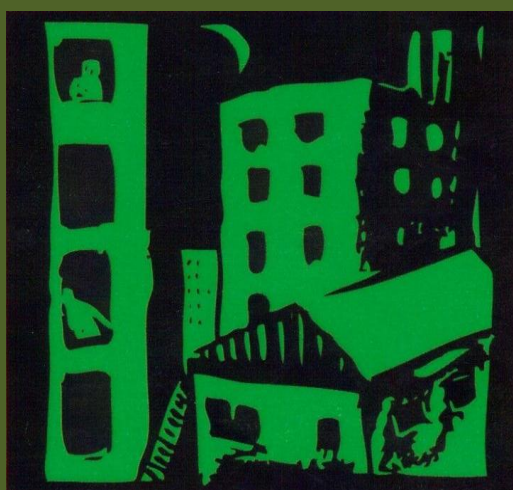


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Development as a right in Africa: Changing attitude for the realisation of women's substantive citizenship

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1 INTRODUCTION

Development has been a right in Africa since African leaders made the commitment thereto at the adoption of the African Charter on Human and People's Rights in 1981. Yet, in Africa, the majority of women cannot exercise citizenship rights because of the manner in which their society view them and, sometimes, even because of the way women view themselves.¹ Development

¹ In a recent interview, the Chairperson of the Women's League of the African National Congress (ANC), Angie Moshekga, made a comment that women are not yet ready for the position of President in South Africa.

in critical aspects of the lives of the people is regarded as one of the envisaged products of constitutional democratic institutions. Women are at most times relegated to the status of “second class citizens” who only operate within the private spheres. While regional human rights instruments have made remarkable gains in ensuring that women within the region are protected,² there is, however, a disconnect between the rights enshrined in the instruments and the daily reality of the majority of women. The majority of African countries are still far from creating an egalitarian society where men and women have equal opportunity and access to benefits. In this article, the authors argue that the conduct of governments in protecting the substantive rights of the majority of women in Africa is in total violation of domestic, regional and international law.³ Nigeria, for example, is committed to the protection of the human rights of all its citizens. However, citizenship rights in Nigeria do not seek to promote and protect the substantive rights of the majority of women.⁴ The implication is the complete erosion of dignity and fundamental rights. In other words, the majority of women lose the essence of the inherent membership of their society.

To achieve development in Africa, it is critical to address formal and substantive citizenship as the pivotal base for development. It is important that those structures that sustain women’s experience of gross inequality in their socio-economic and political lives, such as access to justice are addressed to ensure the realisation of women’s citizenship. The principles and values of freedom, equality and dignity are inherent in a democracy. In the instance where rights are narrowly defined, as seen in the majority of African countries, then democracy becomes limited because legal and constitutional arrangements fail to guarantee civil, political, social and economic rights.⁵ Although the roles of women in society are changing,⁶ nevertheless the majority are still

² Section 18 (3) of the African Charter on Human and People’s Rights specifically provides for the rights of women; the Additional Protocol of the African Charter on Human and People’s Rights on the Rights of Women in Africa which is wholly devoted to the protection of civil, political and socio-economic rights of women; and the SADC Gender Declaration are some of the instruments on the African continent committed to ensuring gender equality.

³ In Nigeria, for example, discrimination against women has taken a turn for the worst because of the actions of the Islamist group, Boko-Haram. Women are at risk of many violations of their rights particularly their socio-economic rights. In the Northern Nigerian town of Chibok, for example, more than 250 girls were abducted from their high school dormitory and allegedly taken to be sold into slave-marriage. This incident highlights the challenges to the right to development and the constitutional guarantee of freedom, equality and dignity.

⁴ This was evident when the Senate caused great furore when it voted on section 29 (4) (a) and (b) of the Nigerian Constitution regarding renunciation of citizenship. This provision empowers any person from the age of 18, as one of full age, to renounce his or her Nigerian citizenship. For women, the position becomes different since apart from the prescribed age of 18, any married woman can be considered to be of full age. This is to be seen against the background that child marriage is prevalent in the Northern part of the country. At least, 20 per cent of girls would be married by age 15. About 40 percent would be married in the North-western region by age 15 and about 73 percent of the married girls receive no schooling. See generally, UNFPA, Nigeria at www.nigeria.unfpa.org/nigeriachild.html (accessed 27 May 2014).

⁵ Jones P & Stokke K “Introduction” in Jones P & Stokke K (eds) *Democratising development: The politics of socio-economic rights in South Africa* (Leiden & Boston: Martinus Nijhoff Publishers 2005).

⁶ Amadiume I *Male daughters, female husbands: Gender and sex in an African society* (Atlantic Highlands, NJ: Zed Books 1987). In this book, the author disproved gender stereotypes by using her native town of

burdened with the adverse effect of discriminatory laws. The right to development stands as a beacon of hope for the majority of women because of its overarching nature of combining civil, political and socio-economic rights. This article discusses, in the first part, the concept of development as a right in Africa and how it is being realised. In the second part, citizenship rights are examined as a prerequisite of claims for the promotion of substantive rights. In part three, the article examines the challenges to women's substantive citizenship such as access to justice, which is also an indication of socio-economic development. These challenges are examined with a view to providing possibilities that are within the right to development as key towards changing attitudes for the realisation of the substantive rights of women.

2 DEVELOPMENT AS A RIGHT IN INTERNATIONAL LAW

Development as a right in international law was first proposed by the Senegalese jurist, Keba M'baye, in 1972 when he argued that "every person should enjoy in just measure the goods and services produced thanks to the effort of solidarity of the members of the community"⁷ Interestingly, this call was made at the time that most countries in Africa were extricating themselves from colonial slavery which might have underpinned the call to international solidarity. The political impetus for the right to development arose at the insistence of developing countries who were seeking a restructuring of the international economic order.⁸ The call at this juncture set the stage for a United Nations Working Group of Experts and High-level Task Force mandated to first of all "define the right", develop the core content of the right to development and then monitor the implementation of the right. It was suggested that the right to development was the right of peoples and individuals to constant improvement of their wellbeing and to national as well as global commitment to justice, equity, participatory and human centred respect for all human rights.⁹ From this definition, the Task Force developed three attributes which constituted the core norms of the right to development. They are:

- (a) Comprehensive and human centred development policy,
- (b) Participatory human rights process, and
- (c) Social justice in development.

Nnobi in Anambra state, Nigeria, as an example of where women are titled like the men and can also take wives who are accorded the rights and privileges of a married person.

⁷ M'baye K "Le droit au développement comme un droit de l'homme" (1972) *Revue des Droits de l'Homme* 503. Other sources on the right to development are: Bunn I D "The right to development: Implications for international economic order" (2000) 15 (6) *American University International Law Review* 1426-1467; Piron L "The Right to development: A review of the current state of the debate for the Department of International Development" (2002) www.odi.org.uk/sites/odi.org.uk/files/odi-assessts/publications-opinion-files2313.pdf (accessed 27 April 2014); Barsh LR "The right to development as a human right: Results of the global consultation (1991) *Human Rights Quarterly* 322; De Feyter K "Towards a framework Convention on the Right to Development" (2013) www.library/esude/pdf-flies/byeros/gen/0982.pdf (accessed 27 April 2014).

⁸ Bunn ID *The right to development and international economic order: Legal and moral dimensions* (Oxford, Portland & Oregon: Hart Publishing, 2012) at 3.

⁹ A/HRC 15/WG.2/TF/ 2, 24 February 2010, Report of the High-level Task Force on the Implementation of the Right to Development at its sixth session.

This is in light of the fact that development policy, particularly in developing countries, was often spatial rather than comprehensive which led to distorted outcomes. Most of these policies were narrow in approach, mainly to promote economic growth or a country's growth of goods and services.¹⁰ For the most part, the development process in Africa was not inclusive with key groups such as women playing roles, if any at all. Consequently, efforts at development led to more injustice; hence, plenty of missed opportunities as each start was fundamentally false.

The United Nations Declaration on the Right to Development (UNDRD) though not a binding instrument, took specific steps to highlight issues that are critical for developing nations. For example, in paragraph 8 of the Preamble, it states:

Obligations of states under the Charter to promote universal respect for and observance of human rights and fundamental freedom for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹

Through reference to the commitment already made at the international level by the countries of the world, it enjoined them to protect human rights and development. According to Article 1 of the UNDRD, it provides: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be realised".¹²

By aiming at these goals, the right to development aims to ensure a process that took seriously the importance of substantive equality and equal opportunities for all, based on the non-derogatory principle of non-discrimination with regards to access to justice, education, health services, and housing, food and income generation.¹³ It is, therefore, clear that two key principles are drawn from the UNDRD, namely, human rights, and equality of opportunity. The UNDRD thus supports an active role for women in the development process¹⁴ and also goes further to affirm equality for its beneficiaries where development policies are constantly aimed at improving the wellbeing of all individuals.¹⁵ Arjun Sengupta, a former independent expert on the right to development, describes the right to development as a "vector of right".¹⁶ In other words, it is a collective right that protects a set of rights and values, in that if one right is improved, then no right deteriorates, but if any right is violated, the "vector" deteriorates and the right to development is violated. In addition, the right to

¹⁰ For example, in the 1980s, the Structural Adjustment Programmes (SAP) mandated for developing countries in Africa, like Nigeria, created massive developmental challenges leading to intensified poverty rather than addressing it.

¹¹ See generally para 8 of the Preamble to the UNDRD which was adopted by the UN General Assembly in 1986 in terms of Resolution 41/128.

¹² Art 1 of the UNDRD.

¹³ Marks SP & Andreassen BA "Introduction" in Andreassen BA & Marks SP (eds) *Development as a human right: Legal, political and economic dimensions* (Cambridge- Massachusetts, Harvard School of Public Health, Francois -Xavier Bagnoud Centre for Health and Human Rights 2006) at viii.

¹⁴ Article 8 (1) of the UNDRD.

¹⁵ Article 2 (3) of the UNDRD.

¹⁶ Marks & Andreassen (2006) at viii.

development sought to ensure a just economic world order where developing countries must participate favourably with other Western countries. To this extent, trade systems and world economic systems must radically be restructured to give Africa the benefit of participating on equal terms in order to curb poverty on the continent. It was against this background that Keba M'Baye made the call for the right to development given the extremely high levels of poverty in developing countries of Africa. Such calls, however, were not segmented according to gender. While it is common cause that developing countries are poor, women in these countries are at the lowest rung of the ladder in terms of socio-economic development. For most people in Africa, particularly women, development is intrinsically linked to the broader context of balancing unequal power relations between the sexes, access to resources and opportunities.

Although the right to development is enshrined in Article 22 of the African Charter on Human and Peoples' Rights¹⁷ (ACHPR or African Charter) which was ratified without any state entering a reservation against it, it is doubtful whether African leaders had the intention of according the same meaning to the right as that assigned to it by scholars.¹⁸ For this reason, what constitutes the normative content of the right remains contested territory because African states understood this right in only international context, where resources must be collectively invested in Africa by way of developmental aid.¹⁹ For the developing nations, it is viewed as a right entailing a duty on the part of the international community, particularly in terms of Western countries' development assistance to poor countries. Western countries, on the other hand, are convinced that the right to development cannot be a right since it is simultaneously presented as a right of both individuals and collectives, including states whereas, conceptually, rights inhere in humans. Echoing this sentiment, Jack Donnelly mockingly dismissed the right to development as a 'unicorn' suggesting that it does not exist.²⁰ Others such as VandeBogaerden²¹ call for the dissolution of the right to development because it does a disservice to socio-economic rights. Contrary to this call, development is significant to people as human beings in Africa.

Some views on development in Africa depict "[d]evelopment as meaning the ability of the people to express themselves, to be able to voice their opinion and must also have improvement in their material well-being" according to Sen.²² Hansungule equates development with infrastructural development and community progress based

¹⁷ Article 22 of the ACHPR provides that: "1. All peoples shall have *the right to their economic, social and cultural development with due regard to their freedom and identity* and in the equal enjoyment of the common heritage of mankind; 2. States shall have the duty, individually or collectively, *to ensure the exercise of the right to development.*" (Emphasis added).

¹⁸ See Jones P & Stokke K (eds) *Democratising development: The Politics of Socio-Economic Rights in South Africa* (Leiden & Boston: Martinus Nijhoff Publishers, 2005) at 5.

¹⁹ Vandebogaerde A "The Right to development in international human rights law: A call for its dissolution" (2013) 31(2) *Netherlands Quarterly of Human Rights* 3.

²⁰ Donnelly J "In search of the unicorn: The jurisprudence and politics of the right to development" (1985) 15 *California Western International Law Journal* 473.

²¹ Vandebogaerden (2013) at 209.

²² Sen A *Development as freedom* (New York: Alfred A. Knopf 1999).

on the statements of most politicians in Africa.²³ Other views on development indicate that it occurs when an individual has skill and capacity that would improve his standard of living; that people have proper healthcare and the ability to feed themselves, and that “people no longer live in poor unventilated mud houses that leaks during rain”.²⁴ In much of Africa, looking at these diverse views, it is obvious that people are at the heart of development as an integral whole of a progressive, sustainable society. Hence, the shift in development discourse which was expanded against the backdrop of creating a generic model citizen that is not only based on social relations but also on the basis of the rule of law and constitutional democracy.²⁵ It is, however, necessary to take into account that in many African countries, social relations still determine many benefits of people, particularly women. It is clear then, that the conceptual idea of citizenship needs to consider not only the formal entitlement accruing to a citizen but the other dimensions as well such as social and economic. The reasons for this shift may be found in two interconnected principles: the meaning and practice of participation and the protection of human rights.²⁶ Undoubtedly, participation as an element of the right to development should resonate with the majority of women in Africa who face marginalisation in access to opportunities. The United Nations adopted a resolution on the implementation of the right to development by stating that “empowerment of women and their full participation on a basis of equality in all spheres of society is fundamental for development”.²⁷ From this standpoint, there is a connection between human rights and the right to development.

2.1 The right to development and protection of human rights

Since the right to development became a focus at the United Nations level, it is imperative to examine the source of the right. This becomes necessary given the political resistance by most Western countries about the reach of their obligations arising from claims on international solidarity and the use of human rights values to advance such claims. The Universal Declaration of Human Rights (UDHR)²⁸ urges all nations of the world to promote all rights and freedoms contained therein and to ensure effective recognition and observance through progressive national and international measures. Specifically, Article 28 provides that “everyone is entitled to a social and international order in which rights and freedoms set forth in this Declaration can be fully realised”. It is then drawn from the above that civil, political, social and economic rights must be protected and, by implication, the right to development.

²³ Hansungule M “The right to development.” A paper presented at the Human Rights and Development Course of the Centre for Human Rights, University of Pretoria (December 2009) at 7.

²⁴ Udombana N “The Third World and the right to development: An agenda for the next millennium” (2000) 22 *Human Rights Quarterly* 753 at 756.

²⁵ Mukhopadhyay M “Situating gender and citizenship in development debates: Towards a strategy” in Mukhopadhyay M & Singh N (eds) *Gender Justice, Citizenship and Development* (Ottawa & New Delhi: IDRC and Zubaan, A Kali for Women 2009).

²⁶ Mukhopadhyay (2009).

²⁷ A/RES/53/155, 25 February 1999.

²⁸ Adopted by the United Nations General Assembly on 10th December 1948 in terms of GA 217A (III), UN Doc A/811.

Arising from the shackles of colonisation at the time of the adoption of the UDHR, the majority of African countries were of the view that just as human rights should be protected, a new international economic order must be advanced to ensure that nations are equal amongst themselves.²⁹ Against this background, it was imperative to affirm the development of a just society in which human rights and social progress were priorities on the agenda. The basic premise of development therefore, is that it is about people and their active participation in every aspect of their lives. This is the reason why the UN Human Development Agenda placed the focus on the human person as the central subject and beneficiary of development.³⁰ In other words, men and women are both endowed with the opportunity to improve their lives. It is therefore pertinent that women should not be faced with multiple sites of discrimination and must be seen as equal partners with men in development.³¹ Therefore, the right to development becomes a composite right from which other rights are realised.

In fact, Algerian scholar, Mohammed Bedjaoui, said of the right to development that “it is a right *erga omnes* to development and also *a jus cogens* permitting no exception in so far as states obligations are concerned”.³² Simply put, there should be no derogation from rights such as equality and access to justice, which can be addressed within the right to development; where these rights are viewed as rights to the process of development.³³ The goal is to ensure that people’s needs are prioritised particularly in the area of poverty and quality of life. In many countries in Africa, the quality of life is hugely diminished by poverty and inequality.

2.2 Africa and the right to development

In Africa, that there is a provision for the right to development, a third generation right, in the founding human rights instrument on the continent is an innovation.³⁴ It is, therefore, important that governments understand the obligation imposed on them by the right to development. The *Endorois* case³⁵ decided in 2010 by the African Commission pronounced on the duty to promote and protect the right to development by the government of Kenya. In Africa, this case is significant because it is the only case that has specifically pronounced on the justiciability of the right to development

²⁹ Bunn (2012) 32.

³⁰ Jonsson U *Human rights approach to development programming* (Kenya: UNICEF 2003).

³¹ Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) describes in detail what constitutes discrimination against women. The Protocol on the Rights of Women in Africa also prohibits discrimination in Art 2. It is also significant that in the Protocol on the Rights of Women in Africa, art 8 contains access to justice and equal protection of the law. It further, supports the right to development in Art 17 (Right to positive cultural context), Art 18 (right to a healthy and sustainable environment), and Art 19 (right to sustainable development).

³² Bedjaoui M “Some unorthodox reflections on the right to development” in Snyder F & Slinn P (eds.) *International law of development: Comparative perspectives* (Butterworths Law 1987) at 69-86. See also the views of Bunn (2012) at 137 on the status of the right to development as right ‘*erga omnes*’.

³³ Hadiprayitno I “Poverty and the right to development in international Law” (2004) 19 *Civitas* 11.

³⁴ Banda F “Women, law and human rights in Southern Africa” (2006) 32 *Journal of Southern African Studies* 21.

³⁵ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Government of Kenya*, Communication 276/2003.

amongst other rights allegedly violated by the government of Kenya.³⁶ In this case, the Endorois people, an indigenous group were removed from their ancestral land to make way for tourism on Lake Bogoria. The African Commission held that the government of Kenya failed to take into account core element of the right to development, which is participation in the socio-economic development of the Endorois people. Furthermore, the Commission made clear certain ambiguities that tend to surround the application of the right to development. For example, the Commission explained the content of the right to development as comprising non-discrimination, participation, equity and accountability. It further clarified the beneficiaries of the right to development and squarely identified the State as having the primary role of duty bearer.³⁷

Ensuring socio-economic development of women and by implication their right to development, by eliminating any form of social, economic or political exclusion should be a priority for States. In South Africa, for instance, equality is one of the founding values of the Constitution owing to the past legacy of racial segregation. So, for South Africa, developing a strong sense of equal benefit and equal protection of the law is a constitutional imperative. This is evident in the cases decided by the Constitutional Court and how this Court has developed equality jurisprudence.³⁸ Although the approach of the courts towards ensuring substantive equality is commendable, it is also obvious that the underlying social structure in which inequality and discrimination exist is yet to be dismantled.³⁹ In Nigeria, for example, the attitude towards gender development is mainly in favour of the male gender to the detriment of the rights of the majority of women.⁴⁰ Although the Constitution of Nigeria, like many others in Africa, provides a non-discrimination clause,⁴¹ it is however, unfortunate that substantive rights, such as equal benefits and opportunities of the law are not protected under fundamental rights. Rather, they are encapsulated in the “social objectives” of the Fundamental Objectives and Directive Principles of State Policy which in terms of section 6 (6) (c) are not justiciable.⁴² In terms of this chapter of the Nigerian Constitution, it is instructive to note that the “social objective” which seems to capture equal benefit of the law has three specific elements to be desired, namely, equality of rights, and obligations and opportunities before the law. One can therefore read into the

³⁶ Kamga SAD “The right to development in the African human rights system: The *Endorois* case” (2011) *De Jure* 381. See also Browning R “The right to development in Africa: An emerging jurisprudence? Examining the Endorois recommendation by the African Commission on Human and Peoples’ Rights (University of Cape Town: August 2011) (On file with the authors).

³⁷ Kamga (2011) at 381.

³⁸ Some of the cases are: *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC); *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC); *Minister of Finance & Another v Van Heerden* 2002 (6) SA 121 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC).

³⁹ Albertyn C, Fredman S & Fudge J “Introduction-substantive equality, social rights and women: A comparative perspective” (2007) 23 *SAJHR* 209 at 210.

⁴⁰ For example, amongst the Igbos of Imo State, to describe the status of women in relation to men, they are said to be “women who stoop down to urinate.” In other words, the woman is below the man by her nature and it should be reflected in her capabilities as a person in relation to a man.

⁴¹ S 42 of the 1999 Constitution of Nigeria and s 9 of the Constitution of South Africa.

⁴² See ss 17 (1) and 6 (6) (c) of the Nigerian Constitution.

section that the State acknowledges the obligation to ensure equal benefit of the law and access to justice, aimed at securing the development of the people. Yet, in Nigeria, the majority of women face social exclusion,⁴³ and ethnic marginalisation regarding state of origin and employment.⁴⁴ The obvious conclusion to reach here is that where women are not viewed as persons equal to men in the eyes of the law, access to justice which is an invaluable indicator of socio-economic development is hugely compromised.

Nigeria is the only country on the African continent that domesticated the African Charter in terms of the Enforcement and Ratification Act.⁴⁵ It clearly means that the duty to protect and promote substantive rights, such as the right to equal benefit and equal protection of the law and access to justice, should be paramount both as a fundamental right under the Constitution and as rights under international human rights law.⁴⁶ Although Nigeria recently enacted a piece of legislation generally referred to as the Fundamental Rights (Enforcement Procedure) Rules (FREP)⁴⁷, it is not clear to what extent this legislation will improve the areas that remain challenging to women in Nigeria. Prima facie, it seems to be concerned with procedural enforcement; however for many, having the substantive right is the first call.

The duties therefore, placed on the majority of African countries as State Parties to protect rights entrenched in international law include the positive obligation to ensure that substantive rights are protected along the same breath as the negative obligation which entails refraining from actions that inhibit the realisation of their socio-economic rights are equally protected.⁴⁸ Bearing in mind the nature of the right to development which incorporates socio-economic rights, it is important to note that the negative obligation requires that the rights which citizens already possess cannot through actions of the State be taken away. A case in point is the Mauritian case of *Shirrin Aumeeraddy – Cziffra & others v Mauritius*⁴⁹ which came before the Human Rights Committee where the amendment to the immigration and deportation resulted in powers being granted to the Minister of Interior to refuse entry to or to deport foreign

⁴³ Among the Igbos, many families are excluded from mainstream community life such as marriage because of the “*osu*” system. It is common knowledge that a man considered to be *nwadiala* (true son of the soil) cannot marry a woman categorised as *osu*.

⁴⁴ “Born free but not equal: The case of Nigeria”, A Report of Save the Children, the United Kingdom (on file with the authors). According to the study, the 10 poorest states in Nigeria are found in the Northern part of the country. Since independence, there are acute ethnic inequalities and religious differences which affect many citizens of Nigeria particularly women who cannot claim the origin of their husbands but must always indicate their own state of origin. They may be denied jobs in areas from which they do not originate even if they are married to citizens from that part of the country.

⁴⁵ Cap 10, Laws of the Federation of Nigeria, 1990.

⁴⁶ The case of *Abacha v Fawehimi* (2001) AHRLR 172 dealt with the status of international law in terms of Nigerian law.

⁴⁷ Fundamental Rights (Enforcement Procedure) Rules (FREP) signed on 11 November 2009. The provisions of the African Charter on Human and Peoples’ Rights will also be taken into account in the application of this procedural enforcement rule.

⁴⁸ Bilchitz D “Socio-economic rights, economic crisis and legal doctrine” *Social Sciences Research Network –SSRN-id2320432.pdf* (on file with authors).

⁴⁹ *Aumeeruddy –Cziffra & others v Mauritius* (2000) AHRLR 3 (HRC) 1981.

husbands of Mauritian women. Prior to the Immigration Amendment Act and Deportation Amendment Act of 1977, both men and women had the same rights. Thereafter, the law changed to a position that took away the rights of Mauritian women. Another case on citizenship rights of women in Africa is the Botswana case of *Unity Dow v Attorney General, Botswana*.⁵⁰ This case underscored the value accorded to women as members of society in their own right, where in the majority of cases, women are deemed to be the property of the man on marriage.⁵¹ It is not uncommon to find that amongst the Igbo ethnic group in Nigeria, women are viewed as chattels to be owned in the same manner as the property of their husbands.⁵² Even amongst other dominant ethnic groups, such as the Yoruba and Hausa, the woman has little or no value accorded to her as her own person. For instance, *Sharia* law, which is widely practised as the customary law of Muslims in the Northern part of Nigeria, forbids a woman to be in a position of authority higher than that of a man. This is based on the interpretation of the *gawama* to mean that men are superior to women and as such act as their guardians.⁵³ Such conditions and such negative attitudes towards the value of women as equal members of society who have and deserve equal protection of the law underscore the need to make the right to development a realisable right in Africa.

In Nigeria, for instance, few cases⁵⁴ have come before the courts in which they have been creative in relying on international human rights law to address the discrimination against women. Despite international human rights law, the majority of women continue to face challenges steeped in patriarchal beliefs and notions of superiority.⁵⁵ The implication of these parochial beliefs is largely felt by women as basic entitlements which are dependent on claims of substantive citizenship are adversely affected. The article now turns to discuss citizenship rights as the basis for claims of the right to development.

⁵⁰ (2001) AHRLR 99.

⁵¹ Anyaogu F *Access to justice in Nigeria: A gender perspective* (Enugu: Ebenezer Productions 2009) at 43.

⁵² Udom-Azogu GI "Women and children – A disempowered group under customary law" in Osibanjo Y & Kalu AU (eds) *Towards a restatement of Nigerian customary law* (Lagos: Ministry of Justice, 1991); Also, the case of *Onwuchekwe v Onwuchekwe* (1991) 5 NWLR 197, p739 where the Court of Appeal held that a wife is owned as property of her husband.

⁵³ Anyaogu (2009) at 43.

⁵⁴ *Mojekwu v Mojekwu* (1997) 7 NWLR (pt 512) at 283 dealing with inheritance by female children of Igbo land; *Mojekwu v Ejikeme* (2005) 5 NWLR (pt 657) dealing with the *nrachi* custom of the Nnewi people whereby a woman remains single in her father's compound to bear male children for the purposes of inheritance; *Okonkwo v Okagbue* (1994) 9 NWLR (pt 368) 301.

⁵⁵ Albertyn C "The stubborn persistence of patriarchy? Gender equality and cultural diversity in South Africa" (2009) 2 *Constitutional Review* 166. In this article, the author makes reference to the constant clash of culture and human rights in South Africa, a situation which one finds also in a country like Nigeria.

3 FORMAL AND SUBSTANTIVE CITIZENSHIP

Formal citizenship is conferred on an individual by the State. In other words, it refers to the relationship between the individual as a member of that particular State.⁵⁶ Through this form of identity, an individual gains recognition, is conferred legal personhood and is able to function in that capacity.

In some countries in Africa, however, women are not fully recognised as having legal personhood let alone able to confer such on another.⁵⁷ For example, in Nigeria, citizenship is conferred and recognized through three categories:

- (a) citizenship by birth,
- (b) citizenship by registration, and
- (c) citizenship by naturalisation

Citizenship by registration is framed in such a way that the right of a Nigerian woman married to a non-Nigerian is violated. Sections 26 (1) and (2) (a) of the Constitution it state:

- (1) Subject to the provisions of section 28 of this constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria if...
- (2) The provisions of this section shall apply to
 - (a) any woman who is or has been married to a citizen of Nigeria, and ...⁵⁸

The implication of this section is that whereas a man can register his non-Nigerian spouse as a citizen, a woman cannot confer the same status on her foreign spouse. It may be argued that the basis for this provision came from the cultural belief that a woman belongs to her husband and his people after marriage; hence there is no need for a woman to confer any form of identity on a spouse. In other words, legally, the woman follows the man and not vice versa. This kind of idea is largely based on the patriarchal nature of African society where the majority of the social, political and economic spheres are conducted and seen through male eyes. Clearly, such a patriarchal notion of citizenship is discriminatory and violates the right not to be discriminated

⁵⁶ Nyamu-Musembi C "Addressing formal and substantive citizenship: Gender justice in Sub-Saharan Africa" in Mukhopadhyay M and Singh N (eds.) *Gender justice, citizenship and development* (Ottawa & India: Zubaan2007).

⁵⁷ See generally the case of *Shiri Aumeeruddy Cziffra & others v Mauritius* (2000) AHRLR 3 (HRC 1981) brought before the Human Rights Committee (HRC) in respect of a violation of Art 2 on non-discrimination of the Covenant on Civil and Political Rights (CCPR). The case based on Communication 35 / 1978 dealt with the discrimination faced by 20 women as a result of the enactment of the Immigration (Amendment) Act 1977 and the Deportation (Amendment) Act 1977 by Mauritius which constituted discrimination based on sex against Mauritian women. Prior to the amendments, foreign spouses married to men or women of Mauritian origin had a right of residency in the country. After the amendments, foreign husbands of Mauritian women lost their right to residency and could be deported at any time by the Minister of Interior. In other words, Mauritian women could no longer confer citizenship on their foreign husbands. See also Anyaogu (2009) at 84.

⁵⁸ Ss 26 (1) and (2) (a) of the Nigerian Constitution.

against on grounds of sex guaranteed in international law as well as in some countries' constitutions including that of Nigeria.⁵⁹

It is clear that women struggle to be recognised as equal members of society; hence the need to expand the notion of citizenship to take into account other markers of belonging. Women's position and experiences in the economic, social and political spheres of society are also a determinant of their inclusiveness. It is, therefore, pertinent that any form of exclusion is challenged and must be based on an understanding of the adverse effect of such exclusion on the lives of women.⁶⁰ Fundamental rights, such as equal benefit and equal protection of the law, from which access to justice flows, are some of the rights adversely affected by the social and legal exclusion of active citizenship.

In challenging the formal exclusion of women from full citizenship status, as already highlighted above, the substantive concept of citizenship is aimed at recognising women's right and the need to protect them whilst acknowledging their contribution to the national economy. However, women are consigned to "second-class citizens" status because their rights are not protected and there are systematic failure to do so.⁶¹ The focus should therefore be on equality, which remains a core component of the principle of justice. In terms of inclusive citizenship, the process of defining rights, interpreting, and implementing them is very pertinent to the framing of any gender justice agenda. Against this backdrop, substantive citizenship means removing all forms of constraints by State institutions or social norms or relationship that affect people's experiences regardless of gender.⁶² For the majority of women, full citizenship status is elusive because of the multiple sites of constraints against them which include: gender inequality and disempowerment of women, and lack of access to justice.

3.1 Challenges to women's substantive citizenship

3.1.1 *Gender inequality and disempowerment of women*

The majority of women in Africa have no status particularly within the family, and their value and worth are intrinsically linked to their roles in the family. For instance, matters relating to the control and ownership of property are mainly in the hands of men.⁶³ Also, efforts by many women involved in informal trading systems undertaken to ensure socio-economic development are not often recognised as contributing to the

⁵⁹ Art 1 of the UDHR; Art 42 of the Nigerian Constitution, s 23 of the Zambian Constitution, and s 9 of the South African Constitution.

⁶⁰Pereira C "Understanding women's experiences of citizenship in Nigeria: From advocacy to research" (2002). Available at www.Codesria.org/IMG/pdf/pereira-1.pdf (accessed May 2010).

⁶¹ See for example, the case of *Edith Zewelani Nawakwi v Attorney General, Zambia* (1991) ZMHC 6. In this case, Edith challenged the letter of consent of the father of her children to be given before her children could be endorsed on her own passport as a single parent. She claimed that such rule was discriminatory towards her as a Zambian citizen and also violated art 23 of the Zambian Constitution on non-discrimination. The matter went all the way to the Supreme Court which ruled in her favour.

⁶² Nyamu-Musembi (2007) at 50.

⁶³ Strickland R "To have and to hold: Women's property and inheritance rights in the context of HIV/AIDS in Sub-Saharan Africa." ICRW Working Paper (June 2004).

economy, thereby fuelling inequality.⁶⁴ All of these challenges are hardly addressed at the institutional level of local and provincial governments. For example, in Nigeria, there is no gender specific legislation dealing with domestic violence; and chastisement of a woman is an acceptable practice.⁶⁵ As a result of inaction with regard institutional transformation, gender imbalance in critical aspects of women's lives persists with a vicious cycle of pain and poverty. It is noteworthy that some aspects of the problems arising from family relations are dealt with through judicial activism where some judges have questioned why women's contributions to the acquisition of family property are not recognised or in instances where a husband's adulterous conduct is not taken into account in the division of family property but that of the wife is taken into consideration by the court.⁶⁶ One of the ways, therefore, of ensuring gender equality and hence empowerment of women is to ensure an accessible, impartial judicial system. For example, in South Africa, Equality Courts have been established to deal with violations of gender equality. In addition, economic empowerment is crucial to women's socio-economic development because where the majority of women do not engage in activities that provide them with economic or financial rewards, the effect is loss of personal value and worth, dependency and a vicious cycle of poverty.⁶⁷ The value of recognising the work done by women at home and in the informal sector is very important and points to the need to develop responses to eradicate gender inequality which is at the root of a lack of gender justice. There have been several approaches towards equality of the sexes because its end products are justice and development.⁶⁸ These end products are critical for both women and society at large. Feminists, in drawing attention to the implication of gender inequality for women in particular, and the society in general, approached the elimination of discrimination against women by creating at least three perspectives, looking at equality as sameness⁶⁹, difference⁷⁰ or

⁶⁴ Rebouché R "Labour, land and women's rights in Africa: Challenges for the new Protocol on the Rights of Women" (2006) 19 *Harvard Human Rights Journal* 235.

⁶⁵ Anyaogu (2009) at 102-103.

⁶⁶ Bowman C & Kuenyehia A (eds) *Women and law in Sub-Saharan Africa* (Ghana: Sedco Publishers, 2003).

⁶⁷ Such high levels of poverty among women deepen notwithstanding the provisions in international human rights law, such as the Protocol on the Rights of Women in Africa which provides in art 13 that: "State parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall...

(e) create conditions to promote and support the occupations and economic activities of women, in particular within the informal sector;

(h) take the necessary measures to recognise the economic value of the work of women at home..."

⁶⁸ Ozoemena R *Challenges and prospects to the realisation of gender justice in Africa* unpublished LLD thesis, University of Pretoria (2013).

⁶⁹ Equality as sameness is formal in nature and seeks to treat people in like manner; in other words, formal equality in line with the thoughts of liberal feminists.

⁷⁰ In terms of the radical feminists' school of thought, it is imperative to understand the differences between the sexes in order to promote gender equality because differences are bound to women's subordination by men. See generally Albertyn C "Equality" in Bonthuys E & Albertyn C (eds) *Gender, law and justice* (Cape Town: Juta & Co Ltd 2007).

substantive equality⁷¹ with a view to developing sensitisation to the complexities surrounding the nature of gender differences.⁷² Substantive equality is the preferred view of the authors because it seeks how best to remove false stereotypes, barriers and conduct that sustain subordination of women.

3.1.2 *Lack of access to justice for women*

Access to justice relates to ensuring that there are no barriers to the quality of justice received and that the outcomes attained at the end of a judicial process are both just and equitable.⁷³ In other words, it is not just about the formal process but to what extent justice is deemed to have been served in both process and law. For many women in most countries in Africa, access to justice is hugely limited by a number of factors, including the adversarial nature of the formal court system. The Human Rights Committee noted in its General Comment 32 on Article 14 of the International Covenant on Civil and Political Rights (ICCPR) that: “availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.”⁷⁴

Ensuring that justice is accessible to all is difficult in most countries within the African region. Issues of cost or affordability, proximity to courts, and language have been identified as well as legal assistance and awareness for women.⁷⁵ It is no coincidence that many violations of human rights and abuse against women do not get reported at all let alone come before a court of law. Cheater aptly described the position of women in this regard:

Women who finally get access to the courts has the following characteristics; the women's defence of such rights is supported by male agnates and or her husband's family such that she does not jeopardise her social entitlements, that she comes from a family with experience of litigation, that the woman herself is reasonably well-educated, able to speak English with sufficient self-confidence..., that she has access to the money needed for litigation and that she feels strongly that any reasonable person would regard her case as valid whatever the legal system.⁷⁶

On a continent, where the majority who are women are poor, it is obvious that access to justice is greatly compromised. Any alternative to counteract the adverse effect of the formal justice system is equally met with gender inequality and hierarchies within the

⁷¹ Substantive equality seeks to address constraints that contribute to women's subordination to men and to eliminate disadvantages that inhibit women from enjoying their rights. The authors subscribe to this version of promoting gender equality as shown throughout this article.

⁷² Van Marle K & Bonthuys E “Feminist theories and concepts” in Bonthuys & Albertyn (2007) at 34.

⁷³ UN Women *Progress of the world's women: In pursuit of justice* (2011-2012) at 9.

⁷⁴ General Comment of the Human Rights Committee, a treaty based body for the International Covenant on Civil and Political Rights, on Art 14 dealing with the right to equality before courts and tribunals and the right to a fair trial.

⁷⁵ Butegwa F “Mediating culture and human rights in favour of land rights for women in Africa: A framework for community-level action” in An-Na'im A (ed) *Cultural transformation and human rights in Africa* (London: Zed Books 2002).

⁷⁶ Cheater A “Investigating women's legal rights and entitlement: Some suggestions from social anthropology” in *Women and Law Southern Africa, Working Paper N0 2* (1990) at 85.

traditional court system.⁷⁷ There are however, huge investment and resource allocation gaps in the institutions that are most relevant for women and their quest for justice and development, such as the traditional institutions. There is therefore the need to critically assess the current system with a view to addressing such matters, such as, skills in dealing with religious and customary practices,⁷⁸ representation of women in judicial administration and gender budgeting initiatives. In addition, seeking alternative methods of dispute resolution is a key element in ensuring greater access to justice for women. Within the traditional arena, traditional courts are not uniformly operative in many countries. Where they exist, they are fraught with challenges that are based on gender hierarchies that obtain in much of Africa. It is argued in this article, that access to justice is imperative for development because the processes involved in ensuring greater rights for women requires strategic linkages between justice and development.

4 CONCLUSION

On the African continent, the right to development is crucial for the realisation of women's substantive citizenship. The right to development should be entrenched as a constitutional guarantee in Africa. This is imperative because of the composite nature of the right, which underscores the protection of socio-economic rights. Thus, there is added value in using the right to development for claims of rights for the majority in Africa. More importantly, mere formal citizenship does not take into account the role of women in the developmental process. In this article, it has been established that substantive rights of women are crucial to any developmental process. It is also evident that citizenship, both formal and substantive, has huge implications for the socio-economic and political development of women. The attitude of society towards the worth and value of women is still based on patriarchal beliefs and notions of superiority. Women's rights activists and feminists have made remarkable inroads towards eliminating gender inequality based on patriarchy and others forms of cultural

⁷⁷ In South Africa, the Traditional Courts Bill brought before Parliament in 2008 and 2011 by the Justice Department was intended to improve access to justice, but was widely criticised as a document that if signed into law would perpetuate the past apartheid system.

⁷⁸ Makinde AK & Ostien P "The Independent Sharia Panel of Lagos State" (2011) 25 *Emory International Law Review* 921 where the authors discuss extensively the operation of an Independent Sharia Panel to adjudicate for Muslims in Lagos State. It is public knowledge in Nigeria that core Muslim Northerners do not take seriously Yoruba Muslims in the South. In South-Western areas of Nigeria, there seem to be no Sharia courts for Muslims. Thus, those who desire to have cases of divorce, inheritance or other civil matters of Muslims adjudicated on would have to use Yoruba customary law or English law. The Independent Sharia Panel, therefore, seeks to fill the gap by asking Muslims to bring cases to it as a private arbitration panel.

beliefs. The impact of their success is still minimally felt by the majority, hence the need to protect women's substantive citizenship through the right to development in Africa. The Africa based human rights instruments are necessary and important tools for the realisation of substantive equality rights for women. It is very clear that the parochial attitude of the majority against women in Africa can be eliminated through a rights based approach to development. We argue that the right to development, which is an innovative concept proposed by Africans, must drive the transformative agenda of unlocking the potential of socio-economic development of women on the continent.