Watch the Courts Dance: Litigating the Right to Non-discrimination on the Ground of Sex

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Introduction

Litigating the right to non-discrimination on the ground of sex has produced mixed results in a number of African jurisdictions. In spite of the fact that courts have looked at laws that discriminate against women with varying degrees of success, some issues such as women's property rights continue to be the most unpredictable terrain when subject to litigation. Increasingly, in the region and internationally, courts have begun to understand that discrimination on a prohibited ground cannot be justified. This has not, however, stopped some courts from insisting that discrimination on the basis of sex can still be justified, particularly when dealing with women's inheritance rights. It is when courts seek to justify the unjustifiable that the judicial precedent and recognised standards on non-discrimination have fallen foul of the law.

This article draws attention to selected cases in a range of African countries, highlights the forward and backward steps that courts have taken with respect to prohibiting discrimination on ground of sex and provides an overview of some of the struggles associated with litigation in this field. Part one maps out some hotspots where litigation efforts to end sex discrimination have experienced significant challenges. Parts two, three and four examine how courts have reacted to these issues in the national contexts of Zimbabwe, Tanzania and Nigeria respectively.

1. Common Challenges across Africa

The easy cases have been the ones that have not involved property rights. The case of *Attorney General of the Republic of Botswana v. Unity Dow*[2] in Botswana became synonymous with progressive court decisions aimed at protecting women's rights in Africa. Ms. Unity Dow, a citizen of Botswana, challenged the constitutionality of Section 4(1) of the Citizenship Act which denied Botswana citizenship to her children on the basis that her husband was a foreigner. The provisions of Section 4(1) patently discriminated against women as Botswana citizenship could be granted to children whose father was a Botswana citizen irrespective of whether the mother was a foreigner.[3] In outlawing the discriminatory provision of the Citizenship Act, the Court relied on the right to non-discrimination on the ground of sex, in spite of the fact that the ground of sex is not expressly mentioned in the section of the Constitution prohibiting discrimination.[4]

There have been other less well known cases where courts across Africa have declared laws and practices unconstitutional on the basis that they discriminated against women. In *Longwe v. Intercontinental Hotels*,[5] the

Zambian High Court held that the Intercontinental Hotel's policy of refusing entrance to women unaccompanied by a male escort was inconsistent with Section 23 of the Zambian Constitution. Section 23 contains a protection from discrimination clause that includes the obligations under Articles 1, 2, and 3 of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). In *Uganda v. Matovu*,[6] the judge refused to apply a caution to the uncorroborated evidence of a complainant in a rape case on the basis that the cautionary rule discriminated against women. The cautionary rule was a rule of common law, applicable in most former British colonies, to the effect that the courts should not rely on the uncorroborated evidence of a single witness in sexual offences; since sexual offences are most commonly committed against women, and in private, this rule discriminated against women.

In Tanzania, courts have sought to engage with international standards in order to redress the gender discrimination which existed in customary law. The case of *Jonathan v. Republic*[7] in which the appellant, who had been convicted of rape, claimed that abducting and raping the victim woman was a permissible form of customary marriage, is a pertinent example in this regard. Although the court in *Jonathan* did not exclusively focus on discrimination, it relied on the obligations under CEDAW to protect and offer adequate relief to women who are victims of violence and the obligation to ensure that marriage shall be entered into only with the free and full consent of the intending spouses required by Article 16(2) of the Universal Declaration on Human Rights (UDHR) to determine that the customary practice was unlawful.

In addition to these progressive decisions there have been some cases involving inheritance where the courts have upheld the principle of equality and non-discrimination. In the Kenyan case *In re Wachokire*[8] the applicant petitioned the Thika Chief Magistrate's Court for an award of one-half of the land that had belonged to her deceased father where she lived with her four children. She had been denied this award due to the application of Kikuyu customary law, under which a woman lacked equal inheritance rights because of the expectation that she would get married. The Chief Magistrate's Court held that the customary law violated Section 82(1) of the Kenyan Constitution, which prohibited discrimination on the basis of sex. It was also held to violate provisions of international law that provided for legal equality between men and women – specifically Article 18(3) of the African Charter and Article 15(1 - 3) of CEDAW. While this was a lower court decision, and hence not binding on other courts in Kenya, it is an important and noteworthy demonstration that courts can deal with discriminatory customary law by relying on international law and existing Constitutional frameworks.[9]

Taking stock of this litigation experience, a general trend has been that courts are more willing to strike down as unconstitutional discriminatory laws that do not affect property or inheritance norms. Whilst discrimination against women on the basis of gender or sex has been found to offend the equality guarantee in other cases across Africa, these cases have not sparked the expected flurry of precedent that they seemed to promise. Those cases seemed to promise that the courts would not condone laws, practices or policies that discriminate against women. In practice, however, laws that mandate discriminatory inheritance regimes have not been repealed or struck down. Instead there has been confusion in a number of countries on how to deal with non-discrimination and

inheritance and this has led to conflicting decisions and uncertainty. Parts 2 – 4 of this paper examine this trend in greater detail through focusing on the Zimbabwean, Tanzanian and Nigerian experiences.

2. Zimbabwe

The Supreme Court decision of *Magaya v. Magaya*[10] has often been cited as an example of the limitations of litigation in enforcing the right non-discrimination on the ground of sex. *Magaya* related to the inheritance of intestate estates. The appellant, Venia Magaya, was daughter and eldest child of the deceased by his first marriage, while the respondent was the second son by the deceased's second marriage. The Zimbabwean Supreme Court, in a unanimous decision, held that women were not allowed to inherit under customary law and that this discrimination was permitted under the exclusion (or "claw back") clause in Section 23 of the Constitution, which excludes customary law and certain aspects of personal law from the non-discrimination clause. Further, the court held that the non-discrimination clause did not prohibit discrimination on the ground of sex (although the Court conceded that international law norms that prohibit discrimination on the basis of sex might be applicable in interpreting the Constitution).

Prior to this decision, Zimbabwean courts had taken progressive steps in prohibiting discrimination on the ground of sex despite the existence of the "claw back" clause. In the earlier case of *Chihowa v. Mangwende,*[11] the Supreme Court held that a woman who had reached the age of majority could succeed her father. In reaching its decision the Court concluded that the provisions of the Legal Age of Majority Act of 1982 superseded customary law and removed all impediments to women's inheritance.[12] This case built upon the jurisprudence developed in the earlier decision of *Katekwe v. Muchabaiwa*[13] which held that because the Legal Age of Majority Act completely emancipated women who reached the age of majority, and no longer required the assistance of guardians, fathers could not sue for damages for the seduction of their daughter and lost the right to demand bride prices. The progressive nature of the earlier judgments in cases such as *Katekwe v. Muchabaiwa* proved to be too adventurous for the Zimbabwean legal system and the Supreme Court in the *Magaya* case overruled the prior decisions on the basis that they applied an incorrect understanding of customary law.

This is always one of the dangers of judge-led legal reform. From *Katekwe* through to *Magaya* there had been no drastic overhaul of the Supreme Court bench[14] (although Chief Justice Dumbutshena who had led the bench in earlier pro-equality decisions had retired) and the decision in *Magaya* was not the result of political interference.[15] However, the conservative Justice Muchechetere was able to lead the Supreme Court into effectively overturning a string of progressive Supreme Court decisions. The case is educative in demonstrating how a slight change in the composition of personnel on a Supreme Court bench can easily erode gains made through litigation.

Indeed the Zimbabwean Supreme Court in *Magaya* recognised the discriminatory nature of the law it was applying but decided that it could not reform the law:

> "Further, I do not consider that the court has the capacity to make new law in a complex matter such as inheritance and succession, in my view all the courts can do is to uphold the actual and true intention and purport of African customary law of succession

against abuse (…) Matters of reform should be left to the legislature."[16]

This self imposed restraint on the part of the Court when dealing with inherent and far reaching practices of discrimination is an unfortunate abdication of its role in protecting the right to freedom from discrimination under international human rights law and the Constitution of Zimbabwe.

3. Tanzania

In Tanzania, where the Constitutional right to non-discrimination is not subjected to a "claw-back" clause, and where discrimination on the ground of sex is explicitly prohibited by Section 13 of the Constitution, the role of the courts has been equally problematic. In the case of *Ephraim v. Pastory,*[17] the High Court held that customary law which prohibited women from inheriting and selling clan land violated the Tanzanian Constitution and consequently upheld the sale of land by a woman who had inherited it from her father.

Subsequent decisions have criticised this on procedural rather than substantive grounds - finding that while the conclusion that the customary law discriminated was not incorrect, the proper procedure for challenging the constitutionality of that law had not been followed.[18] *Ephraim v. Pastory*'s tragedy, therefore, seems to be one of process.[19] The case came before the High Court not as a constitutional reference but as ordinary civil litigation. According to the Constitution, the Chief Justice had to make rules regarding the referral of constitutional matters and this had not been done when *Ephraim v. Pastory* was heard. The laws regarding inheritance rights of women under customary law, therefore, remained unchanged. In the end, *Ephraim v. Pastory* became a landmark decision of a single judge of the high court but does not have binding force so other judges continued to make contrary determinations.

In *Ndossi v. Ndossi*,[20] a case involving a dispute between the widow and the brother of a deceased man's estate, the Tanzanian High Court confirmed a lower court decision to replace the deceased's brother with the deceased's widow as the administrator of the deceased's estate. The High Court held that the Tanzanian Constitution provided that "every person is entitled to own property and has a right to the protection of that property held in accordance of the law" and that Article 9(a) and (f) of the Constitution generally domesticated human rights instruments ratified by Tanzania, including the anti-discrimination principles contained in Article 2(b) and (f) of CEDAW.[21] The decision of the High Court in effect found that these principles of international law were directly applicable in Tanzania – a decision which could have very far reaching consequences for the Tanzanian legal system.

However, in the later case of *Stephen and Another v. the Attorney General,*[22] the High Court held that the customary law that prohibited a woman from inheriting and selling clan land was discriminatory and unconstitutional but refused to strike down the law. In arriving at this decision the Court applied a version of Constitutional avoidance and approved the dictum set out in *Attorney General v. W. K. Butambala* where the court stated:

> "We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner."[23]

The Court in *Stephen and Another* then proceeded to hold that that the customary law rule, which was in violation of the Constitution, could not be struck down because they were protecting the "sacrosanct nature of the Constitution" and ensuring that "only matters of great importance" were brought to the Court.[24] While Constitutional avoidance may be an acceptable principle where there are other legal avenues to protect one's constitutional rights, in this case the only remedy referred to by the Court was to urge district councils to lobby the responsible Minister to change the law, therefore leaving the solution purely in the hands of the political process.

It would appear however, that the real reason for the decision was a reluctance to interfere with customary law. The Court alluded to this by stating:

> "It is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality."[25]

Effectively the decision of the Tanzanian High Court was that it would not make a judicial pronouncement on the constitutionality of the admittedly unconstitutional provision. The High Court's decision had the effect of repealing the Constitutional protection of non-discrimination as this applies to customary law.

4. Nigeria

The Nigerian legal system has also encountered conflicts between customary law and gender equality in respect to inheritance rights. The Court of Appeal in the landmark case of *Mojekwu v. Mojekwu*[26] had to determine whether the appellant (the only surviving male relative to his deceased uncle) was entitled to inherit the respondent's (the deceased uncle's widow) estate. The appellant claimed he had the right to inherit the estate under the application of the custom of *Ili-Ekpe*, which precluded women from inheriting and designated the closest male family member as the heir. The Court held that the *Ili-Ekpe* was inapplicable and that the Kola tenancy custom, which does allow women to inherit, was applicable. The Court opined, in obiter, that the *Ili-Ekpe* custom was repugnant and applied the repugnancy doctrine, which mandates courts not to enforce any law if it is contrary to public policy or repugnant to natural justice, equity and good conscience. In doing so, the Court of Appeal held that the custom was also contrary to the human rights protections within the Nigerian Constitution as well as the human rights obligations in CEDAW.

The case was appealed to the Supreme Court, which confirmed the decision based on the Kola tenancy custom. However, the Supreme Court declined to make a decision on the validity of the *Ili-Ekpe* custom and held that it was precluded from doing so by rules of procedure because the validity of the custom was not a legal issue before the court.

In considering the decision of the Court of Appeal, the Supreme Court turned to address sex discrimination. It expressed its lack of doubt in the lower court's concern for the perceived discrimination against women and held that the concern was understandable. The Supreme Court however then proceeded to criticise the Court of Appeal for over-reaching itself. In doing so it took issue and expressed dissatisfaction with the Court of Appeal's language which was so far reaching that:

"(...) it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads."[27]

The approach of the Supreme Court negates the principle that all laws that discriminate on a prohibited ground cannot be justified and should be struck down, as well as the whole role of the Courts in ensuring adherence to the Constitution. This view, including the examples, entrenches the idea that a justification for discrimination has to be the norm rather than the exception. The court proceeded to state that:

"[T]he import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities."[28]

While the Supreme Court confirmed the right of the women in this case to inherit, its obiter statements on the need to give a hearing to communities that practice discriminatory customs before these are held unconstitutional has the effect of subjecting the rights of women to an extra consideration that does not apply to other fundamental rights.

5. Analysis and Trends

Personal law is governed by customary law across most African countries. Many principles of customary law are inherently discriminatory against women, especially with regards to inheritance with many systems excluding women from inheritance altogether. However, principles of equality have been entrenched in the Constitutions of most countries on the continent, even though personal and customary law is often excluded from the ambit of these principles. It is this tension between customary law and constitutional principles of equality that has created problems for lawyers and judges alike. From a strategic litigation perspective, this is an important opportunity for litigation and lobbying. However, results so far have been mixed.

The judicial development of customary law according to constitutional principles of gender equality has not been easy and straightforward. In some countries, such as Zimbabwe, constitutional exclusion clauses have "protected" customary law from the full application of equality laws. Thus, early advances have been easily overturned by later conservative judges. Issues of property and inheritance appear particularly difficult for courts to deal with. In the Zimbabwean *Magaya* case it is no coincidence that the case which overturned the whole line of progressive cases was a case involving property and inheritance.

In jurisdictions that have constitutions that contain "claw-back" clauses it has been easy for courts to point and decide that the Constitution mandates discrimination. The constitutions of Zimbabwe, Kenya, Gambia and Lesotho are just some that still retain the "claw-back" clause. These clauses exempt customary law and personal law from inquiry into the discriminatory impact of customary law and consequently they prevent prohibition of discrimination provisions under the constitution from taking effect.

Equality before the law and equal protection of the law become a meaningless gesture in the face of such "claw-back" clauses. When one recognises that the majority of women's human rights violations occur in the private sphere, particularly in the family law setting,

to exclude this branch of law from being subjected to the discrimination test guaranteed by the constitutional right to non-discrimination is an acceptance of discrimination. This was explicit in the *Magaya* case, where the Supreme Court held that they were bound by the Constitution and exhorted the legislature to take steps to deal with the discrimination.

In countries where there are no "claw-back" clauses the courts show an unfortunate ingenuity when refusing to interfere with discriminatory inheritance rules. As has been illustrated in the examples of other jurisdictions, when it comes to laws that discriminate against women, the courts have shied away from looking at whether a customary practice is unconstitutional because it is discriminatory on the ground of sex or gender. The basis for this reluctance has been that there needs to be wider consultation with the communities that practice those particular customs. Whilst community participation in law reform is important, especially where customary law is concerned, the Tanzanian and Nigerian courts appear to have imposed requirement of consultation for challenges to discriminatory customary law in ways that do not exist when other rights are enforced through litigation. A potent example of this is the *Stephen and Another* case where the Tanzanian High Court was quite sanguine in accepting the effect of allowing the discrimination to continue, and restricted challenges to the political process.

Conclusion

Strategic litigation on the right to gender equality in the area of inheritance is crucial across Africa, as part of wider lobbying strategies. This article demonstrates that some jurisdictions have produced random and varied judgments which have led to directionless, inconsistent and unclear jurisprudence. Thus the conflicting decisions in Nigeria and Tanzania indicate that more work needs to be done by lawyers to push the boundaries of the law. In Zimbabwe it was only following litigation that the legislature acted to amend the inheritance law and develop customary law in accordance with non-discriminatory principles in the Constitution. Therefore, although the decision in *Magaya* was disappointing, the end result of lobbying and litigation was a positive amendment to the intestate inheritance rules. Ultimately such law reform confirms the importance of strategic litigation as part of a strategy for social change.

Judges can be extremely influential in making positive changes to the law. However, this will always rely on the nature of the bench. It is therefore dangerous to rely on judges to creatively interpret the law to realise equality. While this was successful in the *Unity Dow* case, the *Magaya* case demonstrates the ease with which a conservative bench can overturn a progressive chain of cases. Indeed, many countries in Africa have taken concrete steps to eliminate discrimination against women in the personal sphere, even in instances where the Constitution contains a "claw-back" clause. These steps, taken in spite of the presence of "claw back" clauses, underscore the duty of states to eliminate discrimination against women.

Strategic litigation should attempt to ensure that decisions prohibiting discrimination on the grounds of sex and gender are well-thought out and resistant to criticism. Lawyers should attempt to persuade courts to make decisions that establish or build on principles already set by a previous judgment in order to develop stronger jurisprudence. More importantly, there is a need for the continued appealing of decisions that subject the enjoyment of rights by women

to extraneous considerations, such as the political process used in the *Stephen and Another* case, or that create different tests for discrimination when courts are presented with discrimination claims on the basis of sex. It is not sufficient that the rule has been found to be discriminatory. More effort is needed on the part of courts to set out clear jurisprudence that demonstrates why such distinctions constitute unlawful discrimination and how they violate the principle of equality. Only then will it be possible to enshrine proper content and purpose into this principle across African states.

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[2] *Botswana v. Unity Dow, Journal of African Law,* 1992, 36(1), pp. 91-2.

[3] The full text of this case is available at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm.

[4] Section 15 of the Constitution of Botswana. The Courts noted that section 3 of the Constitution guaranteed all rights regardless of sex.

[5] *Longwe v. Intercontinental Hotels* [1993] 4 LRC 221 (HC of Zambia).

[6] *Uganda v. Matovu*, Criminal Session Case No. 146 of 2001, High Court of Uganda at Kampala, 21 October 2002.

[7] *Jonathan v. Republic*, Criminal Appeal No. 53 of 2001, High Court of Tanzania at Moshi, 21 September 2001.

[8] *In re Wachokire*, Succession Cause No. 192 of 2000, 19 August 2002.

[9] This approach can be contrasted to some High Court decisions where the courts refuse to have recourse to international human rights instruments in order to uphold women's rights.

[10] *Magaya v. Magaya,* SC No. 210-98, Zimbabwe, 16 February 1999.

[11] *Chihowa v. Mangwende*, 1987, (1) ZLR 228 (S).

[12] However, in *Vareta v. Vareta* (S-126-90, unreported) the Supreme Court held that under customary law the eldest son is the natural heir to his deceased father, even if there is an elder daughter. It concluded that the Legal Age of Majority Act, 1982, did not alter this fact.

[13] *Katekwe v. Muchabaiwa*, 1984, (2) ZLR 112 (S).

[14] Indeed the same bench gave many decisions in favour of the enjoyment of civil and political rights and fundamental freedoms such as the right to demonstrate (see for example, *In re Munhumeso & Ors 1994 (1) ZLR 49(S))* and in doing so it took creative steps to limit the state's power to interfere with fundamental freedoms. However, the bench was less interested in intervening positively in cases that affected economic, social and cultural rights (see for example, *Chairman of the Public Service Commission and others v. Zimbabwe Teachers Association and others* 1997 (1) SA 209 (ZS)) or in cases protecting the rights of women.

[15] In fact, the executive had already introduced legislation to ensure a more equitable approach to intestate succession.

[16] See above, note 10, judgment of Justice Muchechetere, page 49, available at: http://jurisafrica.org/docs/customarylaw/vii_Magaya_v_Magaya_judgment.doc. This principle appears to have only been applied to the intersection between sex discrimination and customary law as the Zimbabwean Constitutional Court at that time was very active in protecting other civil and political rights beyond strictly textual interpretations of the Constitution -- see for example *In re Munhumeso* 1994 (1) ZLR 49 (S).

[17] *Ephraim v. Pastory*, AHRLR (TzHC 1990).

[18] See, for example, *Stephen and Another v. the Attorney General,* Miscellaneous Civil Cause 82 of 2005.

[19] The case was not referred to a higher court, however. As it was a decision of a single judge, it is not binding on the other judges and, more importantly, for the reason that the proper procedure (for constitutional litigation) was not followed, it did not lead to the invalidity of the laws concerned in the case.

[20] *Ndossi v. Ndossi*, Civil Appeal No. 13 of 2001, High Court of Tanzania at Dar Es Salaam, 13 February 2002.

[21] Article 2 states: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (...) (b)To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women. (…)(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

[22] See above, note 18.

[23] *Attorney General v. W. K. Butambala* [1993] TLR 46.

[24] The Court also relied on section 8(2) of the Basic Rights and Duties Enforcement Act [cap 3 R.E. 2002] which provides that: "The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious." A purely political process cannot be considered an adequate means of redress for the purposes of this section, as to hold so would make the enjoyment and enforcement of all rights subject purely to the democratic process. Further, the enjoyment of all rights on a non-discriminatory basis is without doubt a matter of the greatest importance.

[25] See above, note 18, p. 21.

[26] *Mojekwu v. Mojekwu*, [1997] 7 N.W.L.R 283.

[27] *Mojekwu v. Mojekwu,* [2004] 4. S.C. (Pt.II). 1. (Nigeria, Supreme Court); (2004) 7 MJSC p. 165. A summary of the judgment is available at: http://www.law.utoronto.ca/documents/reprohealth/LG028-9_Nigeria-Mojekwu_cases.pdf.

[28] See above, note 27.