventions that introduce a complete body of rights for women and girls (first of all the Convention on the Elimination of all forms of Discrimination Against Women-CEDAW[19], but also the UN Convention on the Rights of the Child[20], and, in Africa, the African Convention on Human and People's Rights-Banjul Convention[21]), of which all African States that are considered here are contracting parties, it is the case to specifically refer to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa[22], opened to signature in Maputo, on July 11th, 2003[23]. At the time of writing this article (June 2021), out of 55 Members of the African Union (AU), 42 have ratified the Maputo Protocol. Despite a widespread campaign by the AU for the ratification by all Member States by the end of 2020, this goal was not achieved, and 13 States still haven't deposited their instrument of ratification. Regrettably, there also is still a widespread delay in the domestication of the Protocol by the States, and many of them are also systematically late in submitting their reports on the implementation of the Protocol[24].

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[18] In my interview on April 20th, 2021with Jessica Oluoch, a young lawyer working with the NGO KELIN in Kenya, I learned that KELIN, like many other human rights advocates in Kenya and other African countries, has effectively adopted this bottom-up approach to the conflict between customary law and human rights. They organize education and training sessions with community elders on various issues regarding women's rights, especially on inheritance rights for widows and access to property, with good success. They even obtained the inclusion of women in leadership roles in the councils of elders.

[19] 1249 UNTS 13, adopted 18 December 1979 with UNGA Resolution No. 34/180, entry into force 3 September 1981.

[20] Adopted by UNGA Resolution No. 44/25 of 20 November 1989, entry into force 2 September 1990.

[21] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entry into force 21 October 1986.

[22] Text on the African Union's website (https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa), where it is possible to access all data regarding ratifications by the AU's Member States. The Member States of the African Union reinforced their support of the Protocol one year later, in July 2004, with the adoption of a Solemn *Declaration on Gender Equality in Africa* (available at https://au.int/en/documents/20200708/solemn-declaration-gender-equality-africa).

[23] The Protocol was adopted by the Assembly of the African Union at its second session, with decision No. Assembly/AU/Dec. 19 (II).

[24] See African Union, Press Release of 18 November 2020, *Slow progress in meeting commitment to 2020 as the year of universal ratification of Maputo Protocol* (available at *https://au.int/sites/default/files/pressreleases/39613-pr-accelerating_the_implementation_of_commitments_to_african_women.pdf).*

The Protocol was the outcome of a long process of negotiation, with input from NGOs and experts, under the coordination of a working group established by the African Commission on Human and Peoples' Rights[25].

The Maputo Protocol builds upon the previous conventions on the fight against gender-based discrimination[26], first of all the CEDAW and its follow-ups, but aims at putting a comprehensive body of protective norms in place that specifically consider the peculiarities of the needs of African women and girls, and the context in which such norms are destined to be applied. This is one of those cases where human rights law is tailor-made to fit the needs of the societies in a specific region. This process, together with many advantages (the possibility to address specific features or vulnerabilities of the persons it seeks to protect), also involves some risks, as will be indicated, in particular the risk of coming to compromise with some old and sedimented convictions. As suggested later, in these cases it would be advisable to interpret the regional provisions in a way that is consistent with the universal ones (in this case, the CEDAW), but the problem remains.

The Maputo Protocol introduces obligations for the contracting States of non-discrimination against women and of protection of their dignity. In this respect, it is worth referring to Article III (4) on human dignity and the protection against all forms of violence: «States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence». Not even the Istanbul Convention on Violence Against Women includes verbal violence as such, not limited to the scope of sexual harassment[27].

The Maputo Protocol addresses all the ambits of life, private and family, access to property and inheritance, civil and professional, and enhances the protection of women and girls' rights also in areas which were not expressly covered by existing treaties[28], such as, among the harmful traditional practices that States have the obligation to eradicate, female genital mutilations (Article V, *b*); the particular vulnerability and special needs of adolescent girls (Article XII, 1, *c*), widows (Articles XIX and XX), women in armed conflict, including refugees and IDPs (Article XI), elderly women (Article XXII), women with disabilities (Article XXIII), women in distress, marginalized and living in poverty, but also women during pregnancy and nursing (Article XXIV); the forced and underage marriage (Article VI, *a* and *b*), that sets the minimum age for marriage at 18[29]; the right of women to use their maiden name in marriage and all the rights connected to the matrimonial regime, including access to property (Article VI, *a* and *f*); sexual and reproductive health, including the issue of abortion and the problems deriving from the widespread infection from HIV/AIDS, and the right to be informed on the health conditions of their partners (Articles XIV, 2, *c* and

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[25] F. BANDA, *Blazing a Trail: The African Protocol on Women's Rights Comes into Force*, in *Journal of African Law*, 2006, p. 72 ff.

[26] For an overview, see F. VILJOEN, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, in *Washington & Lee Journal of Civil Rights & Social Justice*, 2009, p. 11 ff.

[27] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, of 2011 (available at https://rm.coe.int/168046031c). Article 40 of the Convention, in the context of sexual harassment, mentions "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature".

[28] S. OMONDI, E. WAVERU, D. SRINIVASAN, *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa*, Nairobi, 2018, p. 8 f.

[29] The Protocol, on the other hand, discourages, but does not prohibit, polygamous marriages, still widely in use in many regions of the continent.

XIV, 1, *d* and *f*). Of great interest is the obligation for the contracting States to consider the gender dimension of – and the women's perspective on – cultural policies, environmental protection and sustainable development (Articles XVII, XVIII and XIX), and the introduction of the rights to food security, including drinking water (Article XV) and to adequate housing (Article XVI). Very powerful[30] is the provision in Article X, which states that «Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace».

The Maputo Protocol is a comprehensive and rich document, that values the traditional knowledge of indigenous women as a precious resource for the protection of the environment (Article XVIII, 2, *c*), while strongly condemning all aspects of the traditions and customs that harm the wellbeing of women. Despite – or maybe better because of – the innovative character of the Protocol, it had to face criticism by Christian groups, including the Catholic Church[31], because, in the Protocol, abortion is considered a right under certain conditions[32] (sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus, under Article XIV, 2, *c*), and by predominantly Muslim States, for example Niger, where ratification was denied by the Parliament, because the Protocol is at odds with many aspects of Islamic law, including the minimum age for marriage and, again, abortion.

On the other hand, it has been maintained that the Maputo Protocol, despite being a significant advancement for the rights of African women and girls and positively influencing domestic legislation, fails to address some of the most serious woes faced by African women. According to this opinion, the Protocol had been adopted precisely in order to fill the voids in the African Charter on Human and Peoples' Rights in respect especially of those traditional and customary practices that negatively affect the welfare of women in African communities. In doing so, the Maputo Protocol could have been more explicit and expressly mention the harmful practices that it means to abolish, as it does with FGMs[33]. Indeed, very sensitive issues are at stake here. While some of them are addressed by the Protocol, others are not, and it is the job of legislators and courts to interpret the law in a way that allows the eradication or deep modification of the most harmful practices: woman-to-woman

[30] F. BANDA, *Blazing a Trail*, cit., p. 81.

[31] See J.L. ALLEN Jr., *Ghost of Maputo Protocol Hangs over African Synod*, in *National Catholic Reporter*, October 11th, 2009 (available at https://www.ncronline.org/blogs/ncr-today/ghost-maputo-protocol-hangs-over-african-synod). The 2009 African Synod adopted a *Propositio* on the Maputo Protocol which, without urging the governments to deny ratification, as some bishops had suggested, strongly condemned the acceptance of abortion as a right of women (Holy See Press Office, Synodus Episcoporum Bulletin, II, Ordinary Special Assembly for Africa of the Synod of Bishops, 4-25 October 2009, *Propositio 20, Maputo Protocol* (https://www.vatican.va/content/dam/wss/news_services/press/sinodo/documents/bollettino_23_ii_speciale-africa-2009/02_inglese/b33_02.html).

[32] It is the first time that, in the framework of reproductive rights, abortion is included in an international human rights agreement.

[33] This criticism is detailed in R.I. DANPULLO, *The Maputo Protocol and the Eradication of the Cultural Woes of African Women: A Critical Analysis*, in *Law in Africa*, 2017, p. 93 ff.

marriage[34], dowry or bride price[35], widow inheritance[36], ghost marriage[37], Nwunye Nrachi[38], just to mention the most controversial. All these practices come down to the assumption that a woman, especially if she has no male children, is nothing more than a property of the man, be it a husband or a father and is destined to be a «perpetual minor»[39], whose only way of surviving, and obtaining a place in society is by having a son who can inherit her husband's (or father's) name and status, even is her husband (or father) is long dead. The root of these harmful and discriminatory practices appears to be, as a matter of fact, in the limited rights of women to own property and land, thus compromising their independence, as inheritance under customary law generally follows patriarchal rules of male lineage[40].

It is true that the mentioned practices are not expressly referred to in the Protocol, but it is also true that the courts, at domestic and regional level, have addressed many situations where customary practices have been considered contrary to the rule of non-discrimination, on the basis of the Protocol's principles and provisions[41]. In addition, it has to be considered that customs vary sensibly from State to State and even within a State, according to the traditions of each community. For this reason, it would be impossible for a necessarily general instrument like the Protocol, to address all and each one of the customary practices that can be harmful to women and girls. The choice to mention only the one that in some way is a symbol of the violation of the integrity and dignity of women and girls[42], i.e. FGM, makes sense in a context where the States are required to «prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are

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[34] It is the practice by which a childless wife marries a younger woman in order to have children through her. The partner can be chosen jointly by the two women. The children will be considered as "adopted" by the older woman. This practice has been compared to an adoption arrangement, or even to surrogate motherhood (C. G. NNONA, *Woman-to-Woman Marriage*, cit., p. 376 and *passim*).

[35] The bridegroom's family "buys" the wife, who becomes a property of the husband. The dowry is sometimes requested back by the husband in case of divorce, thus compromising the already precarious economic position of the divorced woman.

[36] The practice by which the widow is "inherited" by a male relative of her deceased husband. Again, the reason is the limitation of the widow's inheritance rights, especially if she had no male children. The children born from this new union are considered in many communities as children of the dead first husband.

[37] The practice by which if an unmarried man dies without a male heir, his family may decide to marry a woman to his name. Children born to this woman with a partner of her choice will bear the name of the dead man.

[38] The practice by which a daughter remains unmarried in the house of her deceased father in order to give him a male heir, through sexual intercourse with a partner of her choice (for an analysis of these traditional practices and of the case-law of domestic courts to eradicate them, see U. EWELUKWA, *Posthumous Children*, cit., who points out that also in Western societies there are practices for surrogate, medically assisted motherhood, even posthumous, that are not as stigmatized as the African ones).

[39] Constitutional Court of South Africa, *Bhe v. Magistrate Khayelitsha*, case CCT 49/03, decision of 15 October 2004, para. 78 (available at http://www.saflii.org/za/cases/ZACC/2004/17.html). See *infra* for a comment on this case.

[40] For an interesting analysis of this problem, S.U. OJUADE, *Protecting the Rights of Women to Customary Inheritance in Igbo Land of Nigeria*, in *International Journal of Comparative Law and Legal Philisophy*, 2020, p. 86 ff., and the section of this study on inheritance rights and the *Bhe* case, *infra.*

[41] For a survey of the relevant case-law see S. OMONDI, E. WAVERU, D. SRINIVASAN, *Breathing Life into the Maputo Protocol*, cit.

[42] Let's not forget that the Protocol also introduces obligations for States to enact legislation aimed at the protection of women from any form of violence and abuse, including forced sex, «whether the violence takes place in private or public» (Article IV, 2, *a*). This provision is a welcome improvement, in the sense that it removes the distinction between the public and private spheres and surely enhances the responsibility of States for the protection of victims of violence as well as for the prosecution of the perpetrators (see on this point the case *Mary Sunday*, analyzed *infra*).

contrary to recognized international standards» (Article V). It is the task of legislators and courts to adjust the domestic legal order to the principles of gender equality and non-discrimination that derive from the Protocol and the other international human rights instruments, getting rid of, or reforming in depth, all the customary practices that result in conflict with human rights and non-discrimination standards.

The Maputo Protocol is certainly innovative in respect to traditional practices and particularly to women's rights in marriage and inheritance, but there are well-founded points of criticism that have to be pointed out. Some of its provisions are, as a matter of fact, the outcome of a necessary and sometimes unsatisfactory compromise, particularly on an issue that is central to this study, namely access to property: Article VII (d), establishes that in the case of separation and divorce, men and women will have the right to an «equitable sharing» of the joint property deriving from the marriage[43]. Similarly, as regards inheritance rights, Article XXI recognizes that brothers and sisters have the right to inherit in «equitable shares» their parents' properties. It is clear that "equitable" is not the same as "equal", as has been made clear by the CEDAW Committee in its General Recommendation No. 28: «States parties are called upon to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention. The latter concept is used in some jurisdictions to refer to fair treatment of women and men, according to their respective needs. This may include equal treatment, or treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities»[44]. This Recommendation highlights a concept that is inherent in the fundamental principle of gender equality that is enshrined in the CEDAW, while equity or equitable treatment could pave the way to a differentiated treatment on the basis of stereotypes or perceived different needs, which is not consistent with the letter, the objective and the spirit of the Convention. In this perspective, it is desirable that the Courts interpret the mentioned provisions in light of the purpose and spirit of the Protocol, and of the general principles it enshrines, which are equality and non-discrimination, as well as of the obligation for the States Parties to «commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men» (Article 1, para. 2 of the Maputo Protocol). Interpretation is the only way to eliminate the contradiction existing between the general principles and the disputable terminology used in the provisions on matrimonial property and inheritance, although it will not always eliminate all ambiguities for example at the crucial stage of domestication of the Protocol.

In the following sections I will address the most significant cases of application of, or reference to, the Maputo Protocol and other international instruments for the protection of women and girls' rights in Africa. The decisions I chose address issues that can be considered

[43] The wording of this provision is not satisfying, despite the important introduction, in Article XIII (h), of the obligation of States to «Take the necessary measures to recognize the economic value of the work of women in the home», and in paras. (e) and (f) of the same article, of the obligation to protect women working in the informal sector, which often involves family agricultural activity.

[44] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28 (available at https://www.refworld.org/docid/4d467ea72.html). On this point, see also F. BANDA, *Blazing a Trail*, cit., p. 78.

crucial for achieving and effectively promoting gender equality and women's empowerment in society (the red threads I mentioned before): access to justice, clear definition of the position of customary law within the legal systems of the States, inheritance rights, FGMs and their dangers for the life, health and dignity of women and girls, marriage and access to a proper and equal education.

4. *Access to justice and public interest litigation*

The case-law of the African regional courts and bodies that applied the Maputo Protocol in their decisions is not extensive, even though the Protocol has been in force for more that fifteen years, and it is recent, as the first case was decided in 2017, twelve years after its entry into force[45].

It has to be considered that the pivotal issue for the effectiveness of enforcement of human rights standards is the possibility for women and girls to easily obtain access to justice. This is why the first cases that are described here specifically address this issue. As mentioned before, women, and especially the most vulnerable among them, like widows, are often precluded the possibility of bringing their complaints of human rights abuse to court, for lack of knowledge or lack of economic means, but also for the social stigma to which they may be exposed if they search justice outside the realm of traditional community structures. It is not a case that one of the first decisions where the ECOWAS Community Court of Justice (ECOWAS Court) referred to the Maputo Protocol[46], in 2017, was related to the failure by the police and State prosecutors to properly investigate and prosecute a case of domestic violence suffered by the victim, Mary Sunday[47], at the hands of her fiancé, who was himself a police officer. The police, instead of protecting the victim, stonewalled her, exonerated her fiancé and in the end, even lost the evidence that had been gathered at the scene during the investigation. The ECOWAS Court held that the respondent State, Nigeria, had failed to grant the victim adequate access to the justice system, independently from the fact that the violence had happened in the private of the house: «l'idée selon laquelle les violences en cause ayant un caractère privé, la responsabilité de l'Etat ne saurait être engagée est contestable. Elle oublie que le débat judiciaire se noue sur un terrain précis, celui du droit d'accès à un juge. Ce ne sont donc pas les violences exercées, ou leurs auteurs, qui sont en débat, mais bien le sort qui a été fait par la suite aux démarches de la requérante pour obtenir une réparation judiciaire». On these premises, the Court came to the conclusion that «Le

[45] Although it is worth reminding that the ECOWAS human rights jurisdiction was established with the 2005 Protocol, while the African Court of Human and Peoples' Rights, established in 1998, delivered its first judgment only in 2009.

[46] The first case of application of the Protocol by the ECOWAS Court was *Dorothy Chioma & Others* v. *Federal Republic of Nigeria*, case No. ECW/CCJ/JUD/08/17, judgment of October 12th, 2017, available at https://courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_08_17-1.pdf, where the respondent State was held responsible for the unlawful detention of the plaintiffs, as well as for failing to protect them against defamation, assault and other acts of discrimination perpetrated even by police officers. For a comment on this case, see F. POLEGRI, *La Corte dell'ECOWAS si pronuncia sulla pratica statale del rapimento e dell'abuso delle donne in Nigeria*, in *Federalismi – Focus Africa*, No. 1-2018.

[47] Cour de Justice de la Communauté Économique des États de l'Afrique de l'Ouest (CEDEAO), Affaire No. ECW/CCJ/JUD/11/18, *Mary Sunday* c. *Republique Fédérale du Nigeria*, judgment of May 17th, 2018, available at https://courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUG_11_18.pdf.

droit exerce aussi son emprise dans les domiciles privés, il ne s'arrête pas aux portes des foyers conjugaux. Il est inconcevable qu'un Etat digne de ce nom ferme les yeux sur des violations de droits d'autant plus graves qu'elles consistent en une atteinte à l'intégrité physique des personnes». The State was thus condemned to pay a monetary compensation to the victim.

Two points in this ruling are worth emphasizing. Firstly, the responsibility of the State originating from the denial of access to justice (in this case it was a downright denial of justice and not a simple case of negligence on the part of the State), and second, the strong assertion of the obligation of the State to protect women from violence even in the private sphere, in accordance with Article IV (2) (a) of the Maputo Protocol. «The law does not stop at the door of the matrimonial home»: It is a crucial principle for enhancing the protection of women from domestic violence.

As in most cases involving the rights of women, also in Mary's case the action was brought to the Court by NGOs, on behalf of the victim. It is a widespread and well-established practice of public interest litigation with African domestic and regional jurisdictions, that serves the purpose of supporting victims who lack the education and economic means necessary to access justice on their own[48], but also to act on behalf of the general interest of the public. In fact, if in this case the NGOs acted representing the victim, in many other cases they do not represent an individual victim, but act in the general interest of the public in the assertion of a principle of law.

Another case, decided by the ECOWAS Court in 2018, that is worth mentioning here for its relevance to the issue of access to justice is *Aminata Diantou Diane c. Mali*[49]. In this decision, the respondent State was held responsible for violation, *inter alia*, of the Maputo Protocol, having failed to grant timely and effective protection in the judicial system to the victim, Aminata, deprived by her in-laws of her right to stay in the family house after a serious health problem had left her husband incapacitated.

A recent case was even more blatant in its gravity. The ECOWAS Court decided on April 30th, 2021[50], that the State of Nigeria was responsible for failing to exercise due diligence and to intervene to stop, sanction and provide adequate remedies to the applicant, thereby encouraging impunity. At the time of the facts, the applicant, Beauty Igbobie Uzezi, was a 19-year-old member of the Nigerian Air Force. In 2011 she was brutally raped, allegedly by her superior officer and trainer[51]. After the rape, she was beaten, locked up in the guardroom and even chained to the hospital bed, as punishment for daring to file a complaint against a

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[48] For some consideration on the practice of public interest litigation in the field of human rights litigation in African and Latin American Courts, see A. MIGNOLLI, *Post-Electoral Violence in the Southern Kaduna Region of Nigeria. State Responsibility for Violation of Due Diligence Obligations*, in *Federalismi – Focus Africa*, No. 1-2021.

[49] CEDEAO, Affaire No. ECW/CCJ/JUD/14/18, *Aminata Diantou Diane* c. *République du Mali*, judgment of May 21st, 2018, available at https://courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUG_14_18-1.pdf.

[50] ECOWAS Court of Justice, *Aircraftwoman Beauty Igbobie Uzezi* v. *Federal Republic of Nigeria*, application ECW/CCJ/APP/32/19, decision delivered on April 30th, 2021, not yet published. The press release provides excerpts from the ruling and a summary of the facts of the case (available at https://www.courtecowas.org/2021/05/01/ecowas-court-condemns-nigerian-government-for-impunity-in-the-rape-of-an-aircraftwoman-by-naf-officer-and-awards-200000-damages/).

[51] The press release explains that the Court was not able to determine with the support of evidence the identity of the person responsible for the rape, but, since the fact happened inside the Air Force base, it was certain that the perpetrator was a member of the Air Force: «The relevance of the actual identity of the perpetrator thins out in the light of the obligation of the Respondent under the Charter to ensure the protection of the rights therein».

superior officer. No investigation was conducted by the military authorities and finally Beauty was unlawfully dismissed from the Air Force and evicted from her service apartment. The Court observed that «Member States have the responsibility under international human rights law to respect, protect and fulfil the human rights in treaties that they are parties to. In this wise, there is an undeniable responsibility on States to prevent sexual violence from occurring, and to investigate and punish all cases of human rights violations, including rape which is a violation of Article 5 of the African Charter», and condemned «in the strongest terms, the impunity displayed by the NAF authorities and by implication the Federal Republic of Nigeria in the grievous violation of respect to the dignity of the Applicant»[52]. The Court ordered the State to conduct a full investigation into the facts, to report back to the Court within three months, and awarded a monetary compensation to the applicant.

The described cases show how the regional bodies are ready to apply international standards in order to make it clear that the States have the duty and are under the international obligation to provide access to justice in a timely, effective and impartial way, without any discrimination or bias based on gender. Failure to do so entails international responsibility for violation of the obligation to put in place all forms of due diligence necessary to guarantee the protection of human rights[53]. The mere existence of legal systems and sanctions under domestic law is not sufficient, and the State has the obligation to effectively ensure that incidents of violence against women, in public or in private, or discrimination within the family are actually investigated and punished[54].

One of the questions to be considered here is whether the State can be held responsible for behaviors perpetrated by non-State actors, even inside the walls of a private home, when such behaviors entail breaches of human rights. It is widely recognized[55] in this respect that human rights law gives origin not only to the direct obligation on the State not to violate the rights of individuals under its jurisdiction (negative obligations), but also to the "diagonal"[56] obligation to protect individuals from violations committed by non-State actors and the corresponding obligation to prosecute and punish non-State actors for such violations (positive obligations)[57]. The key concept here is "due diligence"[58], since it is impossible to

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[52] Quote from the ruling is reported in the press release cited above. From the limited quotes it is possible to infer that the Court held the State directly responsible for the facts, since the crime had been perpetrated inside an Air Force base.

[53] See M.E. ADDADZI-KOOM, *"He Beat Me, and the State Did Nothing About It": An African Perspective on the Due Diligence Standard and State Responsibility for Domestic Violence in International Law*, in *Afr. Hum. Rights Law Jour*, 2019, p. 624 ff.

[54] *Ibidem*, p. 641.

[55] One of the first landmark cases on due diligence obligations was Interamerican Court of Human Rights, *Velázquez-Rodríguez* v. *Honduras* (1988) (Ser. C) No 4, July 29, 1988.

[56] This term is used by J.A. HESSBRUEGGE, *Human Rights Violations Arising from Conduct of Non-State Actors*, in *Buffalo Hum. Rights Law Rev*, 2005, pp. 21 ff., at 25; significant the example in feminist perspective given by the author: A solely vertical application of human rights protects men that suffer State-sponsored torture, while it does not protect women who endure equally horrendous suffering in the form of domestic violence (p. 27). It is not a case that positive obligations under human rights conventions were invoked with particular strength precisely in the field of domestic violence (see, among many, R.J.A. MC QUIGG, *Domestic Violence as a Human Rights Issue: Rumor v. Italy*, in *Eur. Jour. Int. Law*, 2015, p. 1009 ff., with many jurisprudential references).

[57] From the perspective of criminal law on the point, in respect to the European Convention on Human Rights, see M. MONTAGNA, *Obblighi convenzionali, tutela della vittima e completezza delle indagini*, in *Archivio penale*, 2019, p. 1 ff.; See also A. MIGNOLLI, *Post-Electoral Violence*, cit., p. 7 ff., for additional jurisprudential references.

[58] This is not a new concept in the international law of State responsibility: see R. PISILLO MAZZESCHI, *The Due Diligence Rule and the Nature of the International Responsibility of States*, in *Germ. YB. Int. Law*, 1992, p. 9 ff.; ID., *Responsabilité de l'Etat pour violation des obligations positives relative aux droits de l'homme*, in *Recueil des cours*, vol. 233,

require that the State prevents each and every possible violation committed by private parties. In order to ascertain the State's violation, its scope and extent and, consequently, its responsibility, it is necessary to make, on a case-by-case basis, an assessment of due diligence based on the circumstances of the events, and on the context (and, controversially, the State's capacity[59]). In the evaluation of due diligence obligations, a central role is played by prosecution of the perpetrators and access to justice for the victims.

The responsibility is aggravated if, as in Beauty's case, the State holds direct responsibility in the crime, that was committed by a State organ on the State's watch.

The widespread practice of public interest litigation or *actio popularis* goes in the same direction of enabling women to get access to justice. Most of the cases, both at domestic and regional level, that are examined here derive from actions brought by NGOs and organizations of human rights advocates, on behalf of the victims and/or in the interest of the general public. The practice is becoming so common and crucial for the assertion of human rights in Africa that States are getting impatient and are starting to contest it. It happened in June 2020 in Tanzania, where a new law was passed to limit the right to bring action in court for challenging a law or policy that allegedly violates the Bill of Rights. According to this new provision, in order to obtain legal standing the applicants must demonstrate that they are personally affected by the act or policy they claim is in conflict with human rights[60]. As will be explained in a following section of this paper, the practice of public interest litigation before regional courts was also criticized as it allows the courts (in that case the African Court for Human and Peoples' Rights) to turn into a sort of "guardian"[61] of international legality, where the cases brought to its attention are totally disconnected from individual complaints of abuse.

5. *Customary law between the Constitution and international human rights treaties. Two landmark cases addressing inheritance rights and female genital mutilations*

5.1. *The* Bhe *case and the debate on customary inheritance in South Africa*

2008, p. 175 ff. It can be said that a well-established definition of due diligence as an obligation of conduct for States under international law dates back to the ICJ's *Corfu Channel* case (United Kingdom of Great Britain and Northern Ireland v. Albania), *ICJ Reports* 1949, 4: «every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States». See, for a reconstruction of the development of the concept of due diligence, T. STEPHENS, D. FRENCH, *ILA Study Group on Due Diligence in International Law*, First Report, London 2014; Second Report, London, 2016. The concept was first applied to the treatment of aliens, and later extended to other areas of international law including environmental law, humanitarian law, investment law and human rights law. The last case is interesting because here the due diligence principle loses much of its transnational character, as it applies to a domestic conduct of the State that affects *in primis* its own citizens.

[59] K.E. BOON, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, in *Melb. Jour. Int. Law*, 2014, p. 1 ff., at p. 46, where it is noted that while developed States typically have better capacity to implement due diligence through legislation, controls and a functioning judicial system, developing countries struggle to implement duties of due diligence. See also HESSBRUEGGE, *Human Rights Violations*, cit., p. 85.

[60] O. NYEKO, *Public Interest Litigation Under Threat in Tanzania*, in *Human Rights Watch*, June 18th, 2020 (https://www.hrw.org/news/2020/06/18/public-interest-litigation-under-threat-tanzania).

[61] M. BAKAYE DEMBELE, *La condamnation du Mali par la Cour Africaine des droits de l'homme vers une ultime relecture du code des personnes et de la famille*, in *African Journal of International and Comparative Law*, 2020, p. 72 ff, at p. 84.

The first case that it is necessary to consider in order to understand the position of customary law in the context of a modernizing society and in a democratic constitutional system is a decision by the Constitutional Court of South Africa that dates back to 2004[62]. It is considered as a landmark case not only for the affirmation of gender equality in matters of succession and inheritance, but, even more importantly, for an analysis of the role that customary law is called to play in a constitutional legal system. This judgment is widely cited and commented, even by courts from other States (especially in the Commonwealth framework, where there is a significant circulation of judicial decisions), and celebrated as the foundation for the construction of a system of law that breaks up with the colonial *status quo* (and, given the particular situation of South Africa, with its past *apartheid* system), nonetheless recognizing the value of customary law.

The decision is composed of a majority opinion, written by Deputy Chief Justice Pius Langa, and of a minority opinion, written by Justice Sandile Ngcobo, partially dissenting with the majority. Three similar cases were heard together, as all three concerned the issue of intestate succession in the context of customary law. Two of the cases dealt with the succession of women to the estate of the deceased, while the third case was brought by two organizations for the protection of human rights in the form of public interest litigation challenging the constitutionality of the regime of customary intestate succession[63]. All the women and girls involved in the cases risked becoming homeless and losing all their means of subsistence.

The constitutional scrutiny of the Court followed two steps: a) the analysis of the conformity to the Constitution of Section 23 of the so-called Black Administration Act of 1927[64], that determined the choice of the law applicable to intestate succession for people of African ethnicity, while for citizens of "European" descent (read: "white"), there was a specific Statute on Intestate Succession[65]; b) the constitutionality of the customary law applicable to intestate succession.

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[62] Constitutional Court of South Africa, *Bhe* v. *Magistrate Khayelitsha*, cit. The complete citation, that includes all three cases, is *Nonkululeko Letta Bhe & Others v. Magistrate Khayelitsha & Others, Charlotte Shibi v. Montabeni Freddy Sithole & Minister for Justice and Constitutional Development, South African Human Rights Commission & Women's Legal Centre Trust v. President of the Republic of South Africa & Minister for Justice and Constitutional Development.*

[63] In the first case, Ms. Bhe acted on behalf of her daughters Nonkululeko and Anelisa Bhe, who were both minor at the time. The two girls were considered extramarital daughters of the deceased (no marriage, neither civil nor traditional, had apparently been registered) and had been excluded from the succession and from their father's estate, although the parents had been living together and were building a house together. The second case had been brought by Ms. Charlotte Shibi, whose brother had died intestate and without direct descendants nor spouse. Ms. Shibi was his next of kin, but the lower courts, applying customary law, had excluded her from succession and a cousin of the deceased, Mr. Sithole, the respondent, had been nominated sole heir to the estate. The third case was, as mentioned, a public interest litigation brought by the South African Human Rights Foundation, a State institution supporting democracy and human rights, and the Women's Legal Centre Trust, an NGO whose objective is the advancement and protection of women's rights, especially through the instrument of constitutional litigation.

[64] Act No. 38 of 1927, repealed in 2005, text available at https://www.gov.za/documents/black-administration-act-5-jul-1927-0000#).

[65] It is the Intestate Succession Act, No. 81 of 1987, text available at https://www.gov.za/documents/intestate-succession-act-10-mar-2015-1416?gclid=CjwKCAjwy42FBhB2EiwAJY0yQs7NffMboSPwaXVppqeM7G3LwgZ0zkiBN8dsdyu6lqSbD5uUCuSZ8xoCcjUQAvD_BwE).

On the first issue, the Court unanimously decided that section 23 was a provision that determined the choice of law based only on skin color[66], and as such it was racist and expression of a system of racial oppression, division and conflict in South Africa[67], incompatible with the current democratic constitutional system. For these reasons, the Court declared this provision, together with the implementing regulations, to be unconstitutional and invalid.

But the problem of the constitutionality of the substantive rules of customary law applicable to intestate succession remained, as well as the problem of how to determine the choice of the applicable law. And on this point, there were divergences between the majority and the minority, divergences that provide a very interesting insight on the constitutional position of customary law and on the possible remedies in those cases where rules of customary law conflict with the Bill of Rights in the Constitution and with international human rights standards.

The South African Constitution provides that the country's legal system is a composite one, where customary law forms integral part of South African law. The country is based on cultural diversity and values such diversity. At the same time, though, as the Court emphasized, customary law, as all other components of the legal system of the country – statutes and common law – derives its validity from the Constitution, thus its validity has to be determined on the basis of the Constitution[68]. This established, it was necessary for the Court to determine whether the customary law of succession, which is based on the rule of male primogeniture, was consistent with the prohibition of discrimination on grounds of sex enshrined in the Constitution. The Court encountered two problems in performing the judicial review of the constitutionality of traditional law. Firstly, the difficulty in ascertaining the actual content of the rules, in a context where customary law had been codified by the "Europeans" in statutes and textbooks that have "ossified" customary law and deprived it of its natural flexibility. The Court referred to the necessity to identify the "living" customary law and highlighted the difficulty of the task[69], on account of the fact that changes occur very slowly, and that they lack uniformity on the territory.

On the other hand, the second conceptual problem was that, as the Court observed, a complete abolition of customary law would be in its turn unconstitutional – because the Constitution acknowledges and protects customary law as part of the law of the country – and would even create undesirable effects (as an example, the Statute on intestate succession does not take polygynous marriages into consideration, thus potentially creating new discriminations in the many cases of polygynous marriages still existing in the country). Besides, the Court – and even more strongly the minority opinion – stressed the conceptual difference that exists between customary succession and common law or statutary succession[70]. The former is founded on the notion of family property, that is not the same as individual property of the family head, and subsequently of his heir, but rather a common property with regard to which the family head has rights of administration and management (preservation of the family property, especially land and livestock), but also duties and

[66] Basically, the contested provision required the application of customary law to intestate succession when the deceased was of African descent, with some limited exceptions.
[67] *Bhe*, cit, para. 61. In para. 116 the Court stressed the task of courts in "cleansing" the statute book of legislation so deeply rooted in the unjust past of the country.
[68] *Ibidem*, para. 148.
[69] *Ibidem*, paras. 109-111, and 150 in the minority opinion.
[70] *Ibidem*, paras. 76 and 158 ff.

responsibilities to protect and support all the other members of an extended traditional family. The latter, on the contrary, entails the transmission to the heir of exclusive ownership rights on the property, including the right to dispose of the property, while no duties towards the other members of the family are attached to this form of succession. Explained under this light, succession under customary law shows its social function, at least in the traditional rural society where it was first developed and affirmed. It is not any longer acceptable, though, in the contemporary society where the social fabric, economic structure and the role of women in society and in the economy (and even in the family) have deeply changed. It was out of doubt, for the Court, that the rule of male primogeniture is not compatible with a Bill of Rights based on the values of equality and non-discrimination, as expressed also by the international instruments of which South Africa is a contracting party, including the Maputo Protocol that at the time of the decision had already been ratified by the country but was not yet in force, yet was referred to by the Court anyway, to give more strength to the argument.

The problem was the remedy to this situation and here a deep difference emerged between the majority and the minority of the Court. For the majority, the customary rule of male primogeniture, being unconstitutional, had to be discarded and it was the task of the legislature to establish appropriate rules that consider the needs deriving from all the different features of traditional families. The legislature followed the indications of the Court a few years later, with the adoption of the Reform of the Customary Law of Succession and Regulation of Related Matters Act in 2009[71], which incorporated the principles indicated by the Court (non-discrimination of female heirs, non-discrimination of children born out of wedlock or in non-registered unions, non-discrimination of women in polygynous marriages). The minority opinion, on the contrary, disliked the idea of a statute codifying a reformed custom – an oxymoron –, and rather favored the role of the courts in developing customary (or indigenous, as Justice Ngcobo preferred to name it) law rules when they deviate from the «spirit, purport and objects of the Constitution»[72]. In this different perspective, the courts should support the flexibility of living customary law and be ready to examine the applicability of customary law in the «concrete setting of social conditions presented by each particular case»[73]. Following this approach, which was aimed at favoring and boosting the spontaneous process of change in customary law, Justice Ngcobo suggested that customary law, and statutory law as well, should be applied on the basis of the agreement of the involved parties, under court supervision in order to guarantee that no constitutional principles are violated and that the vulnerable members of the family are protected[74].

In effect, neither the majority, nor the new Reform, specify under which criteria should customary law be applicable and which citizens are subject to its rules. Article 1 of the Reform Act, under the heading «definitions», explains that customary law means «the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people», while Article 3 affirms that the Statute regulates the intestate succession to any person «who is subject to customary law» and dies after the entry into force of the reform, without any clarification on who is subject to customary law. The risk of

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[71] Act No. 11 of 2009 (text available at https://www.gov.za/documents/reform-customary-law-succession-and-regulation-related-matters-act).
[72] *Bhe*, cit., para. 215.
[73] *Ibidem*, para. 216.
[74] *Ibidem*, paras. 231 ff.; at 235 he refers to the experience of other countries, where the importance of diversity emerged from the courts' decisions and from legislation.

reintroducing racist criteria was around the corner, and the legislature carefully avoided the trap, but the ambiguity remains. The only way out from this minefield could be provided by the (non)definition of indigenous peoples that can be found in Article 33 (1), of the UN Declaration on the Rights of Indigenous Peoples[75]: «Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions». The international provision correctly relies on the self-recognition of each individual as a member of an indigenous community. This definition, despite the differences in context with the situations the Declaration wanted to regulate (indigenous peoples as minorities in independent States where the majority of the population is composed of non-indigenous former colonial or immigrant peoples[76]), could be helpful in stressing the voluntary character of the choice to be subject to customary law as self-identified members of a community.

Research conducted on the ground in the years following the *Bhe* judgment and the adoption of the reform showed that the customary rules on succession are indeed changing, including the attribution to women of the position of head of the family, but that change is proceeding very slowly and does not follow a uniform pattern on the territory[77]. More than fifteen years after this landmark decision, discriminatory practices still exist, while customs evolve too slowly. The risk is that there is a divergence between the families that have the necessary knowledge to give application to the statute (the 2009 Reform Act) and those that still rely on the old customary rules, which are changing at too slow a pace. This is why, notwithstanding the importance of a reform that finally brings customary law in line with the Bill of Rights, it is still necessary to work on the enhancement of the flexibility and evolution of "living" customary law[78].

5.2. *Female genital mutilations in the High Court of Kenya*

[75] Adopted by the General Assembly on September 13th, 2007, with Resolution No. A/RES/61/295, text available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

[76] In this perspective, the definition, or better the scope of application provided by Article 1 (1) of the 1989 ILO Convention on Indigenous and Tribal Peoples is more accurate, as it considers: «(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions». The provision also takes self-identification into account, as in para. (2) it affirms that «Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply». The Convention combines the social, economic, cultural and ethnic criteria with self-identification in the determination of its scope of application, and also considers the cases of States where indigenous peoples are not a minority in a previously colonized region but parts of the population which distinguish themselves from other parts on account of their cultural, social and economic conditions.

[77] C. HIMONGA, *Reflection on* Bhe v. Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa*, in *Southern Africa Public Law*, 2017, p. 1 ff.

[78] *Ibidem*, pp. 13-16.

The decision delivered by the High Court of Kenya at Nairobi on March 17th, 2021[79], addressed the problem of the relationship between culture, with the underlying practices and traditions, and the Constitution (and international human rights law) from a different perspective than the *Bhe* case, described in the previous section, but with a similar outcome. The action was a constitutional petition submitted to the High Court by a woman, a medical doctor who used to practice female circumcision[80], against a Kenyan statute that prohibited all forms of female genital mutilation and cutting - FGM/C[81] (Prohibition of Female Genital Mutilation Act[82]) in the country in all circumstances. According to the petitioner, the Act had to be declared unconstitutional because it violated the right of Kenyan women to uphold and respect their culture, ethnic identity, religion and beliefs, in that it prohibited to perform FGM/C in all cases, including in hospitals by qualified medical practitioners on adult women with their consent. In doing so, the Act was to be regarded, in the applicant's words, as «an imperialistic imposition from another culture with a different set of beliefs or norms»[83], while female circumcision should on the contrary be considered as a practice that not only has its roots in the traditions and cultures of the communities, but forms integral part of the identity of girls and women and constitutes, as such, an important element of the sense of belonging to the community: Women who performed female circumcisions, like the petitioner herself, should be seen as persons «who are practicing our African way of life»[84], and should not be put in jail for this. In this context the High Court had to do a very careful job, in order to avoid giving the impression of enforcing values that were perceived as alien to the culture of the country. Any resemblance to a "repugnancy test" had to be avoided, but at the same time the Court needed and wanted to be very firm and determined in establishing the principles and values – not foreign, but values that are incorporated in the country's ethos – that stand behind the prohibition of a practice as harmful for women and girls as FGM, a practice that profoundly violates the physical, psychological and social integrity of women and girls.

The Court's ruling considered many lines of argument, starting from the chilling testimony of medical experts and FGM survivors, all focused on demonstrating the devastating health and psychological toll of FGM on the lives of women and girls, including the case of a girl who for refusing to undergo the rite suffered hostility and social stigma by the community, to the point that she had to relocate. But the most interesting points can be found in three issues touched upon by the Court: a) the notions of culture, cultural practice and harmful cultural practice; b) the notion of freedom of choice in relation to harmful practices such as FGM; d) the notion of human dignity. Finally, the overarching problem of

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[79] High Court of Kenya at Nairobi, Constitutional Petition No. 244 of 2019, *Dr. Tatu Kamau* v. *The Hon. Attorney General and Others*, available at http://kenyalaw.org/caselaw/cases/view/209223/.

[80] Terminology is also important here: The petitioner deliberately used "female circumcision" instead of "female genital mutilation", to stress that in her view it is not a mutilation, but simply a "circumcision", not very dissimilar from the procedure that in many cultures is performed on males. The comparison with male circumcision was, in effect, one of the arguments used by the petitioner, but the Court demonstrated that the psychologic and health consequences of FGM are incomparable with those of male circumcision, so any attempt at suggesting a discrimination between men and women in this context is simply inadmissible.

[81] Female genital mutilation and cutting comprise all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons, as described by the World Health Organization (see https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation). For an Islamic religious perspective on the issue, critical towards the WHO's comprehensive approach to FGM, see the website https://femalecircumcision.org/.

[82] No. 32 of 2011.

[83] *Dr. Tatu Kamau*, cit., para. 13.

[84] *Ibidem*, para. 18.

balancing the competing constitutional freedoms of culture, religion, beliefs with the rights to human dignity, life, integrity, health, and education.

Culture and cultural diversity are fundamental values in the Kenyan Constitution, in the Preamble («we the Kenyan people are proud of our ethnic, cultural and religious diversity and determined to live in peace and unity»), and Article 11(1), where it is stated that culture constitutes the «foundation of the nation» and is the basis of the «cumulative civilization of the Kenyan people and nation». The Constitution includes a Bill of Rights that guarantees all the fundamental freedoms, including freedom of religion, belief, conscience, the freedom to use the language and to participate in the cultural life of the person's choice (Article 44), but it also establishes that no one should be forced to perform, observe or undergo any cultural practice or rite (para. 3). In addition, the Constitution, in Article 2(4), provides that any law, including customary law, that is inconsistent with the Constitution, is void and deprived of legal effects. In the briefly described legal framework, task of the Court was to establish the consistency of the rite of FGM with the Constitution, in order to decide on the constitutionality of a law totally banning such practice: «Cultural rights intertwine with human rights in certain social spaces, and are not easy to separate but the Constitution offers the first most important standard against which the relevance of all other laws, religions, customs, and practices are to be measured»[85].

In order to determine whether FGM could be considered as a harmful cultural practice, contrary to the Constitution, the Court largely relied on the definition provided by the Maputo Protocol, as the notion of harmful cultural practice is not defined in Kenyan statutes: «all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity» (Article I, *g*). Acquired, from the converging testimony, the harmful character of FGM for the life, health, dignity, education and physical integrity of women and girls, on the basis of the cited definition the Court came to the conclusion that «the commitment to eliminate harmful practices is linked not only to promoting the health and well-being of women but also to women's human rights»[86]. In sum, FGM is harmful not only because it entails a violation of the physical integrity of the women or girls who undergo the practice, with many serious consequences on their physical, sexual, reproductive and mental health, but also because it has a whole lot of other consequences: early marriage and school drop-out, stigma and social exclusion of women that refuse the practice and, in some cases, even loss of life. All the mentioned consequences amount to serious violations of the fundamental human rights of women and girls that go even beyond the dramatic health consequences resulting from FGM. FGM, in the Court's vision, is a practice that negatively affects the person of the woman or girl in a comprehensive way, and that hurts her dignity in all aspects of her life, both personal and social.

This determination brought the Court to discuss the logically subsequent problem of the validity of consent or freedom of choice for adult women to undergo the rite of FGM in the cultural and social context of the communities that follow this practice. The question was whether the rights of women to uphold and respect their culture and identity by voluntarily undergoing FGM, had been violated by the Act. «The assumption is that anyone above the age of 18 years undergoes FGM voluntarily. However, this hypothesis is far from reality, especially for women who belong to communities where the practice is strongly supported.

[85] *Ibidem*, para. 143.
[86] *Ibidem*, para. 134.

The context within which FGM/C is practiced is relevant as there is social pressure and punitive sanctions. From the evidence, it is clear that those who undergo the cut are involved in a cycle of social pressure from the family, clan and community. They also suffer serious health complications while those who refuse to undergo it suffer the consequences of stigma. Women are thus as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent»[87]. The described social context convinced the Court that consent could not be considered valid in the case of FGM, and that the contested Act was correct in excluding its validity, for the two cumulative reasons that consent in a context of social pressure could not be considered as free and that it amounted to consent to an illegal practice: FGM «cannot be rendered lawful because the person on whom the act was performed consented to that act. No person can license another to perform a crime»[88]. On top of all this, the practice of FGM is contrary to the Hippocratic Oath: «Do No Harm»[89].

Ironically, but probably this is another significant testimony of the cultural debate on these issues, a violation of human dignity was claimed by the petitioner, for herself as a practitioner and for all the women who voluntarily desire to undergo the rite of FGM, in the exercise of their constitutionally guaranteed right to practice their culture and traditions. In response to this claim the Court introduced two crucial elements: a definition of human dignity, citing one of its own previous cases, and an approach to the notion of culture that, stemming from its fundamental value for the Kenyan society, highlights at the same time its evolving and changing character. Human dignity, which is not defined in the Constitution, is «that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanization. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution»[90]. The contested Act, according to the Court, did not violate human dignity by limiting the petitioner's right to practice her culture, as human dignity can never justify the violations it is designed to protect against, humiliation, degradation and dehumanization; on the contrary, as the Court extensively demonstrated, the practice of FGM does.

While it is certain that culture is at the heart of the country's identity and value, it is also true that «culture is dynamic and not static and will continue to grow responding to new factors. It is also fluid and changes from time to time. It is susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. But there are certain aspects of culture that identify a particular group, their history, ancestry and way of life and this diversity is recognized and protected by the Constitution»[91]. Communities can preserve their identity and sense of belonging even abolishing those traditional practices that are harmful for the rights and dignity of individuals. The same concept is applicable, according to the Court, to human rights themselves. This point was expressed with an inspiring citation from a judgment delivered by the Supreme Court of India in 1973: «The fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its

[87] *Ibidem*, para. 135.
[88] *Ibidem*, para. 161.
[89] *Ibidem*, para. 169.
[90] The Court here quotes *Republic* v. *Kenya National Examinations Council & Anor Ex Parte Audrey Mbugua Ithibu*, High Court Nairobi J.R. 147 of 2013 [2014] eKLR (available at http://kenyalaw.org/caselaw/cases/view/101979/).
[91] *Dr. Tatu Kamau*, cit., para. 207.

experience»[92]. Each generation, this is what the Court wanted to make clear, with its own sensibility and on the basis of the new needs of an evolving society, has the duty to pour into the vessel of the constitutional fundamental rights, new priorities and new values and balance them with traditions. Following this line of reasoning, the Court did not need to use the repugnancy test, which is understandably disliked by the public opinion, but relied exclusively on the Constitution and the international commitments made by the country. Both sources stress the important value of – and respect due to – the traditional culture and the cultural and religious diversity of African countries. Cultural and religious traditions and norms form integral part of the constitutional system, as the South African Constitutional Court said in *Bhe*, and as such, they must give way to the Constitution and its Bill of Rights in case of conflict: «The evidence before us demonstrates that the practice of FGM/C implicates not only the right to practice cultural life but also the right to health, human dignity and in instances when it results in death, the right to life. The provisions of international treaties reproduced hereto are also clear that not all traditional practices are prohibited, but only those that undermine international human rights standards»[93]. And the conclusion: «In sum there is no doubt that FGM/C was central to the culture of some communities in Kenya including the Kikuyu to which the petitioner belongs. However, from the medical evidence, and as discussed earlier, we are left in no doubt about the negative short term and long term effects of FGM/C on women's health. We have also discussed the absence of consent by victims who undergo the rite (…). We are not persuaded that one can choose to undergo a harmful practice. From the medical and anecdotal evidence presented by the respondents, we find that limiting this right is reasonable in an open and democratic society based on the dignity of women»[94].

The cases that have been analyzed in this section show how the courts are working towards the construction of a legal system where customary law and constitutional law can coexist without impacting negatively on the fundamental rights of the citizens and on the principles of equality, human dignity and non-discrimination. The task is not without difficulties, especially in the method. The different approaches followed by the majority and minority in *Bhe* tell us that there is the need to find a difficult and delicate balance in the enforcement of legislation "against" tradition. In this search for a balance an effort is needed to understand in depth the roots of certain traditions in order to change them in accordance with the new societal structure and system of values, but maintaining, at the same time, the respect that is due to traditional and customary bodies of rules that have regulated the life of the communities for centuries. This effort of inclusion and reform, together with a better and more widespread policy of information and education, is particularly important in cases, like those that have been described here and those that are the object of the following section of this study, where the communities themselves oppose resistance to change in the name of tradition (or religion). It is significant that the African Union has delivered a statement that lauds the decision by the High Court of Kenya in the FGM case, praising it as «a clear

[92] Supreme Court of India, *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225, para. 1707, quoted in *Dr. Tatu Kamau*, cit., para. 208. To be precise, the quote comes from Justice K.K. Mathew's dissenting opinion, where he expressed the view that fundamental rights are natural rights of the human being, and as such they are inherent in society, and they may evolve with generational change.
[93] *Dr. Tatu Kamau*, cit., para. 214.
[94] *Ibidem*, para. 215.

demonstration of the commitment by member states to preserve, protect and promote women's rights through laws, policies and action»[95].

6. *Adolescent girls, marriage and pregnancy in regional and domestic courts. Impact on the girls' right to education*

This section discusses two cases that address the life and wellbeing of adolescent girls forced into early marriage, or banned from school for being pregnant. From a legal point of view, these decisions are significant because they not only show the importance of the enforcement of international and constitutional legal standards and of the strong affirmation of their prevalence over religious traditions and bigot mentality, but they also bring to light the obligation of States to work towards the elimination or change of such traditions and bigotry, through a much needed effort of education, training and sensibilization of the population, the only way to boost a bottom-up process of harmonization between traditions and gender equality. At the same time, though, the implementation difficulties must be duly pointed out.

The African Court for Human and People's Rights (African Court), applied the Maputo Protocol for the first time in 2018, in a case addressing the problem of minimum age for marriage and the resultant conflictual relationship between religious practices and human rights standards[96]. The case is remarkable because the African Court was requested, in the framework of a public interest litigation action, to assess the consistency of a State law with international human rights instruments. The applicants, two NGOs active in the promotion of women's rights, contested the newly approved 2011 Family Code of the Republic of Mali, which set the minimum age for marriage at 18 for boys and 16 for girls, whereas Article VI (b) of the Maputo Protocol sets that age at 18. In addition, the same Malian law allowed marriage at 15 for both boys and girls, but with the consent of both parents in the case of boys and of the sole father for girls. It is interesting to note that the respondent State maintained that the 2011 law responded to the «social realities»[97] of the country, where Islamic communities regularly practice early marriage, especially for girls. Marriages celebrated by religious ministers, moreover, were not subject by the law to the same requirements of strict verification of the consent of the parties to get married as civil marriages.

The history of this reform of the Family Code is useful to understand the context in which the adoption of the law took place. In 2009, the Malian parliament had approved a text that was in line with international standards[98]. The approval of the text triggered widespread and violent protests on the part of the Islamic associations in the country (Islam is the majority religion in Mali), protests that even led to the paralysis of the State

[95] African Union, *African Union Lauds Kenya's Court Ruling Against Female Genital Mutilation*, Press Release of 19 March 2021 (available at https://au.int/en/pressreleases/20210322/african-union-lauds-kenyas-court-ruling-against-female-genital-mutilation).

[96] African Court for Human and Peoples' Rights, matter of *Association pour le Progrès et la défence des droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA)* v. *Republic of Mali*, Application No. 046/2016, judgment of May 11th, 2018 (available at https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/215/3a6/5f52153a6cd1a562612259.pdf).

[97] *Ibidem*, para. 67.

[98] Loi No. 09-038 AN-RM, portant Code des personnes et de la famille.

institutions[99], forcing the State, hostage of the protestors in an already unstable political situation, to approve a new law[100] on December 30th, 2011, which reinstated the religious provisions on marriage and personal status. Before the African Court, thus, was a domestic law, whose content was contested for being at odds with international human rights standards on non-discrimination and sex equality established by international treaties to which the respondent State was a contracting party, but which had been passed with overwhelming support by the population (at least the most combative, presumably predominantly male, part of it). On top of all this, the law was contested by NGOs, considered with suspicion by many observers in the country, and accused of being fomented by the West (a visit by the minister of women's rights of France, Mme Najat Vallaud-Belkacem in February 2014 was met by the hostility of the Muslim authorities as she called for the revision of the new Family Code) and of attempting to turn the African Court into a sort of watchdog of international human rights law, without any connection to actual individual violations, and with no hope of effectivity[101].

The Court held that «the way in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards which define the precise conditions regarding age of marriage and consent of the parties, for a marriage to be valid»[102]. There was more: The applicants contended that the impugned Malian Family Code also violated Article XXI of the Maputo Protocol as it allowed the application of religious and customary law to inheritance. Under Islamic law, women inherit half of what a man receives, and widows are penalized, as well as children born out of wedlock, who can inherit only if their parents so decide. Having established that the responding State, by enacting the Family Code, had violated numerous provisions of the Maputo Protocol and of the African Charter on the Rights and Welfare of the Child[103], the African Court not only ordered the State to amend the law and harmonize it with international human rights norms, but requested as well to comply with its obligations with respect to information, teaching, education and sensitization of the population[104]. In the view of the African Court, culture and religion do not constitute a justification for violating the international conventions on the protection of human rights. There is no room, for the States, to invoke their culture and traditions in order to derogate from international human rights. The Court did not accept as a justification for derogating from the international standards, the cause of *force majeure* that had been invoked by the State, which claimed that the violent protests that had followed the adoption of the previous act on family law had forced the State's institutions to adopt the new law in order to preserve public order. The Court did not elaborate on this issue, considering it preposterous, but is an important issue, if one considers the situation of the country: Aggressive Islamic associations[105] and even jihadist groups active on the territory, combined with the fragility of the institutions, posed

[99] M. BAKAYE DEMBELE, *La condamnation du Mali*, cit., p. 78.
[100] Loi No. 2011-087 AN-RM.
[101] M. BAKAYE DEMBELE, *La condamnation du Mali*, cit., p. 83 f.
[102] African Court for Human and Peoples' Rights, *APDF and IHRDA v. Republic of Mali*, cit., para. 94.
[103] African Charter on the Rights and Welfare of the Child, adopted on July 1st, 1990, text available at https://au.int/en/treaties/african-charter-rights-and-welfare-child.
[104] *Association pour le Progrès et la défence des droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, cit., para. 135.
[105] After the publication of the judgment, the Islamic associations of Mali released a heated declaration in which they violently contested the judgment, as enforcer of rules «made in Europe» on the basis of «fanfaronnades feministes». See M. KIMBIRI, Président collectif des Associations Musulmanes du Mali, in *Malijet*, 1 juin 2018.

a very serious problem for the execution of the ruling. As a matter of fact, Mali, where a military coup had been carried out in 2012, underwent a second coup in 2020. The political instability of the country and the divisions therein make it very unlikely that the Family Code will be changed anytime soon. This is of course an extreme situation, but highlights the problem of compliance with the rulings of regional courts, especially where, as in this case, the social environment is characterized by hostility towards the application of international human rights law, considered as the product of external interference.

The problem of early marriage arose also in a domestic case, which was decided by the High Court of Kenya in Malindi in 2015[106]. It was a criminal case for the submission of a 17-year-old girl to early marriage, an unlawful practice under Kenyan law, that was likely to affect negatively the physical and psychological development of the girl: In the instant case, in fact, it was reported that shortly before her marriage, the girl dropped out of school, being deprived of her fundamental right to education. The High Court, relying on the 2010 Kenyan Constitution and relevant international human rights treaties, including the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, established that the freedom of religion does not entail the constitutionality of practices that are harmful for children: «The State would not have done its duty under the Constitution if it were to condone early marriages in the name of religion. It has a duty to protect the best interest of a child and it would not be in the interest of the child no matter the child's creed, sex, intellectual capacity or socio-economic background, to be married off before the age of majority (…). Early marriages are permissible under Islamic practice. However, in Kenya, such marriages are not allowed. The law limiting such marriages is constitutional. Muslims living in Kenya should obey the Kenyan laws and ensure that they conduct marriage when the bride and the bride groom are above eighteen years. This is not limitation of freedom of conscience or religious practice»[107]. In the Court's view, the expression «Harmful cultural practices», that can be found in the Constitution, as well as in international instruments, including the Maputo Protocol[108], should be broadly interpreted, to include all religious practices which are currently not in line with the Constitution[109].

The right to a proper education for adolescent girls was strongly affirmed in another recent case, decided by the ECOWAS Court in 2019[110], in an action brought by two NGOs on behalf of a group of pregnant teenagers excluded from attending school because of their pregnancy. The background of this policy was the decision of the State to close schools during the Ebola outbreak in 2014-2016 in Sierra Leone. During the lockdown period, many girls got pregnant and, as the schools reopened, they were banned from school. The Minister of Education of the time publicly stated that «visibly pregnant» girls in Sierra Leone would no longer be able to attend school upon the reopening of schools, as pregnant girls served as «negative influence on their peers»[111]. A few special schools were established in order to meet their needs, but such schools were not remotely comparable in quality of education to

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106 High Court of Kenya at Malindi, Constitutional Petition No. 40 of 2011, *Council of Imams and Preachers of Kenya, Malindi & 4 others* v *Attorney General & 5 others* [2015], judgment of October 29th, 2015, available at http://kenyalaw.org/caselaw/cases/view/115306/.

107 *Ibidem*, p. 8.

108 Article I (g). See above, the previous section of this study.

109 *Ibidem*, p. 6.

110 ECOWAS Community Court of Justice, *Women against Violence and Exploitation in Society (WAVES) & Child Welfare Society Sierra Leone (CWS-SL)* v. *The Republic of Sierra Leone*, case No. ECW/CCJ/JUD/37/19, judgment of December 12th, 2019, available at https://ihrda.uwazi.io/en/entity/1i7yfu3qr0cj.

111 The statement is quoted in the judgment: *ivi*, p. 16.

the ordinary public schools (only four subjects were taught and the schools operated only three days a week), thus creating discrimination and inequality. The Court's conclusions affirmed the right of girls to not be discriminated on the ground of being pregnant, and strongly condemned all discriminatory practices that allow girls to be segregated, while «their fellow men or boys who may have impregnated them go about and enjoy regular schools with better facilities and full curriculum»[112]. The Court established that it was the duty of the State not only to immediately remove the ban and reinstate the girls in the normal schools, but also to develop «strategies, programs and nation-wide campaigns that focus on reversing negative societal attitudes that support the discrimination and bias against pregnant girls attending school»[113]. Even more importantly for the future, the Court mandated to integrate «sexual and reproductive health into school curricula as this increased knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancy»[114]. Interestingly, in its ruling the ECOWAS Court referred to the judgment delivered by the European Court of Human Rights in 2010 in the case *Oršuš & Others* v. *Croatia*[115], where the Grand Chamber of the European Court ruled that segregating Roma children in Roma-only classes was discriminatory. It is yet another example of the cross-contamination of human rights jurisprudence[116]. The government finally lifted the ban on pregnant girls at school in March 2020, unfortunately when schools were about to close again for the Covid-19 pandemic[117].

The cases analyzed in this section try to address harmful practices and discriminatory policies from a broad point of view, applying human rights standards of equality and non-discrimination of constitutional and international origin. The rulings stress the crucial point of the central role of education in the complete development of persons. One of the main reasons why early marriage is harmful for girls is because it forces girls to drop out of school, thus perpetuating a situation of inferiority of girls compared to their male counterparts. At the same time, teenage pregnancies are a product of ignorance and lack of education and in turn pregnancy leads to school drop-out. Again, a vicious circle of which too often women and girls are the victims. The Courts try to break that circle highlighting the fundamental right of girls to a proper education and the corresponding obligation of the States to provide that education in a non-discriminatory way, while removing all obstacles, such as early marriage, to the full realization of the girl as a person. But these cases also show the opposition that the enforcement of human rights often faces from the States or from communities within the States. This consideration reinforces the conviction that it is necessary to change the perspective of a forced "westernization" of African law that is perceived as aiming at destroying the traditional cultures; on the contrary, there is the need to reverse this perception, stressing the growing awareness of African societies themselves on the matters of equality and non-discrimination.

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112 *Ibidem*, p. 28.
113 *Ibidem*, p. 32.
114 *Ibidem*, p. 33.
115 European Court of Human Rights, *Oršuš & Others* v. *Croatia*, Application No. 15766/03, judgment of 16 March 2010, available at https://hudoc.echr.coe.int/eng.
116 See, extensively, A. DI STASI, *Il diritto all'equo processo nella CEDU e nella Convenzione americana sui diritti umani*, Torino, 2012: This work refers mostly to the ECHR and the Inter-American Convention, but the same pattern of strong cross-reference is present also in the jurisprudence of the African regional Courts, that often consider the interpretation and application of human rights by their European and American counterparts.
117 *Sierra Leone Overturns Ban on Pregnant Schoolgirls*, https://www.bbc.com/news/world-africa-52098230.

7. *Conclusion*

It has been observed that customary law should be neither demonized nor romanticized[118]. African customary law was and remains today the expression of the tradition, history and culture of the African peoples, and in modern times it has become integral part of the law of the States of the Continent. As such, it is widely applied by the population and the communities and it is valued and cherished as an important part of African identity. Nevertheless, societies are changing, and the law, even customary law, should change accordingly.

As I observed at the beginning of this article, among the distortions produced by colonization there were, on the one hand, the discriminatory and racist application of customary law[119] and, on the other hand, the codification of customary law produced by the Europeans with textbooks and other instruments that deprived customary law of its intrinsic and necessary dynamism and flexibility. Thus, the contradictions between "official" and static customary law on the one hand, and "living" customary law on the other, started to emerge, when customs, evolving with the developments of society, embarked on the slow and lengthy process of alignment with the new needs and dynamics of societies, which include a new, more active and independent role for women, while the courts continued lazily to apply (and, in many cases, strike down) the codified "official" customs. The case of discrimination on grounds of gender is very significant in this perspective. As the necessarily limited – but sufficiently exemplifying – survey of domestic and regional case-law that have been examined tried to demonstrate, the effort that African courts are making in the most recent decisions is to integrate customary law as law of the land within the constitutional systems of democratic States, bringing the customary rules in line with the Bill of Rights and international human rights norms and purging customary rules of all discriminatory elements, but keeping the underlying traditional values alive. Many different methods can be (and have been) used to achieve the objective of a customary law system entirely consistent with human rights, from the most traumatic repugnancy test, now largely repudiated, to the declaration of unconstitutionality of customary rules, to an effort of consistent interpretation of the customary rule in order to bring it in line with fundamental rights, to the devolution to the legislature of the task of adopting new rules on matters where customary law is discriminatory, to the development by the courts themselves of revised or modernized customary rules.

At the bottom of all this, though, the fact remains that integrating women and girls' rights in African customary law requires much more that the simple act of ratification of international treaties by the States, or even the adoption of authoritative judgments by the courts. It requires the choral effort of entire communities, legislatures, courts, NGOs and citizens, and a bottom-up approach of reform that relies on the potential for change of customary law, on its community and co-operation values, on the useful role that informal dispute settlement structures can play as an alternative to courts. The direction of this effort should be to pursue a dialogue between customary law and human rights, where the

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[118] T. EZER, *Forging a Path for Women's Rights in Customary Law*, in *Hastings Women's Law Journal*, 2016, pp. 65 ff., at p. 85.

[119] Whose effect was a sort of "legal apartheid": see the South African Constitutional Court's considerations in *Bhe*, described above.

alignment and harmonization between the two is achieved by the communities themselves[120], on the basis of the conviction that «the human rights project is not about westernizing African societies, but on the contrary, is an attempt to integrate the traditional and modern values of the African people with the concept of human rights and dignity for all persons»[121]. The international instruments, treaties and courts, as this study has pointed out, play a significant role in this process, as they contribute to the spreading of the necessary knowledge and awareness about human rights. A pivotal position pertains to the Maputo Protocol, which is tailor-made on the needs and social context of African women and girls. As has been illustrated before, the Maputo Protocol itself values customary law, practices, and traditional knowledge, but at the same time introduces in the fabric of African law and traditions the inalienable principles of non-discrimination and equality, and the interpretive means necessary to discern harmful traditional practices, in order to remove them or replace them.

The evolution of the rights of women and girls in the African continent is ongoing, and it reflects the debate that is in process on the continent, at least in the last 20 years.

In this respect, it is necessary to spend a few, non-conclusive but challenging words on the issue of universalism vs. regionalism of human rights. This matter was addressed at the beginning of this paper, to point out that the specificities of the African societies and legal structures – as in all other regional societies and legal systems in the world – explain the peculiar problems that women and girls face in pursuing the full enjoyment of their rights, and the different weight of some rights with respect to others that might be more relevant in other contexts. The special needs of African women are taken into consideration, as mentioned before, in the text of the Maputo Protocol, whose Preamble, it is worth noting, expressly refers to all international sources of human rights and, specifically, of women's rights, from the Universal Declaration to the UN Covenants, to the CEDAW, thus making it clear that the regional dimension of women's rights is inscribed in the universal path of development of human rights. But, at the same time, it can provide an additional contribution in terms of values to the universal dimension. A process of cross-fertilization between different cultures and traditions can be profitable for all. Reading the case-law of both regional and domestic courts, this impression is widely confirmed by the legal references to universal and regional instruments and by the frequent cross-reference between regional courts. So, yes, context matters in the process of loading with content the "empty vessels" of human rights that each generation finds before them. And yes, generations from different contexts and different latitudes can share their experiences and pursue a richer cargo for those vessels. This process of cross-fertilization becomes even more important if one considers that while European and American regional courts, despite specific features peculiar to each of them, share a large amount of common legal traditions and culture, due to the historical experiences of the two regions, this is totally different in Africa, where, as observed in this article, the relationship between "Western" legal traditions, including human rights, and local legal traditions and customs, has long been difficult and conflictual, due to the traumatic and recent colonial history of the continent

From an institutional standpoint, domestic and regional courts operate in a multilevel system of human rights governance, that includes informal adjudication at community level, domestic courts and regional courts, although there is a frequent "substitution" of the

[120] M. B. NDULO, *African Customary Law*, cit., p. 114 f.
[121] *Ibidem*, p. 115.

regional or sub-regional level in case of inaction or inability of the States to provide effective remedies to human rights violations, and the respective competences are not so clearly determined. This is in part due to the fragility of many African States and their judicial systems. It is significant, in this respect, that there is no formal requirement of previous exhaustion of domestic remedies for access to the ECOWAS Court, while Article 56 of the African Charter requires the exhaustion of local remedies for the admissibility of cases before the African Court of Human and Peoples' Rights. The latter provision, however, in consideration of the objective difficulties applicants often face in obtaining access to justice at domestic level, is applied with a certain degree of flexibility by the African Court[122], precisely in the light of facilitating as much as possible access to justice in all circumstances where the competent State's law enforcement and judicial system is fragile or unwilling to act or even abusive itself.

In the light of all the above considerations, and as this paper tried to demonstrate, it would be a mistake, and too often this is instrumentally done (from the West and from inside Africa alike), to reduce this process to a westernization of the African culture. It would mean to replicate an old model – former colonies versus former colonizers, and vice-versa – that could be acceptable in the 1960s or 1970s, during or immediately after decolonization. Today, it is necessary to get past that model. The process of enhancement of women's rights (and of human rights at large) is by now a debate and a process that is all internal to Africa[123], where large parts of the society share these values and strive, as in other parts of the world, for the affirmation of human rights for women and girls as well as for their empowerment and enhanced role in the society[124].

Recently the African Commission on Human and Peoples' Rights has declared the admissibility of the complaint brought by Senate Masupha[125], the daughter of a deceased prominent chief in Lesotho, against the customary rule that precludes the inheritance by women of the role of chief. The case will probably be decided later this year. It might be an important occasion to start a process of reform also in the attribution to women of traditional leadership positions, after many Constitutions and legislations of African States have already

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122 T. SOBOKA BULTO, *Exception as a Norm: The Local Remedies Rule in the Context of Socio-Economic Rights in the African Human Rights System*, in *Int. Jour. Hum. Rights*, 2011, p. 555 ff.; more recently, L. CHENWI, *Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights*, in *Human Rights Quarterly*, 2019, p. 374 ff., critically points out that while the Court is still adopting a flexible approach to the application of the local remedies rule, in recent case-law its interpretation of the rule has been more restrictive. This trend is seen with concern for the possible limitations to the right of access to justice.

123 It is significant in this respect that the Charter for African Cultural Renaissance (available at https://au.int/en/treaties/charter-african-cultural-renaissance), adopted by the African Union in January 2006 and entered into force in October 2020, includes among its objectives, under Article 3(k), «to develop all the dynamic values of the African cultural heritage that promote human rights, social cohesion and human development». Article 10 (1) adds that «States will ensure the introduction of African cultural values and the universal principles of human rights in education (…)». It appears clearly from these provisions that the universal values of human rights are considered as an integral part of the cultural heritage of African peoples, together with social cohesion, respect for and value of diversity, freedom of expression and cultural democracy.

124 In the current African Court for Human and Peoples' Rights, 6 justices are female and 5 are male, while in the ECOWAS Court seat 3 male justices and 2 female ones. The African Commission on Human and Peoples' Rights counts 11 members, 6 of which are women. In the European Court of Human Rights out of 47 judges only 14 are women. Things are not better in the European Court of Justice: 7 women out of 39 between judges and advocates-general in the ECJ and 15 women out of 51 judges in the General Court. We can conclude that the African Courts practice gender diversity much more effectively than their European counterparts.

125 It is the Communication No. 480/14, *Senate Masupha & Others v. Lesotho*, declared admissible by the African Commission on Human and Peoples' Rights during its 27th extraordinary session in 2020.

introduced, with significant results, positive measures to guarantee the participation of women in the public life of their countries.