The perception and application of international law within the domestic arena – the paradigm shift in the Kenyan scenario

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Submitted as part fulfilment of the Masters programme in Women's law, SEARCWL, 2005/2006

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22 September 2005

Introduction

Kenya subscribes to and has ratified without reservation various international instruments, conventions and declarations that protect and promote women's human rights. These instruments, treaties and declarations include: the Universal Declaration on Human Rights, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the African (Banjul) Charter on Human and People's Rights (African Charter), and the Beijing Platform for Action, among others. However, the fact that Kenya has ratified them does not make these international instruments automatically applicable in its legal system. Suffice to say that the courts cannot directly enforce or apply these instruments unless they are incorporated into the municipal law. Section 3 of the Judicature Act, spells out the laws that are applicable in Kenya and customary international law and international agreements are not included.[1] This statutory provision is definitive, restrictive and exhaustive, therefore makes uncertain the application of international law within the municipal courts.

The problem is further compounded by the provision of section 3 of the Kenyan constitution, which provides that the constitution shall be the supreme law of the land and shall prevail; and that any other law that is inconsistent with it shall be void to that extent. Any other law here includes international law. This provision presents problems on the application of international law by the courts, uncertain because they must pay due regard to the constitutional provision vis-à-vis the international provision.

The purpose of this essay is to give an outline of selected cases and the analysis of the extent to which international provisions as enshrined in CEDAW and the African Charter on Human and People's Rights have been applied by the courts to protect the human rights of women in Kenya. Most Kenyan courts do not generally apply these laws, but in recent times things have begun to change. A few courts now have begun to recognize the importance of international law in the interpretation of domestic law to protect women's human rights.

Inequalities in the application of local laws

Kenyan laws seem to be gender neutral in their provisions but have different outcomes when it comes to interpretation and application by the courts. For instance, section 82(1) of the Kenyan constitution prohibits any law to make provisions that are discriminatory either of themselves or in their effect. Section 82(3) gives effect to what amounts to discrimination and provides further that there shall be no discrimination on the basis of sex, among other things. However section 82(4), of the same constitution allows for discrimination on matters relating to burial, marriage, divorce, adoption and customary law, devolution of property upon death and other matters of personal law. It is clear from these provisions that the Kenyan constitution permits gender discrimination in relation to customary law and family-related issues. These provisions are based on the English common law system in their colonies which allowed legal pluralism – that is use of the received law and African customary laws to suit the indigenous population. This was replicated in most of their colonies[2] and is still a practice to date.

Another piece of legislation which also has an element of discrimination in its interpretation, is the law of succession and inheritance. Section 35(5) of the Succession and Inheritance Act provides that when someone dies intestate, the property shall devolve on the surviving child or equally be divided among the surviving children without making any distinction as regards to the sex of the children. However there has been limited and inconsistent interpretation of this Act by the courts as to whether daughters can inherit from their deceased parents' estate. Such interpretations have been informed by traditional ideologies which deny women the right

[1] Section 3 of the Judicature Act chapter 8 Laws of Kenya provides for the sources of Kenyan laws that guide the jurisdiction of the courts. Such laws in hierarchy are: The constitution, Acts of Parliament of the United Kingdom, common law, doctrines of equity and the statutes of general application in force in England on the 12 August in 1897 and African customary laws.

[2] See post-colonial constitutions of former British colonies such as Zimbabwe, Zambia, Botswana and Tanzania among others which also permit gender discrimination on matters of personal law.

to inherit from their parents. In practice the courts have in many instances ruled that married or unmarried daughters have no right to inherit and they are customarily excluded or given less share of the net estate than sons. One would argue that there is inconsistency and limited creative or innovative interpretations of the Act.

The same inequalities are exhibited in the way the courts divide matrimonial property between spouses upon divorce or separation. The inequalities in application and provisions have persisted in Kenya despite the fact that Kenya has ratified international conventions which advocate for equality between men and women, such as the Convention on the elimination of All forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples Rights (ACPHR) also known as the Banjul Charter. It is also important to note that the same principle is enshrined in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa at articles 2 which obligates state parties to eliminate discrimination against women through appropriate legislative, institutional and other measures.[3]

The principle of equality is enshrined in CEDAW and the African Charter. CEDAW is premised on the principle of equality as set out in its preamble. Article 1 of CEDAW defines discrimination against women as any distinction, exclusion or restriction based on sex, which has the effect of impairing the enjoyment of their rights on equal footing with men, irrespective of their marital status. The convention in article 2 enjoins state parties to adopt measures such as legislative changes and other measures to realize the principle of equality. The same principle is echoed in the African Charter in articles 2 and 3 which stipulate that every individual shall be entitled to the enjoyment of rights without distinction and shall be equal before the law and entitled to equal protection of the law. These two international conventions, set standards for women's rights within a global context in all spheres of life.

Despite rapid ratification of the two conventions, they have not been applied widely by state parties such as Kenya and other jurisdictions. Preference in Kenyan courts has generally been for local legislation over international conventions when resolving disputes that are brought before them. The gist of this essay is to expose the extent to which the Kenyan courts have interpreted international law within the municipal law to challenge the inequalities highlighted.

Application of international rights norms within the domestic court

Generally international law becomes binding on states upon ratification and deposits of instruments thereof. However, application at municipal level may depend on the constitutional system of a particular state. As earlier indicated, section 3 of Kenya's Judicature Act spells out the laws that the courts are to be guided by in exercising their jurisdiction and international law is not considered. This therefore presents difficulties for courts in applying international law to support and strengthen their decisions where the municipal laws are discriminatory and when a more liberal approach could be found in using the international laws ratified, such as CEDAW. For a long time courts in Kenya have ignored and declined to invoke international law to protect women's human rights, despite ratification.

The following pronouncement from the courts in the case of *Okunda v Republic, 1970 East Africa Law Reports* illustrates this. In this case the Attorney General of Kenya brought a prosecution against two persons under the Official Secret Act of 1968 of the then East African Community, without the consent of the counsel of community as was provided for under the community legislation which Kenya had ratified. An issue then arose as to whether international law could become part of the laws of Kenya automatically and the Court of Appeal had to make its deliberation on this. The court found:

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[3] The Protocol was adopted by the Second Ordinary Session of the Assembly of the African Union in Maputo on the 11 July 2003. However it has not achieved the requisite 15 signature deposits by the state parties to make it operational in the regional courts. If the protocol becomes operational it will greatly enhance women's rights as opposed to the African Charter.

> '…the provisions of a treaty entered into by the government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the constitution, then, to the extent of such conflict, such provisions are void.'

This is the first case in Kenya to give an insight as to the applicability of international rights norms within the Kenyan domestic courts. It has also been used as a point of reference as to what should guide the courts in exercising their jurisdiction on matters that come before them for deliberation with similar issues of application of international law. Premised on this decision, the Kenyan courts have often declined to apply international law, like CEDAW, to inform decisions relating to women. Even when litigating counsel use them in their submissions, there is never reference to them by the judges in the decisions handed down to protect women.

The first example is Kenya's landmark case of *Virginia Edith Wambui Otieno v Joash Ochieng Ougo and Omolo Siranga* Civil Appeal No 31 of 1987, popularly known as the S.M Otieno case. Wambui, a Kikuyu, was married to a renowned Luo criminal lawyer. When the husband died, an issue arose as to where his remains were to be buried. The deceased's brother and his clan went to court for determination of this issue based on the Luo customs. There ensued a protracted court battle for a year between the clan and the widow that ended in the Kenyan Court of Appeal. The deceased's brother and the clan were finally given the right to bury the deceased based on the Luo customary laws against the wishes of his widow. The court held that Wambui, by marrying her late husband, was subjected to and affected by the Luo customs and so the issue was to be considered in that context.

The protracted battle was fought three years after Kenya had ratified CEDAW and the courts would have been expected to be alive to the CEDAW provisions which outlaw discrimination on the basis of sex and advocate for equal treatment of both spouses within the family. The court arguably ought to have been guided by the provisions of CEDAW on the principle of equality as enshrined in article 2 of the convention. The court could have used article 2(f) of CEDAW which mandates state parties to take legislative measures to modify and abolish laws, customs and practices which discriminate against women to address the lacuna. This would have made the customary law which was in question then to be in conformity with the international rights norms. Had the court been sensitive to the provisions of the international instrument, they may have come with a different decision.

At the end of the judgment, the three judges acknowledged that there was some inconsistency on the issue of burials and intimated that parliament needed to legislate separately to enable the courts to deal with burial disputes expeditiously.

In the case of *Shaka Zulu Assegai vThe Attorney General of Kenya,* 1990 Unreported, the petitioner was a black American who married a Kenyan of Kikuyu origin. He filed a constitutional reference against the Attorney General seeking Kenyan citizenship by virtue of the fact that he was married to a Kenyan woman. The court dismissed his case on the basis that he had no *locus standi* and that it was against the provisions of the constitution for Kenyan women married to non-Kenyan citizens to confer citizenship on their spouses or children. That Kenya being a patrilineal society, the children and wives take up the nationality of their fathers and therefore the converse was not legally acceptable. At the time the decision was made, the constitution was silent on the issue of discrimination on the basis of sex.[4] Such decision was against the principle of equality and contravened article 9 of CEDAW which Kenya had ratified without reservation. The court should have been guided by article 9 of the convention which provides that:

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[4] In 1997, section 82 of the Kenya constitution was amended by the Inter-party Parliamentary Group to reflect that there shall be no discrimination on the basis sex, which had been left out in the earlier provision.

> 'That state parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband….'

The court did not consider the international instruments to resolve the case as it squarely bordered on discrimination based on sex which it could have used to challenge the Kenyan constitutional provisions on conferment of citizenship. This would have helped create harmony in the consistency of the laws and created a level ground for both male and females.

In a similar case women have been castigated for fighting for their rights. In the case of *Beatrice Wanjiru Kimani v Evanson Kimani Njoroge,* HCCC No. 1610 of 1999, women were castigated for going to Beijing to look for ideology. This castigation reflected the prevailing ideology at the time.[5] In this case a high court judge declined to award the respondent Wanjiru her share of matrimonial property by considering extraneous matters that were purely based on discrimination. This was more than ten years after the ratification of CEDAW and various colloquia organized by the Commonwealth Secretariat legal division, for the judiciary to embrace judicial activism in their courts to protect women's rights where the conventions have been ratified but not yet domesticated. The presiding judge revealed his open bias against women in general and censured women for going to Beijing. In his judgment he said:

> 'Many a married woman goes out to work. She has a profession. She has a high career. She is in big business. She travels to Beijing in search of ideologies and a basis for rebellion against her own culture. Like anyone else, she owns her own property separately, jointly or in common with anyone. Her business interest, her property and whatever is hers is everywhere in Kenya and abroad, in the rural, urban and outlying districts. In Nairobi alone her property and businesses, swell through Lavington, Muthaiga, Kileleshwa, Kenyatta Avenue, swirls in Eastlands, with confluents from everywhere**.** Perhaps apart from procreation and occasional cooking, a number of important wifely duties obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for all these and more…'

The fact that this judge focused on women going to Beijing in search of ideology was an indication that he was aware of the global trend then on the issues of human rights of women and the activities surrounding their protection. But it would appear his traditional thinking and attitude of the place of women clouded his judgment and he could not see how women could rebel against their own culture based on foreign ideas such as those espoused in the Beijing Platform of Action (1995).[6] Perhaps one can conclude that the woman did not get a fair hearing of her matter from the court and that a fair hearing could not have been possible given the judge's view. Clearly his bias oppressed or contravened article 15(1) of CEDAW which mandates state parties to accord to women equality with men before the law and article 16 that embodies equality of spouses within marriage and at its dissolution.

In the case of *Mary Kinyanjui v Ezekiel Kinyanjui, Nakuru High Court Civil Case No. 42 of 2004, Originating Summons,* the petitioner, Mary Kinyanjui, having legally separated from her husband, faced difficulties in getting her share of their property from the husband. He attempted to forcefully evict her from the family land she had occupied from early 1970s, in favour of his second wife. The property was registered in her husband's name and therefore she had to sue her husband for division of matrimonial property[7] and a declaration that that the property, though registered in his name, could be construed that he held such title on his own behalf and in

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[5] Our Assistant Minister Nyiva Mwenda in a press conference after attending the Beijing conference 1995 indicated that Kenyan women could not be guided by ideas which emanated from the whites and therefore not ideal for African women. It was such a great blow to women who thought she would help push for women's agendas as a priority as the Assistant Minister for Social Services Culture and Sports.

[6] This was Hon. Justice Kuloba who has since retired from the bench and therefore no longer sitting.

trust for his wife Mary. The land in question was bought during the subsistence of marriage between Mary and her husband in the mid 1960s and the second wife had played no role in its acquisition as she only appeared much later in their life. An issue then arose as to whether under Kikuyu customary law, property could be divided to give to a wife during her husband's lifetime, as raised by the respondent's counsel. I appeared for the petitioner in this case. In both my oral and written submissions to the court, I relied heavily on provisions of articles 2 and 16 of CEDAW to buttress my arguments. Article 2 basically obligates state parties to embody in their national constitutions and legislations, if not incorporated and ensured through law and other appropriate measures, to actualize the principle of equality. Article 16 provides for equality of spouses within marriage. It mandates state parties to ensure that both spouses have the same rights and responsibilities during marriage and its dissolution; rights in respect of ownership of property, acquisition, management, administration and disposition of property whether free of charge or for valuable consideration. I was attempting to use these provisions to persuade the court not to be guided by customs which appeared punitive as they did not recognize that women could own anything.

The court was further implored if it was not persuaded by CEDAW, to be guided by the English Married Women's Property Act of 1882 which has been often used by the courts. This Act recognizes a woman's non-financial contribution (such as taking care of the children, giving, domestic chores which are not valorised yet play significant role in supplementing the employed husband) to accumulation of property where she is not in paid employment. Counsel for the husband had opposed the production of copies of CEDAW in court as being irrelevant and not amenable to the prevailing conditions in Kenya and declined to address the court on them. That objection was overruled and the court took the copies of CEDAW as part of the court record. However the presiding judge[8] did not make any reference to the conventions in his judgment to strengthen his decision although he awarded the petitioner equal shares of the matrimonial property to the husband, based on the provisions of the English Married Women's Property Act.

In this case, the outcome anticipated by the conventions was achieved but their application was avoided.

In the absence of concerted efforts by the legislature and executive to change laws to be gender responsive and reflect acceptable international standards, it is only the judiciary that can make the municipal laws conform with the treaties. There is now a new trend in the region that is being embraced by the municipal courts to give international law meaning and effect within the domestic arena through other measures. A good illustration can be seen in the Bangalore Principles of 1988, brought into being by the Commonwealth Jurists and Chief Justices in India[9] through a judicial colloquium. This colloquium provides a blueprint for judicial creativity and or innovation; it also outlines vital duties of independent judiciary in interpreting and applying national constitutions and law in light of universal human rights.[10] The Bangalore Principles have been amplified and reinforced through the Harare Declaration of 1991 and Victoria Falls Declaration of 1994.[11]

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[7] This was in terms of Section 17 of The English Married Women's Property Act of 1882, which is applicable in Kenya as Statute of General Application obtaining in England by 1897 by virtue of the reception clause.

[8] This judge, Hon Justice Musinga, had just been newly appointed from the bar and had not served in the bench for long. Nakuru was his first posting station.

[9] (1999) 25 Commonwealth Law Bulletin page 104.

[10] Articles 7 and 8 of the Bangalore Principles provide that where national law is clear and inconsistent with the international obligations of the concerned state in common law countries, the court is obliged to give effect to national law. In such cases the court should draw inconsistencies to the attention of the appropriate countries, since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country. Thus advocates for judicial activism to remove ambiguity or uncertainty in national constitution and laws.

[11] Principle Commonwealth Human Rights Treaties: Declaration of Common wealth Principles, pages 8-12.

This is a clear sign that the Commonwealth jurisdictions have realized that international treaties have a role to play in the interpretation of domestic legislation. Regionally courts have now begun to apply international conventions to support their decisions to protect women's human rights.[12]

This is a clear indication of the willingness of the judges to give effect to international law within the domestic laws in resolving issues that come before them which cannot be resolved by relying solely on local legislation. Kenya has not been left behind in the new trend and has also begun to move in line with the new global or regional wave.

The conclusion is inescapable. International law will at best be applicable in as far as it does not contradict any local legislation; at worst, it will not apply at all unless there is an enabling local legislation mandating its municipal application. Exceptionally however, international law has been applied as a result of the creativity and boldness of the presiding judicial officers in interpreting the national law in conformity with international law ratified without reservations as seen in the earlier examples referred to (*Dow v Attorney General of Botswana and Longwe v Intercontinental Hotels)*.

The paradigm shift in the Kenyan situation

Despite the inaction of the judicial staff in embracing judicial activism to promote women's rights where there are gaps or constitutional discrimination based on customs, not all hope is lost as there are few judges who attempt to actualize this for women. The judiciary's reluctance or inaction can be attributed to the fact that most of the conventions have not been formally domesticated in the Kenyan legal system. Generally speaking, application of international law at the municipal level gravitates around two theories, namely the common law theory and the civil law theory. Under the common law view international law is only part of domestic law where it has been specifically domesticated to become part of municipal law. Under the civil law theory, the position is that international law is automatically part of domestic law upon adoption except where it is in conflict with domestic law. Kenya therefore subscribes to the common law theory though the position seems now to be that international customary law and treaties can be applied by state courts where there is no conflict with the existing state law, even in the absence of implementing legislation.

One could say that in Kenya there has been a paradigm shift as a few members of the bench are now referring to international instruments such as CEDAW and the African Charter on Human and People's Rights in their judgments in favour of women even in the absence of domestication. In the case of *Mburu Chuchu v Nungari Muiruri and two others,* High Court Civil Appeal No.335 of 1999, Honourable Justice Waki made elaborate references to CEDAW in his judgment in favour of a woman who had been disinherited by the brothers:

> 'That the existing view may well test the conscience of modern day activists who would justifiably plead that the custom is discriminatory to women and contrary to international instruments assented to by this country, prohibiting discrimination on the basis of sex. I allude to the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which Kenya ratified on the 9 March 1984... Perhaps it is time serious thought is given to implementing article 5 of CEDAW which again this country has undertaken to do but has taken no steps to do so. Our hopes are that the current constitutional review process…will examine the issue squarely. For now I can only bemoan the binding precedents of the Court of Appeal of entitlement to land to unmarried women as determined by customs.'

[12] This can be seen in the regional cases such as *Unity Dow v Attorney General of Botswana*, (1992) L.R.C 623, popularly known as the citizenship case. See also *Sarah Longwe v Intercontinental Hotels, Zambia*, (1993) 4 L.R. C 221 where the high court of Zambia, held that the hotel's policy of excluding entry to unaccompanied females violated Longwe's rights. The judges invoked the provisions of CEDAW and the African Charter to support their decisions.

The judge, in arriving at this decision, invoked the provisions of CEDAW without the counsel representing the parties making reference to the instruments in their submissions. This is a clear sign of positive progress in attitudinal change and perception of women's human rights by a section of the judicial staff. While the judge gave a pronouncement which favoured the woman, he recognized the hurdle that this approach may still face, he was optimistic that if the constitution was amended to entrench the equality principle without distinction, women's rights would be greatly enhanced.

The position was emphasized by Justice Waki J.A. (of the Kenya Court of Appeal) in the recent case of *Mary Rono v Jane Rono, William Rono*[13], in a matter concerning distribution of assets of the estate of a deceased father. The superior court awarded the daughters of the deceased less share in the estate of their deceased father, based on the argument that even though the daughters were entitled to inherit part of the estate, they were bound to get married and giving them equal shares could give them unfair advantage over other family members. The court then proceeded to give the sons larger shares at the expense of the daughters. These were the superior court's findings:

> 'The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute law recognizes both sexes to be legible for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all daughters will get equal shares and all the sons will get equal shares. However due to the fact that daughters have an option to marry, the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged, as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than the daughters of the second house.'[14]

The court awarded the five daughters five acres of land each and the sons were given thirty acres each. In her decision the female judge considered both customary and statutory laws on succession. The daughters were dissatisfied with the judgment on various other grounds and moved to the Court of Appeal to challenge the same on the basis of discrimination. Justice Waki made elaborate reference to international law and used CEDAW and the African Charter in resolving the dispute that was brought before them. He recognized that Kenya subscribes to and has ratified international instruments such as the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, CEDAW and the African Charter, and went on to argue that such ratification is a clear sign that Kenya has the intention of being bound by these provisions within the global context even if it has not domesticated them. In this case the judge in considering the position of international law within municipal courts stated that:

> 'Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international treaties and covenants… In 1984 it also ratified, without reservation, the Convention on the Elimination of all forms of Discrimination Against Women and also the Banjul Charter (1992) without reservations. …It is in the context of these international laws that the 1997 amendment to section 82 of the constitution to outlaw discrimination on the basis of sex becomes understandable. The country was moving in tandem with the emerging global culture, particularly on gender issues I have referred at some length to international law provisions to underscore the view I take in this matter that the central issue relating to the discrimination which this appeal raises cannot be fully addressed by reference to domestic legislation alone. The relevant international laws, which Kenya has ratified, will also inform my decision.'

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[13] Civil Appeal No. 66 of 2002 (Eldoret).

[14] Eldoret High Court Probate and Administration Cause No. 40 of 1988.

Justice Waki was alive to both the international treaties and made eloquent reference to other cases such as *Unity Dow v Attorney General of Botswana* and *Sarah Longwe v Intercontinental Hotels* in Zambia to enrich and support his decision. He also referred to the Bangalore Principles on judicial activism. This was an important move as it showed clearly what other jurisdictions have embraced to give international law meaning within the domestic courts where they have been ratified but not domesticated and was trying to make the Kenyan judiciary wear the same outfit and come into line with the global trend to safeguard women's rights.

This is an historic decision as it the first time in Kenya's legal system that the Court of Appeal has applied international laws such as CEDAW and the African charter in support of their decision to protect the human rights of women against the Kenyan constitution. The relevant provision here is its section 82(4)) which allows discrimination in respect of personal law, among other things, under which the issue directly under dispute in this particular case fell; that is the issue of distribution of assets of the estate of a deceased father. The two other judges who presided over the case totally concurred with Justice Waki's proposition and unanimously set aside the superior court's decision and awarded the daughters equal shares with the sons of the deceased. The presiding judge in the court below, the superior court, was a female judge, Honourable Justice Nambuye, who was not alive to the CEDAW provisions.

Another recent decision directly relating to this point is High Court Succession Cause No. 464 of 1998 at Nakuru where Justice Muga Apondi observed as follows:

> '… That apart, Kenya is also a signatory to United Nations conventions that prohibit discrimination against women and children. Specifically, Kenya has ratified the United Nations Convention on the Elimination of all forms of Discrimination Against Women that was passed in 1979 by the General Assembly. The principles enunciated in those conventions are universally accepted and should be considered and applied in our jurisprudence. Having stated the above, I hereby accept and concur with the 'girls' who are the female beneficiaries that the estate should be divided equally between all the beneficiaries…'

In *Thika Chief Magistrates Court Succession Cause No. 192 of 2002,* in the estate of Njoroge Machokire, Jane Watiri moved the court to declare that she was equally entitled to a share of the estate of her late father which claim her brothers had denied on the basis of customs which do not allow daughters to inherit as they had the potential of getting married elsewhere. The presiding magistrate decided the case in her favour and awarded her equal shares with the brothers. She invoked the provisions of CEDAW article 15(1)-(3) and article 18(3) which provide for legal equality between men and women and declared the said customs as discriminatory and therefore a violation of section 82(1) which prohibits discrimination on the basis of sex.

The above cases clearly show a marked departure from previous trends where courts paid no attention to international instruments and, if continued, this will greatly enhance the position of international law. The last two examples are decisions which the courts gave in April 2005 and through the doctrine of *stare decisis* will contribute as authorities used at all levels of the courts by women's right activists to bolster their arguments. Suffice to say that the winds of change are slowly blowing towards the Kenyan judicial system as they are beginning to embrace the principles enunciated in the Bangalore Principles and the Victoria Falls Declaration for the promotion of the human rights of women. Lawyers should also join in the cause and make reference to international law in advancing their arguments in court, and move with this new wave.

Conclusion

From the foregoing discussion, the following conclusions can be drawn.

First, as far as most municipal legal systems are concerned, Kenya included, international law is not self-executing and special measures have to be taken to make such law both applicable and enforceable; Second,

there is no provision for the general application of international law in the municipal legal system of Kenya, and as the law presently stands, such law is entirely inapplicable.

The Kenyan judiciary and lawyers need to be trained on using international law to give them effect within the domestic arena. Consequently, the option available is to train the judges in Kenya to be sensitive, bold, creative and innovative in their role in the implementation and enforcement of international law in test case litigation that comes before them, as seen in *Dow v Attorney General* and *Longwe v Intercontinental Hotels*. The training process is ongoing under the jurisprudence of equality programme (JEP).[15] We can only say that the shift that has occurred, as illustrated in recent trends in Kenya, is tantamount to a partial rather than a complete shift in paradigm for now, as only a few judges have been innovative in invoking international law and arriving at their decisions to protect women's rights. Only time will tell.

However there is a glimmer of hope: if our proposed draft constitution is implemented, the scenario will change. Section 5(g) of the present draft constitution for the first time clearly points to the current thinking in Kenya that the laws of Kenya should comprise, among others, the international laws and international agreements applicable in Kenya. This is a clear indication that international laws will be automatically applicable in the Kenyan courts once the draft constitution becomes law. It is hoped the process of making it law will not be scuttled as the country was already set to have a referendum on the draft constitution in November 2005.

[15] For detailed discussion on the training programme, see P. Tororey J*udicial training on the use of human rights to promote gender equality: An overview of the Jurisprudence of Equality Programme in Kenya* (2005).

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