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**SEX, CONSENT AND POWER: A CASE STUDY OF SEX-RELATED  
CULTURAL PRACTICES AMONG THE LUO COMMUNITY OF KENYA**

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**BY  
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Masters Degree in Women's Law at the Southern and Eastern African  
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## Abstract

**This dissertation exposes how, under the current contradictory provisions of Kenya's Constitution, Luo men remain free to order the core of the life of their community around the brutal, routine and systematic sexual domination of their women. Using 'taboo' or the fear of disobeying superstition (euphemistically called 'culture') as their excuse, these men (in collusion with the older and already brutalized female members of the society) control the mainly poor and illiterate female population by forcing them to submit to 'sacrificial' (and unprotected) rape (by them or by drunk, insane strangers) throughout their lifetime and beyond. These so-called 'sex-related cultural practices' are manifestations of institutionalized rape and breach, at the very least, the Luo women's human rights (1) to be treated with dignity as human beings and as equals with men before the law; (2) not to be subjected to cruel, inhuman, humiliating and degrading treatment and (3) to health (physical, mental, emotional, psychological, etc.). The researcher uses an intelligent combination of methodologies (especially the Grounded, Women's Law and Human Rights Approaches) and data collection methods to collect, interpret and present her detailed research findings through the eyes or 'lived realities' of its victims and, to some extent, their perpetrators. This serves both as a starting point to reveal the horrendous regime under which these women are forced to live, as well as the urgent steps (legal and otherwise) which the writer recommends the Kenyan government (and relevant stakeholders) should take to eradicate/reform these criminal practices in terms of Kenya's obligations to comply with binding/persuasive local, regional and international Human Rights instruments.**

AN AFRICAN WOMAN: A poem by a young Namibian woman

Victoria Hasheela

*I'm an African Woman  
A victim of culture  
I have no rights  
I do whatever he says*

*I am the first wife  
I thought I would be the only one  
But after one year  
There were two of us*

*I was taken by surprise  
I didn't see it coming  
I was only told  
The day that she arrived*

*He said it is his right  
He said I have no say  
He said it is his house  
He said it is Africa*

*This is the fifth year  
There are now five of us  
I wonder if he will get more  
I still have no say*

*He is a proud King  
I gave him two sons  
But I am feeling ill  
There's a disease in me*

*I wonder if culture will ever change  
I wonder if this will go on and on  
I wonder how many more generations  
Will experience this trauma*

*They say it is culture  
It is not his fault  
He found it there  
But I really wonder  
If it's not about time  
To stop this trauma  
And let culture go.*

## ***LIST OF STATUTES***

*The Constitution of Kenya*

*The draft Constitution of Kenya*

*The Constitution of Zimbabwe*

*The draft Family Protection Bill (Kenya)*

*The Judicature Act (Kenya)*

*The Sexual Offences Act (Kenya)*

## ***LIST OF INTERNATIONAL INSTRUMENTS USED***

*African Charter on the Human and Peoples' Rights*

*Convention on the Elimination of All Forms of discrimination Against Women (CEDAW)*

*Declaration on the Elimination of All Forms of Violence against Women (DEVAW)*

*Protocol to the African Charter on Human and peoples' Rights on the Rights of Women  
("African Protocol on Women's Rights")*

## ***LIST OF CASES***

*Magaya vs. Magaya*

*Otieno vs. Ougo and Another (civil appeal)*

*Republic vs. Camplin*

*Valasquiz Rodriquez Vs Honduras*

**DECLARATION**

**I, BELDINE ATIENO OBIERO do hereby declare that this is an original work presented towards the award of the Masters in Women’s Law Degree at the Southern and Eastern African Regional Center for Women’s Law, University of Zimbabwe. It was not previously presented for any degree or other award in any academic institution.**

**Signed.....Date.....**

**This work is approved for submissions towards fulfillment of the degree of Masters in Women’s law by the supervisor**

**Signed.....Date.....**

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**University of Zimbabwe.**

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To my mother Alice Adhiambo Obiero and my father Robert Obiero Ojal I say, "If integrity had a face, it would look like you." Dad, before many of your peers had knew about gender inequalities, you insisted that all your daughters go to school saying; education was the only shield you could give to us as we went out into the world while the boys remained with you and inherited your property. Today the many degrees we have attained are all yours!

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Asante Sana!

Ndinotenda!

Ngiyabonga!

Erokamano!

Thank you!

## **DEDICATION**

This dissertation is dedicated...

...To my sons, “the big brother” Robert Ojal, and the newest member of our family, Emmanuel Mich. To them I say you have it in you to do far more than I have.

...To my late father Robert Obiero, my late sister Rebecca Obiero, my sisters Judy and Betty, and to my aunt Annabel.

...To all the women who are victims of negative cultural practices, and those who are spearheading women’s liberation from out-dated cultural practices.



## **TABLE OF CONTENTS**

### *TABLE OF STATUTES AND INTERNATIONAL INSTRUMENTS USED*

### *DECLARATION*

### *ACKNOWLEDGEMENT*

### *DEDICATION*

## **1. CHAPTER ONE: INTRODUCTION**

1.1. Introduction	1
1.2. Background: Luo customary framework	2
1.3. Background: Sex-related cultural practices	3
1.4. Statement of problem	6
1.5. Significance of study	7
1.6. Research objectives	7
1.7. Research assumptions and questions	8
1.8. Demarcation of area of study	9
1.9. Limitation of study	9

## **2. CHAPTER TWO: THEORETICAL AND METHODOLOGICAL PERSPECTIVES**

2.1. Introduction	11
2.2. The Women's Law Approach	11
2.3. The Grounded Theory Approach	13
2.4. The Sex and gender perspective	14
2.5. The Human Rights perspective	15
2.6. The Actors and Structures perspective	15
2.7. Semi autonomous social fields	16
2.8. Methods of data collection	17
2.8.1. Introduction	17

2.8.2. Key informants' interviews	20
2.8.3. In-depth interviews	21
2.8.4. Focus group discussions	22
2.8.5. Desk research	22
<b>3. CHAPTER THREE: LITERATURE REVIEW</b>	
3.1. Introduction	23
3.2. Power dynamics	23
3.2.1 Patriarchy, power and cultural formations	23
3.2.2 Coercive power	25
3.2.3 Power and its causes	26
3.3. Cultural practices and values	27
3.3.1 Widowhood practices	27
3.3.2 The Sexual cleansing of widows	29
3.3.3 The Concept of chira/kwer	32
<b>4. CHAPTER FOUR: FINDINGS, DISCUSSIONS, AND ANALYSIS</b>	
4.1. Introduction	33
4.2. Link between sex, culture and power	33
4.2.1. Male dominance and power	37
4.2.2 Sex as a social construct	39
4.3. Other reasons why women engage in cultural sex	40
4.3.1 Women's empowerment	41
<b>4.4. Emerging themes</b>	43
4.4.1. Rural-urban dichotomy	43
4.4.2. Sex, power access to resources	44
4.4.3. Age and culture	45

## **5. CHAPTER FIVE: DISCUSSION OF FINDINGS AND THEMES EMERGING FROM STUDY**

<b>5.1.</b> Introduction	46
<b>5.2.</b> Cultural sex not consensual hence marital rape	46
<b>5.3.</b> Conflict between culture and human rights	47
<b>5.4.</b> Analysis of conflict between culture and human rights	49
5.4.1 Discrimination	50
5.4.2 Right to health: Article 14	52
5.4.3 Right to positive cultural context: Article 4&17	52
5.4.4 Widows' rights: Article 20	53
<b>5.5.</b> National legislations (compliance and inadequacy)	53
5.5.1 The constitution	54
5.5.2 Sexual offences act	58
5.5.3 Family protection bill	61
<b>5.6.</b> State obligations	62

## **6. CHAPTER SIX: RECOMMENDATIONS AND CONCLUSIONS**

6.1 Introduction	66
6.2 Legal reforms and self motivation	66
6.2.1 The constitution	66
6.2.2 Creation of traditional authorities	67
6.2.3 Creation of community courts	68
6.2.4 Codification of customs	68
6.2.5 The Sexual Offences Act	69
6.2.6 The Family Protection Bill	69
6.2.7 Social reforms	71

6.3 General recommendations from participants 71

**BIBLIOGRAPHY 72**

## CHAPTER ONE: INTRODUCTION

### **1.1 Introduction**

Power is a basic fabric of society which is possessed in varying degrees by social actors in diverse social categories. Weber defines power as the likelihood that a person may achieve personal ends despite possible resistance from others. Since this definition views power as potentially coercive, Weber also considers ways in which power can be achieved through justice. Authority, he contends, is power which people determine to be legitimate rather than coercive. Power becomes abusive and exploitative only when independence and individuality of one person or group of people becomes so dominant that the freedom of others is compromised. (Weber, 1946)

As a group, women are at a distinct disadvantage when considering both power and authority. Several factors act as determinants of the amount of power a person holds or can use in his or her relations with others: status, resources, experience, and self-confidence. Males and females traditionally have had differing amounts of power at their disposal. By virtue of the male's greater ascribed status in society, men have more legitimate power (based on rank or position) than do women. (Willerscheidt et. al, undated)

Women and children have often been on the abusive side of power. (Weber, 1946) Some causes that are often referred to are: the greater physical strength that men tend to have, the imbalance of power between men and women resulting from social structures and historical practices in regard to finances, education, roles of authority and decision making, the abuse of power by men and the failure of cultural pressures to prevent such abuse, and a distorted view of sexuality and the objectification of the female. The picture painted by Weber is what is depicted in Luo land. The act of cultural sex depicts a world of interplay between power, consent and sex as this paper will demonstrate.

The Luo community of Kenya has different cultural practices with pre-determined reparations in case of any defiance. These pre-determined reparations are commonly referred to as "*chira*". It is noteworthy that sex is commonly done as a cultural requirement in fulfillment of almost every cultural practice, and also as a remedy. The said cultural practices also go with food, mainly

chicken and beef, which of course is beyond the scope of this paper. For purposes of this study, much focus will be on the aforementioned cultural practices namely; construction of a home/house (*goyo dala* or *donjo e ot*), dispersal of children following the death of their parents (*kee*), marriage of children (*kend mar nyithindo*), widow inheritance (*ter*) as compared to the process of a widower's remarriage, sex after the birth of a child (*Ngado imbo nyathi*), and commencement of farming activities (*golo pur*). During these occasions the activity had to either start or end with sex, so that sex has become a cultural pivot.

This study focuses on sex and its function in the community. Specifically, it investigates:

- i) Whether women exercise free will in engaging in sexual intercourse or are forced for fear of the predetermined consequences of *chira* (taboo), and
- ii) The role of patriarchy in women's sexual behavior and choices. Have they broken through the barrier of culture and if so what informs their choices?

My experience as a Luo girl growing up in the care of a cultured grandmother, and later as an adult woman interacting with male counterparts who also grew up under the influence of the Luo culture, many questions preoccupied me about why things happen the way they do in the Luo community. Now a lawyer, and a student of Women's Law, those questions have not gone away but have instead grown more serious and in greater need of answers. Rape and marital rape, as they are defined in some circles, is considered normal practice in my culture, and this explains my peculiar interest in this research topic. I can also lay claim to insider knowledge of Luo culture, yet this knowledge is also only partial due to my limited lived experience of what many of the Luo women face and fight on a regular basis.

## **1.2 Background: Luo customary framework**

The Luos form the third largest ethnic group in Kenya, occupying the Western Nyanza region along the lake shores of Kisumu, bordering Uganda and Tanzania. These are a group of people who migrated down the Nile River from Egypt through to Sudan and Uganda settling, in the 1700s, around the Lake region.

Nyanjom describes the Luo as a highly conservative tribe culturally, who despite the external influence occasioned by communication and integration of statehood, have retained a significant portion of their cultural practices. Colonialism did not impact the Luo community as directly as it did the other tribes of Kenya, i.e. the Kikuyu and the Kalenjins, whose land in central Kenya and the highlands, was invaded by the white settlers. These tribes were thus better positioned to under-study the finer extra-political aspects of the British master's culture. For this among other reasons, Luo culture is possibly the most oppressive of women among the indigenous cultures of Kenya. Coming into contact with the British made other cultures progressive as far as women's rights are concerned. Christianity on the other hand permeated Luo society very profoundly bringing with it a covert colonialism of the mind which had, in many ways, far reaching consequences than the (mere) physical presence of the colonialists. A positive outcome of this latter colonialism was the establishment of a solid infrastructure in terms of education and health by the mainstream churches throughout Luoland. To date a large percentage of the older generation of well educated Kenyans are both Luo and alumni of the mission schools established by the early Christians. (Nyanjom 2006)

Christianity impacted the Luo culture significantly. Whether positively or negatively, a few customs and practices remained unscrutinized, and those suitable and deemed acceptable were adapted to fit into biblical teachings: many present day 'Traditional Luo customs and practices' are a product of this interplay between original and invented tradition. (Nyanjom 2006)

In Nakuru, a sizeable town situated in central rift valley Province of Kenya, a significant population of the Luo has settled either on account of business or employment. Wherever they stay, singly or in enclaves, they have retained and ordered their lives culturally or traditionally; even the high income groups retain a residue of some of those customs.

### **1.3 Background: Sex-related cultural practices**

As already stated the Luo have quite a number of cultural practices, among them those that either start or end with sex as a strict requisite. It was believed that if sex was not done, or if someone did it at the wrong time, it brought what is commonly referred to as "*chira*" by the Luos. '*Chira*' can be defined as the consequences of defying culture, or taboo. The does and don'ts are

commonly referred to as '*kwer*'. Ocholla-Ayayo defines '*chira*' and '*kwer*' noting that '*chira*' encompasses all immoral acts and relationships disapproved by the Luo society that might cause sinful consequences to an individual, family or his lineage; whereas '*kwer*' is a higher level of forbidden acts which can cause destruction of the whole society. At some point '*chira*' and '*kwer*' are linked so closely that it is difficult to draw the line between them. (Ochola-Ayayo 1976).The following are the customary practices related to sex:

- ***Construction of a home/house (Goyo dala)***

It is a requirement that when constructing a home or a house, construction must begin and be completed on the same day, and that husband and wife must “sleep” on that very night. It was found that “sleeping” as it is used in everyday Luo talk, is equivalent to having sex; so the husband and his wife must have sex as a strict requisite on the night of the construction. It is the element of ‘sex’ that gives the woman cultural ownership of the house. The homestead belongs to the man but the house is the wife’s. Several other houses can be constructed for other wives, but they can sleep in the first wife’s house only if she has slept there. It becomes as “*kwer*” (a forbidden act) when a younger wife sleeps in the first wife’s house before the first wife sleeps in it herself. *Chira* (taboo) may then follow.

- ***Ploughing (Golo pur), planting (golo kodhi) and harvesting (golo cham).***

It is believed among the Luos that ploughing begins at the first wife’s farm, and that the first wife and her husband must “sleep” the night immediately before or after ploughing begins. In a monogamous set up, where there are married sons, the sons cannot have sex with their wives before their parents have sex the night before the ploughing, planting or harvesting begins. They must abstain that night to allow their parents to pave way for them, otherwise any son who defies this command is in risk of contracting '*chira*' because they have done what is considered as '*kwer*'. This tradition is applicable to ploughing, planting and harvesting alike. If the husband works out of the village, it is a requirement that he comes back home to perform sex so that the other members of the family who own farms can start their harvest. Should the wife/wives harvest in the absence of the man (meaning sex was not done) the crops will not be brought



home and the husband cannot eat them. This is particularly the case for crops such as maize and millet in most areas, but in other areas cow peas are considered equally important.

- ***Dispersal of children following the death of a parent(s)***

When a parent dies, sons and daughters are not expected to sleep in their houses but to stay outside for 3 days after the burial if it is a mother who has died, and 4 days if the deceased is a father. At the end of the said days, the sons and daughters will disperse in succession, a tradition commonly referred to as 'kee'. The idea behind this is to allow the first son to reach his home and have sex with his wife, and then the second born boy leaves and so on until the youngest finally leaves. The same is also expected of girls. It is not permissible for anyone to have sex before the elder person(s) has had sex with their spouse. If this practice is not followed, 'kwer' happens and 'chira' will definitely follow.

- ***Marriage of children (kend mar nyithindo)***

In the olden days when women used to be captured, the day a son brought a lady home was deemed to be the day of marriage. Over time, as culture evolved, however, arranged marriages emerged. In this kind of marriage, when dowry was paid and the lady joined the husband, that day was deemed the day of marriage, and the parents were expected to have sex on that night. The son was supposed to be given instructions that he should wait until such and such a time before he and his wife could engage in sex, by which time their parents were expected to have consummated. Failure to observe this brought a taboo upon the defiant party.

- ***Sex 3-4 days after the birth of a child (Ngado imbo nyathi)***

Three days after a baby girl was born, and 4 days if the baby was a boy, the parents were supposed to engage in sex regardless of the wife and new mother's condition. A man was expected to remain in the wife's house till they had had sex so that he could be free to go to his other wives' houses. He was not expected to sleep with any woman before he had had sex with his wife who has just delivered. On the other hand, the wife was also expected to have sex with the husband before she had sex with other men. If by any chance the husband strayed, the baby would be sick and could even die. If the woman engaged in sex in a similar manner it was said

that she would not give birth again, and the child would be sick and could even die. The idea was to release the man to go and have sex with other wives/women.

- ***Death of a spouse(widowhood vs. widower hood, sexual practices, and inheritance)***

When a husband dies a wife is expected to abstain for 1-2 years before she has sex with any man; until she is inherited. Before the actual inheritance she is expected to go through several rituals, which include one in which she has to lie with a “*jakowiny*” (normally a person who is not mentally stable). Sometimes the family (in-laws) participates in looking for the ‘*jakowiny*’ who will have “cleansing” sex with her, especially if the husband has died under suspicious circumstances. Thereafter she will be given a limited number of brothers in-law to choose from as a ‘*levir*’, who will inherit her for a wife. Inheritance here means sex. However when a man loses his wife he is supposed to have sex with his late wife in a dream, an act that sets him free to go out in the pubs and look for any lady to have with sex before he settles on the lady he intends to remarry. This lady he finds in the pub is of sound mind, and it is up to him to have the dream and eventually marry whomsoever he pleases, unlike the widow who must be inherited.

#### **1.4 Statement of problem**

Discussions about culture, customs and traditions, into which is sometimes lumped religion, have occupied the center stage of women’s human rights discourse both at national and international level and has occupied the attention of academics, lawyers, human rights activists, the United Nations and many NGOs, alike.

The Women’s Committee has made several recommendations explaining the provisions in the convention and making recommendations as to how the rights contained therein could be implemented. Some of these general recommendations have identified culture, religion and other practices as being impediments to the enjoyment by women of their rights.

“While most countries report that national constitutions and laws comply with the convention, custom, tradition and failure to enforce those laws in reality contravene the convention. There are conflicts between constitutional provisions of equality and customary norms” (Banda, 2005).

Sex related practices discriminate against women and the Kenyan Constitution does not protect women against practices which border on personal laws such as widow inheritance. Luo customary practices surrounding sex, for instance, have major implications for women's rights and the law. Blatant violations of the most basic of women's rights and freedoms are compounded by the deliberate absence of laws to regulate the abuses.

### **1.5 Significance of the study**

Article 5 of the (Convention on the Elimination of all forms of Discrimination Against Women, 1979) CEDAW and Article 2 of the African Charter defines the focal outset for this study: The potential conflict between gender equality, human rights, and cultural practices. In this light, this study will make the following contributions. It will:

1. Illustrate some of the customary values and practices that pose challenges to gender equality.
2. Show some of the gaps between customary and the statutory laws in Kenya, recent statutory developments in the process of law reform and judicial reflections on women and customs in Kenya. This collection together with an introduction to the legal framework of women, customs and the law, and a compilation of the most relevant legal texts, will provide the reader with a sound overview of the current situation with regard to, women, culture and the law.
3. Serve as a guide to all those men and women who wish to contribute to the enhancement of women's rights in Kenya or elsewhere, and those who wish to empower themselves by critically analyzing the way they have been taught to think.
4. Provide a tool not only for further research, but also for lawyers, and stakeholders in the field of women's rights and customary practices and the public at large.

### **1.6 Objectives of the study**

The main aim of the study is to investigate sex-related cultural practices, and their usage among the Luo community of Kenya. It seeks to investigate whether or not women give their informed, full and free consent to cultural sex and if they do, what informs their choices and/or decisions,

and whether male power and dominance is one of the factors contributing to their participation in cultural sex.

The specific objectives of the study are:

- To investigate the link between sex, culture and power in the Luo community of Kenya.
- To explore the reason/s why men and women engage in “cultural sex”
- To find out to what extent women consent or have informed, free and full consent to cultural sex and if the same falls within the paradigm of marital rape
- To investigate to what extent the values underlying cultural sex are in conflict with or in compliance with relevant international instruments on the human rights of women and the national laws of Kenya
- To provide recommendations for the way forward

### **1.7 Research assumptions and questions**

**Assumption 1:** There is a link between sex, culture and power in the Luo community of Kenya.

**Question 1:** Is there a link between sex, culture and power in the Luo community of Kenya?

**Assumption 2a:** Men engage in cultural sex to prove their power and dominance and to satisfy their physiological needs.

**Question 2a:** (i) Why do men and women engage in cultural sex? (ii) Do men seek to prove their power and dominance and to satisfy their physiologic needs when they engage in cultural sex?

**Assumption 2b:** Cultural practices involving sex are engaged by coercion, intimidation and threats of harm against the woman, her children or property.

**Question 2b:** How is the consent of participants in cultural sex obtained? Do the means involve coercion, intimidation and threats of harm against the woman, her children or her property?

**Assumption 3:** Cultural sex is not consensual; hence it falls within the paradigm of marital rape.

**Question 3:** Is cultural sex consensual? Does it fall under the paradigm of marital rape?

**Assumption 4:** The values underlying cultural sex are in conflict with international instruments on the human rights of women.

**Question 4:** Are the values underlying cultural sex in conflict with international instruments on the human rights of women?

**Assumption 5:** The national laws are either inadequate or laws not enacted to meet the needs of Luo women to redress their situation.

**Question 5:** Are there national laws in place as redress for the Luo women? If so, do they meet the needs of the women?

Basic research questions were formulated around the assumptions to guide the data collection process, and to establish standards against which data collected was constantly checked for relevance to the central theme of the study.

### **1.8 Demarcation of area of study**

Initially the research was to be carried out in the Nakuru and Kisumu districts but on being informed that the president (*Ker*) of the Luo Council of Elders came from the South Nyanza-Rachuonyo district, a decision was made to substitute the Kisumu district with the South Nyanza district.

### **1.9 Limitation of the study**

The study started off well save for few hitches here and there. When the research began it was a rainy season (Elnino rains) which made meetings difficult especially in the Rachuonyo district. When in Rachuonyo the first time I travelled on Thursday evening so that I could have Friday and Saturday to talk to '*Ker*' but he had an urgent meeting to attend that day. Nevertheless he organized and I met his official who then summoned others for the meeting. Meanwhile the

market day in this place falls on the Fridays and this was such a great impediment as everyone was in the market place either buying or selling or just meeting people and though we had a sitting you could see signs of people who wanted to be elsewhere especially women. Some respondents left in the middle of interviews since this was a group discussion.

On my second visit to Rachuonyo, which visit I had arranged with some women from a self help group, it became difficult to meet some of the key respondents like the '*Jakowiny*' whom I intended to interview because the area member of parliament's wife had died and almost everyone in the village attended her burial. However I still managed to interview a group of women and men.

Some people perceived me as a representative of an NGO and refused to be interviewed until they were paid. The hitch with this, despite having money was the large amount they demanded for being interviewed and the negative influence it had on those who were willing to volunteer information. Other widows continued coming to the office as a follow up after discussion to ask me to help them with money so that they could go back home and arrange for construction of her house without going through inheritance.

Language at some point became a little challenging especially where the respondent did not know English and I did not understand the Luo word used. Though this was solved later when I asked other Luos to interpret the meaning for me.

## **CHAPTER TWO: METHODOLOGICAL PERSPECTIVE**

### **2.1 Introduction**

Feminist researchers see gender as a basic organizing principle that shapes the conditions of people's lives. Thus gender is a lens that brings into focus particular questions. The questions that feminists pose relate to the centrality of gender in the shaping of individuals' consciousness. However, they also recognize that other aspects of identity interact with gender to produce a unique lived experience (Collins, 1990). This chapter outlines the broad methodological framework used in the study to examine the sex-related cultural practices among the Luo community of Kenya. It presents two theoretical and methodological framework perspectives, namely, the Women's Law Approach and the Grounded Theory Approach. It outlines sex and gender analysis as the analytical tool that was used to decipher the data. The use of women's human rights instruments as an analytical tool resulted in identifying a theoretical gap in its application to customary rights as provided for in the Kenyan Constitution. The chapter continues by exploring actors and structures and the semi autonomous social fields and their role in this area of study and date. Finally, the sub-sections briefly discuss the methods of data collection.

### **2.2 Women's law approach**

Women's law takes women as its base; it evaluates the law from a feminist perspective. The feminist perspective establishes a systemic cross-section through existing rules of law in order to perceive otherwise unnoticed connections of significance for all individuals, but especially and directly for women. It implies that women's law attaches greater weight to law's systematizing function, and there under its concept formation and theory construction, in comparison to what is usual in law. In addition, the feminist perspective attributes greater substantive content to several sources of law. It directs attention to the consideration of women-relevant aims reflected in the legislative process; it increases knowledge of general public opinion of what the law is or ought to be and the actual practice of individuals; and it provides alternative raw materials for a result oriented application of precedent and for other practice etc. (Dahl, 1987)

Due to the objectives of this study (i.e., to investigate why men and women engaged in cultural sex, and whether women consent to it) there was a need to take women as the starting point and get from them the main reason(s) why they engaged in cultural sex. Their dominant response was that they “feared ruining the lives of the children”. One of the respondents said that despite being separated from her husband, she was compelled to go back home (in the rural areas) to construct a home/house with her husband, and was forced to engage in cultural sex according to the traditions observed when building a home. She said that despite having knowledge that the husband was unfaithful, she had to have sex with him so that she could protect her children. In essence the Women’s Law Approach helped unearth different reasons why women obey culture and why others do not.

One of the assumptions made in this study calls for investigating the law, both domestic and international, in order to assess whether women are aware of the said laws and/or rights, and their application. Using the Women’s law approach it was noted that although a number of women were aware of their rights, they were not aware of how to go about voicing their plight. This approach was useful in understanding ‘the lived realities’ of women as they cope with the challenges they encounter as they participate in their customary duty of cultural sex. It was also possible to link the law that was under investigation to the situation of the women, and to further use the laws to sensitize those who were not aware of their rights. In no time, most were able to identify some of their rights which were being violated, and to suggest what they perceived as remedies to their situations.

The Women’s law approach was the approach of choice as it provided a research framework and analytical tools that helped describe current women’s situation in Luo land. It also helped analyze and explore whether cultural sex was consensual or not, and to what extent the underlying cultural practices were in conflict with the domestic laws and the international instruments. It also raised questions about the efficacy of the Sexual Offences Act and the draft Domestic Violence Bill. The methodology revealed the gaps in the law and its inefficacy; especially in respect of the Constitutional provisions which provide for outright discrimination in personal laws. All this was possible because the strength of the women’s law approach lies in its inherent interaction with data, theory and ‘the lived realities’ of women in a manner that perceptions and norms are constantly influencing each other (Bentoz, et al, 1998). For instance it



was revealed that cultural sex was done without any use of condoms to mark the ritual as complete and that widows had their in-laws choose for them remarriage partners. As a result the approach has helped contribute to recommendations for legal and social reforms which may greatly benefit women.

### **2.3 The Grounded Theory Approach**

Whilst the Grounded Theory Approach unpacks ‘the lived realities’ of women, it also looks at the reality on the ground for men as well. I particularly engaged the methodology because I wanted to investigate the lived realities of women. In many instances, before I set out into the research field, I read from books and heard from people that cultural sex in Luo community had changed and that sex was now symbolic. This change, I learnt, was due to the impact of the Aids pandemic. From my data collection I gathered that women were forced to engage in physical sex first with a ‘*jakowiny*’. This enabled me get a more practical positions of women and men as opposed to what we read from the books. One of the respondents was pleading that I should talk to men on their behalf so that they can be allowed to have the same standards as men, that is, women should also look for the ‘*jakowiny*’ in the pubs like men. I set out to capture voices of women and I compared the women’s voices on the procedures of widowhood inheritance and widower hood, and it was revealed that there was glaring discriminatory practices between the two.

This methodology helped me in that from the beginning of my research I merely collected data on the procedures of the cultural practices, without identifying the problematic areas. When I called for a focused group discussion it emerged from the respondents that the practices were so much alive in the rural areas and despite the fact that I had gone to the rural for my research, I was forced to go back and carry out further research and in some instances I had to re-interview the people I had interviewed for clarification on pertinent issues. For instance I wanted to hear women’s voices and experiences as far as the issue of inheritance was concerned. When I met about 8 widows, what came out so clearly is that they all had sex which was unprotected apart from one lady who had protected sex. It also came out clearly from those I interviewed that no symbolic sex takes place, except in the case of one old lady whose husband died when she had stopped having sex.

This method was very useful in unearthing real experiences of women. In fact one beauty of the methodology is that from one person's experience it led me to know who to interview next and even where to find the person, because in some instances the very widow or widowers, knew a fellow person who had been involved in a similar experience.

#### **2.4 Sex and gender perspective**

Many theories about the role and position of women in law and society are based on notions about sex and gender differences.(Bentoz at el, 1998) This methodology was useful to me in the following way. As a result of applying the grounded theory I established that there were double standards in the treatment of widows and widowers. Whereas widowers are subjected to a series of rituals closely-controlled by her in-laws (including forcible sexual cleansing by a stranger) before she is inherited by one of them, widows are basically free of these rituals and may marry whomever they wish. This method enabled me unearth differential treatment based on sex for example rules and actions that treat men and women differently on the basis of sex.

Sex and gender perspective enabled me look at sex as a social construct and sex, the act. I was able to investigate whether women find the cultural sex valuable and whether men enjoy that part of the culture. Was the culture imposed on the women by some gate keepers? One respondent says:

“I wish we could talk to men so that this rules may be changed. We should be given a chance to choose our own men and privacy to have sex with whomsoever we choose. Letting everyone know the day and time of inheritance is like having sex in the field and it is so shameful, especially with the children.....”

The sex and gender perspective was helpful in the sense that I was able to gauge the balance between men and women. Who pushes more for culture? The gender perspective also brought out the fact that women themselves were not of equal mind when under similar circumstances. A Gender and Social Development Officer said:

“Culture does not make sense to me, it has no value to add or remove from my life, and I do not practice it myself”.

## **2.5 The Human Rights perspective**

The research assumptions herein call for multidimensional investigations. One of the issues that I sought to investigate was whether the state was fulfilling its obligation towards women by enacting legislation to protect their cultural interests of women and whether its national instruments protected the human rights of women specifically in the area of cultural practices. The most suitable approach was the human rights approach. With it I was able to look at the Kenyan Constitution. I found that although the Constitution appeared to protect women's human rights on the one hand, it also had claw back clauses which preserve discriminatory cultural practices against women. I also discovered that there are also Bills pending before Parliament which have not yet been passed into law and become Acts. This approach made me question other legislation, for instance, the Sexual Offences Act to see if there was any provision in it which took care of the rights of women in a cultural context. It is a method that made me analyse critically our court decisions to see the extent to which cases that set precedents in cultural matters (like the *Virginia Wamboi Otieno's* case) conflicts with or upholds the human rights of women.

## **2.6 The Actors and structures perspective**

This perspective is particularly useful in obtaining a dynamic and a holistic understanding of gender and legal change in the context of societies where state law interplays with other normative orders. It assumes that social and legal change takes place through the interaction between human beings as individuals or groups and not through some seemingly abstract medium such as "The Law" (Bentoz et al 1998).

This methodology became very useful in my research because it enabled me look at the normative structures that impinge on women's rights. I looked at the woman as an actor within the structure of the family, the clan and society at large, which structures offer women a variety of choices as to how to achieve their aims and goals. In my mind this perspective is closely linked to the semi autonomous social fields approach (see below) which informs a woman's behavior or decisions. In this society a woman does not have autonomy over her sexuality; rather it is the family, which consists of her children and in-laws, who influence and decide how

or whether the woman should be inherited and with whom, and who should have sex with whom first before the others have sex.

This methodology enabled me look at actors, like Parliamentarians and judges, and structures, like Parliament and the courts, to see whether they have enacted and interpreted laws in order to protect women in this area. For example, I looked at the courts and the decisions made by them and I noted that the judgments were discriminatory in so far as they did not seem to uphold those aspects of personal or family law which benefit women.

## **2.7 The Semi Autonomous Social Fields Approach**

Sally Falk Moore describes semi autonomous social fields as a tool that assists in describing and analyzing the extent to which and how rule-generating and rule-upholding processes affect the position of women and gender relations in a situation where a plurality of normative structures inform human interaction. As Bentoz and others put it, most women within an African context who are in legal dispute within the family are likely to be situated at an intersection or confluence of different systems of law and a plethora of normative orders that influence the choices they and other make about their lives (Bentoz, 1998).

During the research I found that only one woman and her family had resorted to court action after discovering that their uncle and his clan had made arrangements for the remains of their mother to be cleansed (meaning having sex with a dead body) by a *'jakowiny'*. The court ruled in their favour and made an injunction against the clan and the *'jakowiny'* from performing any cultural rituals with the deceased. No other woman who had been aggrieved by a decision of the clan or the in-laws had attempted to go to court. Instead they used other institutions to solve their disputes. These institutions included the family, the clan, the Luo elders office and the church, among others.

The Semi Autonomous Social Fields Approach was an ideal approach because each of the actors were governed by their own rules and regulations when it came to dealing with the issue of cultural sex and their perception of "*chira*" (taboo). The methodology was instrumental in that it helped me understand the various factors that affect women's choices as to whether they should engage in cultural sex, with whom and even how and when. It further enabled me to understand

the predicament of women when dealing with these semi autonomous social fields. It revealed to me that those institutions (i.e., the family, etc.) do not reason based on culture but rather as the result of an uncritical, preset and judgmental mind set.

A community worker in Rachuonyo district and a widow had refused to be inherited. When her mother-in-law died, the clan elders called a meeting and found that she should be inherited and that she could only attend the funeral if she agreed to be inherited. The woman refused and asked her parents to stand in for her at the funeral. Realising that she would not change her mind, the clan elders softened slightly towards her because she was the wife of the deceased's first born son. They sent her father in law to her asking her not to shame them but to attend the funeral, even if she did not agree to be inherited. This is a case where other fields inform behavior and make powerful and far-reaching decisions that cannot be easily disobeyed. It takes the brave (like the respondent in this case) to defy those rules without thinking about the repercussions of defiance.

## **2.8 Methods of data collection**

### **2.8.1 Introduction**

I developed my research methodologies having been guided by the research problem and the research questions or issues to be answered and clarified. When designing the methodological approaches I took into account the difference between what people state as the operative norms and the actual practice that they themselves employ. I designed the methods in such a way that the methods would help reveal these differences. In some instances I had to try to address the same research question using more than one source.

Flexibility underpinned the interview process. During some discussions some points were belabored particularly where the rights and interests of women were concerned and this was mostly with widowhood and widower hood procedures. There were instances when cultural procedures were inconsistent especially with reference to when sex was performed. It was not clear which came first. The sex or the cultivation? In the case of a polygamous home: is sex performed with all the women or just the first wife? Some of the Luo elites were not comfortable

with discussions around culture and these were the instances when I was forced to triangulate their responses (i.e., test them against other data).

In some instances in both the rural and the urban settings the discussions were dominated by status and class. In the case of group discussions in Nakuru, discussions became so heated that it was important for me to take a back seat, listen and observe. This was especially so in a combined discussion groups of men and women where the men often overpowered the women, as a result of which most of the women withdrew from the exercise. This kind of passive observation played a key role in data collection. I noted that whenever at least three Luos were gathered, they would essentially agree that sex was the ultimate goal of the cultural practice. But they would disagree about the exact details of the performance of the ritual and become involved in heated debates. Each one believed that he knew the proper way it was to be done. In one case, one of the group members claimed that he knew the correct procedure and that a neighbouring household who had failed to follow it had suffered serious repercussions. After the group discussion he admitted to me in private that he was referring to himself but did not want his identity to be revealed. I respected his wishes.

The advantage of being both an insider (being a Luo myself) and an outsider (being a researcher) helped me during data collection. Being a Luo woman it became very easy for both the respondents and I to communicate in Luo and I tried as nearly as possible to give it the same meaning in English. The methods used in the dissertation are summarized in Fig 1 below.

Fig. 1: Table summarizing methodology and participant information

Method	Area	Gender of participants	Number of Participants	Brief Demographics
Key Informant Interviews	South Nyanza	Male	1	<ul style="list-style-type: none"> <li>President of the Luo Council of Elders</li> </ul>
	Nakuru	Male	1	<ul style="list-style-type: none"> <li>Branch Chairman of the Luo Council of Elders</li> </ul>
	Nakuru	Male	1	<ul style="list-style-type: none"> <li>Provincial Commissioner</li> </ul>
	South Nyanza	Males	9	<ul style="list-style-type: none"> <li>Members of the Luo Council of Elders</li> </ul>
Focus Group Discussions	South Nyanza	Female	8	<ul style="list-style-type: none"> <li>Mixed group</li> <li>Professionals</li> <li>Aged 40-65</li> </ul>
	South Nyanza	Female	5	<ul style="list-style-type: none"> <li>Group of widows</li> <li>2 had defied culture (community workers)</li> <li>3 had been inherited</li> <li>2 were not inherited</li> <li>Aged 40- 75</li> </ul>
	South Nyanza	Female	9	<ul style="list-style-type: none"> <li>Group of widows</li> <li>All inherited</li> <li>Aged</li> </ul>
	South Nyanza	Males	6	<ul style="list-style-type: none"> <li>Group of widowers</li> <li>Aged</li> </ul>
	Nakuru	Females	6	<ul style="list-style-type: none"> <li>Randomly selected group of ordinary women</li> <li>Aged</li> </ul>
	Nakuru	Males	6	<ul style="list-style-type: none"> <li></li> </ul>
Quantitative Questionnaire		Males	7	<ul style="list-style-type: none"> <li></li> </ul>
		Females	13	<ul style="list-style-type: none"> <li></li> </ul>

**Total number of Females interviewed: 41**

**Total Number of Males interviewed: 30**

### **2.8.2 Key informants' interviews**

Key informants' interviews were chosen mainly because of their expert knowledge especially in cultural issues, their age and working experiences in different structures and institutions that interact with issues of cultural norms and values on daily basis. Three key informants i.e. Ker (the president) of the Luo council of elders (Kenya), Luo council of elders Nakuru branch Chairman, and the Provincial commissioner were interviewed individually, while the other officials of Luo elders were interviewed as a group.

The Luo council of elders is selected by the Luos as their representatives on the basis of age and his knowledge on cultural issues. In case of any disputes or cultural interpretations, they are contacted and their verdict is basically final. For this reason I sought audience with them so that apart from their resourceful information, they would be able to clarify issues that were problematic. For instance I came across a practice commonly referred to as “*Ngado Imbo Nyathi*” which initially I was not able to translate in English because it sounded much more like Greek than Luo. Upon obtaining clarification from them I now knew that it was sex done 3 -4 days after the birth of the child. They were able to clarify why things were done the way they were done, as opposed to informants who merely contended that they did them because “we found them being done” and for fear of the consequences of ‘*chira*’ or taboo if they did not do them.

The Key informants were also picked on the basis that they represented various other normative structures and orders that played a crucial role in generating and upholding rules which they applied or invoked in solving cultural cases which were brought to their attention. For instance one of the respondents said that he was faced with two cases that needed cultural sexual cleansing yet it would have posed a conflict in view of the fact that in Luoland sex is not just done, succession is of great importance. Caleb says that:

“My father died and ordinarily I must have sex with my wives for purposes of completion of death rituals, but the 2<sup>nd</sup> and the 3<sup>rd</sup> wives had given birth at the same time just before the death of my father. After death we are supposed to refrain from sex until 3-4 days after burial commonly known as ‘*Kee*’. I was between a rock and a hard place. I then confronted the elders who advised me to start with first things first. I had to start with the birth rituals first, that is, sex with my 2<sup>nd</sup> wife, then my 3<sup>rd</sup> and there after I had to go



back to my first wife, 2nd and 3<sup>rd</sup> in succession to finish the death rituals (kee) of my father. In that sense, and because the verdict came from the elders I had no fear of the consequences of “Chira” (taboo) on any of the wives and the children.

### **2.8.3 In-depth interviews (Individual and group discussion of men and women)**

I carried in depth interview with individuals and also some groups. I happened to have met the former Provincial Commissioner with the Police Executive Officer who was one of the informants. He then suggested that I could interview the Provincial Commissioner who turned out to be very helpful. Though I had my question guideline, the respondent ignored the same and insisted on starting from his own point of view. He then started by giving a brief though comprehensive background of the Luos especially the marriage practices among them before we could embark on the question guidelines. Before my supervisor came, I had actually interviewed him and he gave me the contact of the President of the Council of Luo elders (*Ker*) and directed me on how I could get to his home. ‘*Ker*’ in turn gave me useful information based on the very ancient Luos culture and explained the dynamics and evolution of culture generally before we focused on my area of research. *Ker* then led me to his officials -the council of Luo elders- whom I took through an in-depth group discussion.

The in-depth interviews were mainly applied when I desired to obtain information from the actual victims of cultural sex (sex cleansing) and those who had interacted with them by virtue of belonging to a cultural group and also the offices they hold which deal with cases of culture on a daily basis. I conducted a total of 18 interviewees with men and 25 with women. This was done by way of introducing the research problem, and then allowing them to talk freely and narrate their problems. I mostly let them narrate the stories from their own perspective without restrictions. This method was very useful because it allowed me to collect a lot of information which I never anticipated in my assumptions, and from this method I was able to come up with emerging issues, which turned out to be pertinent for the findings of this research.

From their narratives I was able to identify the gaps in law, culture and even in international instruments. The victims, especially women, were able to come up with their own recommendations while the males who were female sympathizers were able to come up with a way forward based on the perspective of victims close to them.

#### **2.8.4 Focus Group discussions**

In major interviews, I started with a focused group discussion, especially in Nakuru which was made up of a random sample of the interviewees. I went round selecting Luos from different professions, age groups, marital status and levels of education using random sampling at first. Later on the respondents were able to direct me to people they knew who could offer me valuable information and I chose to interview some of them as a group, whilst I interviewed others on an individual basis. I choose this method, because from the group I would single out the victims of cultural sex who provided very good data on individual interview.

#### **2.8.5 Desk research**

This method was useful in helping me identify the gaps that were there in the already written literature and what was being practiced on the ground that enabled me look for the ways of filling those gaps and provisions for change to improve the situation of women.

## **CHAPTER THREE: LITERATURE REVIEW**

### **3.1 Introduction.**

The Luo community of Kenya is a conservative lot who believe in their culture and traditions. As already stated, sex is a central part of the said culture which must be done, whether physically or symbolically and failure to do so results in a taboo commonly known as “*chira*” or “*kwer*”. It is against this background that I seek to understand the inter-connectedness between sex, consent and power in the cultural practices among the Luo community of Kenya.

This dissertation seeks to examine sex-related cultural practices, the consequences of failure to perform them and to research relevant literature on the topic and, if so, to determine the relevance or point of departure? I will review my literature in two major thematic areas, i.e. power and cultural practices, while consent and the law will be discussed in chapter 5 in relation to the findings of the research for ease of flow.

### **3.2 Power dynamics**

#### **3.2.1 Patriarchy, power and cultural formations**

Willerscheidt in Gender and Power (undated) defines power as the basic fabric of the society and is possessed in varying degrees by social actors in diverse social categories. Power becomes abusive and exploitative only when independence and individuality of one person or group influence becomes so dominant that freedom for the other is compromised. Women and children have always been on the abusive receiving end of the power. This definition depicts a world where an individual or a group becomes so dominant, as in the case of Luo community, which is both patrilineal and patrilocal and the male dominance gets its roots through that kind of structure and it has made men so powerful as the house hold heads, from the family level to the national level where they are majorly in the decision making arena, while women are in the private sphere where they are not even taking part in decision making.

This definition of power by Willerscheidt is supported by other writers among them is Moncrieffe who in development and transition of identities in Africa, sees power as inevitable

fabric of the African society .In her discourse and analysis of the construction of identities which include cultural formations, she avers that clans or groups of people who share the same ancestors, either through birth or kinship-were the central units of administration in both seminary and more centralized societies, though in the more sparsely populated areas, family relations took precedence. Clans had a variety of customary practices and social and political structures. Some of these customs were developed through consensus and /or commonly accepted principles of mutual accountability and susceptibility, such as between elders. She continues to say that in these communities (African) Women had very low or no place, and were regarded as objects to be bartered and exchanged. It is unlikely that women were broadly accepting of their inequalities though over time many conformed. (Moncrieffe 2004)

I argue that from the above it is very clear that when cultural values and practices were being formulated women were not involved in framing cultural practices because the structures in place did not( then) recognize women as being part of the decision making process, and that explains male power and dominance in issues of culture/cultural sex. Gunga explains in his paper about male power, which corroborates Moncrieff's position and supports my assumption and findings that it is the male power and dominance that influences the woman's involvement in cultural sex since these rules of dos and don'ts were formulated by the male elders of the clan. That is where the male power is derived from. (Dahl, 1987) says that, it is the norms of the Man that are in operation, a situation that is clearly seen in the widowhood cleansing and sex after a child's birth commonly referred to as "*Ngado imbo nyathi*" among the Luos.

Gunga explains power in relation to marriage a position that is backed by Cohen & Adhiambo (1989) Ocholla –Ayayo (1976). Gunga explains that

“The Luo culture is matrilineal and patrilocal, and hence family life is centered on the lineage as defined through male descendants. Upon marriage a woman moves to where her husband's family is located. Among the Luo, inheritance and residence are also centered on the male lineage, and men are the major decision makers and controllers of wealth and power. Upon marriage, husbands and families exchange bride wealth for the reproductive and productive capabilities of women. Marriage is therefore considered actualized when the woman relocates to a geographical place of residence agreeable to the man. It is therefore a common saying among the Luo that marriage is not a mutual affair: the man marries the woman, and the woman gets married to the man in reference to the idea of relocation of the woman. Consequently, virtually all power lies in the hands

of the elderly males. Men make most decisions, which women are expected to follow, and a man is expected to be the head of the family.”(Gunga 2009)

I concur with Gunga in so far as he corroborates my assumption and findings on the fact that there is link between sex, culture and power in the Luo community. The fact that a woman is married in well established cultural norms leaves her with very slim chances of changing the institution that is well established. It is noteworthy that the power being talked about here is general power in a society while the gap that this dissertation seeks to fill is the link between sex, culture and power in specific cultural practices and how it impacts on sex both as biological factor and as a social construct.

### **3.2.2 Coercive power**

John French in his study of social power defines power and he contends that power is the ability to influence others to believe, behave or to value as those in power desire them to or to strengthen, validate or confirm present beliefs, behavior or values. He goes on to say that coercive power exists when use of threat is made to extract compliance from another. He contends that force is not limited to physical means; social, emotional, political or economic force is also included. (French, 1959).

I identify with French’s definition because from Moncrieffe averments on the formation of identities and further From Gunga's above analogy I can safely state that Men in Luo community had the ability to influence women to believe in the sexual cultural norms by using coercive language ,coupled with inflicting fear in them, causing them to act as Men desired them to act and if they failed to conform to those values laid down ,they would contract Chira(taboo/kwer) and the consequences thereof would follow. This is what was to ensure women’s compliance to perform cultural sex. The belief has not been taken off the minds of majority of the members of this community. Ken Petress (undated) further reaffirms that coercion, in our society, is seen as in-appropriate: however Many victimizers and some victims fail to recognize coercion or do not Know how to counter coercion when it befalls them.

Majority of women think that the fear of the consequences of taboo instilled in them is just fine and they take it as part of the accepted norm of the society and the victimizers on the other hand

think it is manly to instill fear and coerce women or they do not realize that it is coercion. This is the more reason I find this literature relevant to my study save for the fact that it is not specific on issues of cultural sex. My topic seeks to capture the specific instances of power in relation to sex and specific cultural practices. The power I found out had also to do with women not the male power parse'. The dissertation seeks to fill in this gap and demonstrate how the empowered women use their power to defy culture and the well established patriarchal institutions, despite Gunga's position that Women are married and are therefore forced to follow the norms. That position I argue is truly the starting point for a woman but with empowerment she can defy the norms.

### **3.2.3 Power and its causes**

Moncrieffe further says that women and children have often been on the abusive side of the power and that some of the causes that are often referred to are: the greater physical strength that men tend to have, the imbalance of power between men and Women resulting from social structures and historical practices in regard to finances, education, roles of authority and decision making. The abuse of power by Men and failure of cultural pressures to prevent such abuse: and a distorted view of sexuality and the objectification of the female. Fortunately enough some of the above are also forces that influence and inform women's behavior and choices in cultural sex issues as shall be seen in chapter 4. This position is supported by Weber. He states several factors as determinants of the amount of power a person holds and can use in his or her relations with others. Status, resources, experience and self confidence. Males and Females traditionally have had differing amounts of power at their disposal. By virtue of the male's greater ascribed status in society. Men have more legitimate power (based on rank or position) than do women (Willerscheidt undated)

Petress (undated) argues that traditionally, power is that force that is exerted upon us to conform to traditional ways. Traditions, for the most part, are social constructs; they invite, seduce, or compel us to conform and act in predictable, patterned ways. Breaking with traditions put people at risk of social alienation. Traditions can blunt rationality; they can block innovation; and they can appear to outsiders as silly when original traditions' rationales become outdated or forgotten. The power of traditions, rather than being typically vested in particular individuals, is ordinarily.

I am in total agreement with Petress and I join in his reasoning, albeit in the Luo context. Luo as a community have deep belief in the existence of *chira or Kweche* (Taboos) that at times it becomes a way of life that people don't reason out of it. What makes Luo culture is the traditional power instilled in them which they find difficult to break from for fear of the consequences of taboo (*chira*). Sure enough as can be seen from many voices of the women in chapters 4 and 5, some cannot construct their houses to live in because someone should have had sex with her and has failed, therefore she would rather continue being in the urban set up and renting house because if she goes back home (village) *chira* may befall her and her children. The traditional power blocks innovation. I now want to specifically look at how this may be relevant in the context of cultural sex.

### **3.3 Cultural practices and values**

*'To be human is to be have been encultured to some specific culture whose characteristics have been internalized (An-Na'im quotes pearce and kings 1988; 29)*

#### **3.3.1 Widowhood practices**

Gunga in his paper "the politics of widowhood" describes some of widowhood rituals in the Luo community. He says that in many societies, widowhood is a process characterized by rituals, forced remarriages, harassment, rejection, loneliness, poverty, loss of status, fear of the future and depression. This position is also supported by (Ntozi, 1997) who further says that the degree of expression of the negativities depends on the communities' culture, religion and economic systems.

Gunga (2009) says that:

"... Widowhood practices are closely tied to cultural and traditional beliefs about death, ghosts, inheritance, feminine roles, family structure and family relationships. The overpowering belief in the ability of the ghost of a dead person to come back to dispute and haunt all kinds of things and relatives has reinforced and perpetuated the age-old practices of widowhood in Africa.... The belief that death brings corruption and the dead still have contact with the living, especially their closest partners in life, is one of the reasons used for subjecting widows to inhuman and humiliating customary practices. The satisfactory completion of these ceremonies, rituals and practices is therefore believed to

help restore the balance and security, which the death had sought to overthrow. The people, due to superstitious beliefs, rationalize these practices with the argument that they perform important functions, such as giving the widows protection from their powerful deceased husbands”.

This is a position also supported by Sossou (2002).

Gunga continues to say that in various cultures throughout the world, and in particular in sub Saharan Africa, women are forced to undergo various rituals after the death of their spouses a position supported in (COHRE & WHRP 2008). Luo widows are not permitted to formally remarry or take other sexual partners in addition to the surrogate husband a position that is supported by Potash (1986a, 1986b) and Kirwen (1979). Just as in the lower castes of Haryana of India (Chowdhury 1994), Luo widows are encouraged to get a surrogate husband within the family of the deceased husband through *ter* (culturally-sanctioned “re-marriage”), a situation that has often been controversially referred to as “wife inheritance” or “widow inheritance”. Through *ter*, as a Luo cultural practice, a male relative of the deceased takes over the guardianship of the deceased’s family, including the wife (COHRE & WHRP 2008), so that the deceased’s inherited property stays in the family (Ntozi 1997). However, in the Luo culture, the widow remains the wife of the deceased, and not the wife of the guardian or “inheritor”. The Luo practice of *ter* entails cleansing as a pre-requisite for restoring normalcy of the widow into the society, and as a means of neutralizing the assumed cultural impurity and avoiding *chira* or taboo violations.

The position held by the above writers is the true widowhood procedures. I particularly identify with Gunga in so far as he explicitly explains the rituals a widow is expected to go through and why she must go through them and what should happen if she fails to comply. Sex is just a component of his discourse as opposed to my study which though looks at the widowhood cleansing rituals as one aspect of cultural sexual practices. My dissertation is actually asking why must there be sex with a *jakowiny* and later on the guardian as Gunga calls them. What informs the woman’s decision is it the fear of violation of ‘*chira*’ and is there connection between sex, consent and power in cultural sex. Gunga’s analysis is narrowed down to examining widow hood rituals while the study investigates not only the cultural sex in inheritance but entire cultural



practices which involve sex. I appreciate Gunga's literature because it is confirming my assumption that women involve in cultural sex for fear of the consequences of Chira.

### **3.3.2 The Sexual cleansing of widows**

Ambasa Shishanya explains that women are expected to observe a cleansing ritual, which has a sexual component, before being re-incorporated into society; a widow was confined to her homestead for a whole year, since she was considered as culturally impure and dangerous to the community. During this time, a widow had a dream where she engaged in sex with the deceased. The sex dream was an indicator that the widow was free to be cleansed. Indeed, widowhood taboos were lifted after the final post-burial ritual where the life of the deceased was celebrated. Thereafter, widows were given to men in the community to guard them, with a view of providing material and emotional needs. This ritual endangers the lives of widows and their new sexual partners through possible infection with HIV/AIDS. If the family suspects that the death was related to HIV/AIDS, it hires a professional cleanser, and gives him alcohol. Thereafter, he is taken to the widow's house to perform a sex ritual on her. Family members sometimes supervise the ritual, to ensure that actual sexual intercourse takes place, thereby effecting the cultural cleansing. Sex is a must. This is because the prime function of cleansing is both to free the widow from *okola* (bondage), and to enable her to get children so as to perpetuate the deceased's lineage. A professional cleanser, *jakowiny*, clears all possible ritual obstacles in readiness for the guardian to take over the widow. (Ambasa-Shisanya 2007).

Kunda (1995) and Butlerys (1994) are in support of Shishanya's position that sex is central to the cleansing ritual. It is a prelude to placing a widow under guardianship and is performed by a professional cleanser. The "ritual cleansing" (*chodo okola*) is achieved through obligatory sexual intercourse, performed by ' *jatiek kwere* ' if he is from within the clan or a *jakowiny* when he is an outsider a position that Kimani (2004) and Ocholla-Ayayo (1996, 4) acknowledges and they observe that a *jakowiny*, is a sexual perverse, Or psychopath capable of doing what normal human beings cannot do, who is persuaded to Perform a sexual cord cutting ritual to separate the widow from her deceased husband, So that the widow may be free to re-marry or to be inherited. It is preferable that he be an outsider, because his undertaking to cleanse the widow means his

assuming the State of contamination or "uncleanness", thus accepting to be separated from the clan much like the sacrificial lamb that takes on the blemish of the offender (Kimani 2004).

Shishanya continues to say that although widowhood rituals are intended as ways of showing public respect for the dead and proof of the inconsolable sadness of the widow, they expose the widows to psycho-emotional and physical indignity as discussed above. The fundamental social change in her lifestyle is dramatized, emphasizing her faithfulness to her husband's memory and her chastity during the marriage period. The moral justification of widowhood rituals among the Luo is for the purpose of meeting the perceived needs of the dead, his living relations and dependants. The psychological fear of defiling children with cultural impurity, *chira*, and the subsequent desire to neutralize it, are the driving forces for cleansing rites. While in re-marriage the woman may relocate to live with the new husband after undergoing a fresh round of marriage rites, inheritance refers to a situation where the "new husband" acts for the deceased, as the latter remains the undisputed husband in death. The inheritor (*jater*) is normally a brother or a close male relative of the deceased, and the decision of the survivor (widow) in this regard, is culturally compelled rather than self-willed, a situation that creates problems in adjusting to the new scenario within the community.

Whereas widows are subjected to very strenuous widowhood rites among the Luo, widowers are in a similar fashion to Owens's (1994) observation, bereaved Luo men may interact freely in the community and are therefore more likely to remarry out of choice, because their movements are not unduly restricted by widowhood rites. In the few instances where men are also required to undergo some "cleansing rituals", the procedures are much simpler than what their female counterparts experience (Limann 2003). Far more restrictions are placed on a widow than a widower (Sossou2002).

The enforcement of widowhood rituals has been vested in elderly married women and widows. They have been psyched into believing that the rituals are for the widows' benefit and those of their children. With fellow women in charge of the situation, young widows are silenced into submission (Sossou 2002), as they are taken through the observation of the rites as "willing" participants.

Shishanya, Ayayo and Gunga are discussing a detailed cultural ritual which surrounds widow hood. In their discourse or explanation sex is one of the components of the widow hood rites to be performed, while this dissertation looks at all the cultural practices which involve cultural sex. the point of departure here is that while Shishanya argues that widows must dream that they are having sex with the their deceased husband, I will be arguing that widows procedures are long because they are not subjected to the same treatment. they are not supposed to dream. The reason why I link their literature to my studies is that she problematizes sex in widowhood and the fact that it is actually done with no modification is in line with my finding .Ayayo describes a “jakowiny’ as one who can do things that a normal prudent man is not capable of doing. I find this literature quite corroborative even in the sense that it depicts my findings that women were forced to be cleansed by a jakowiny who was mentally unstable and in certain instances he was intoxicated. Ayayo also makes a finding that, all these sexual rituals were performed for psychological fear of defiling the children with cultural impurities. This is a fact that supports my assumption that cultural sex is not consensual, hence marital rape. It should be noted that Shishanya’s focus is in the widow hood cleansing rituals in relation to HIV/AIDS.

She continues to say that during this time, a widow was confined in her homestead for a whole year, since she was considered as culturally impure and dangerous to the community. During this time, a widow had a dream where she engaged in sex with the deceased. The sex dream was an indicator that the widow was free to be cleansed .Indeed, widowhood taboos were lifted after the final post-burial ritual where the life of the deceased was celebrated .Thereafter, widows were given to Men in community to guard over them with a view to providing basic and emotional needs. Widows choose their successors but made their decision public before a group of elders. The senior widow (first in a polygamous marriage) announced the choices that junior widows had made. Screening of the chosen names was done to ensure that no taboos were broken.

Her literature is very useful to me insofar as it clearly supports the assumption that cultural sex is in conflict with the international instruments, hence a violation of Women’s Human rights. The fact that women have not been given a wider choice like their male counter parts who have a wide discretion to choose from the whole realm.

### **3.3.3 The Concept of chira/kwer (taboo)**

Ocholla-Ayayo in his paper examines Oludhe Macgoye's notion of "*chira*" in a period marked by an upsurge of HIV/AIDS to interrogate how "traditional" knowledge informs "modern" understanding of the disease and how this relationship impacts on the people. He also looks at how Macgoye uses the silences and the denials that accompany "*chira*" and/or HIV/AIDS and the damage that "*chira*"/HIV/AIDS causes to the body to critique political corruption in contemporary Kenyan society. Informing the issues that Macgoye raises in *chira* (1997) is the question of morality, both individual and public. In the novel, the writer interrogates various forms of sexual moralities – Christian sexual morality, traditional sexual morality and secular sexual morality – possibly seeking to ascertain their relevance or otherwise in regulating sexuality and helping control the spread of HIV/AIDS.

Macgoye focuses on *chira (taboo)* as being one of the ways the Luo interpret AIDS and associate it with a traditional disease, using pre-existing explanatory systems to give meaning to the new epidemic of H.I.V /AIDS. Macgoye contends that *chira* comes as a result of crossing of boundaries, or in other words through the wrong mixing of kinship categories in sexual relationships. Macgoye looks at the concept of *chira* and defines it.

Macgoye focuses on one aspect of this research namely "*chira*" and its perception with regard to HIV/AIDS. It is looking at how the perception of *chira* has been used to instill psychological fear into Women forcing them to give in to cultural sex. Our focus on "*chira*" looks into the wider scope of how it then affects cultural practices pertaining to sex.

## **CHAPTER FOUR: RESEARCH FINDINGS, ANALYSIS AND DISCUSSIONS.**

### **4.1 Introduction**

This chapter discusses the findings from the research under different thematic headings. The assumptions were tested in the field using different methodologies as explained in chapter two. For clarity of purpose and ease of reference, the data findings are presented, discussed and analyzed according to each assumption or jointly and severally where the assumptions intersect, as it is not easy to totally divorce one from the other. The chapter will also discuss and link the human rights violation and the law where necessary. In quoting respondents identities will be protected where necessary. It is important to note that international instruments and the law touching on human rights will be dealt with comprehensively in chapter 5

### **4.2 Link between sex, culture and power**

**Main assumption: There is a link between sex, culture and power in Luo community in Kenya.**

For most part the findings confirmed the main assumption that there is a link between sex, culture and power in Luo community in Kenya. These findings are discussed below under different subheadings.

- **It was unanimously agreed that there was significant link between sex and culture in that all cultural practices begin and/or end with sex.**

Sex is paramount in every cultural practice and it is an important aspect of the lives of the Luos. The discussants observed that in the following cultural practices sex is compulsory: construction of homesteads, farming activities, marriage, dispersal of children following the death and burial of a parent, widow inheritance, and birth of a child, among other practices. In common Luo talk the mention of some of these practices has literal reference to sex. For example when a Luo says, “*Ose gol pur*” (We have commenced farming) they actually mean; “We have had sex, so farming

can proceed.” When they say; “*Owadwa maduong pok okee*” (My elder brother has not dispersed (*kee*))” they will be understood as having said; “My elder brother has not had sex with his wife (this following the burial of a dead parent) so I can’t disperse.” One of the discussants, Edward remarked that:

“All Luo cultural practices rotate around sex. Culture must be satisfied either with food or sex or both. Whether you take *Manyasi* (herbal concoction with medicinal value used as remedy in case of defiance) you must still eat and have sex”

- **It was also revealed that sex marks cultural ritual as complete and if not completed with sex *chira* will follow.**

Generally the respondents cited the centrality of sex to cultural rights to such an extent that in cases where husbands and wives had separated, if a cultural rite had to be carried out the two had to come together and have sex as per cultural requirement lest *chira* befell them. The woman, for example Philgona who had separated from her husband because of his unfaithfulness was forced to return to the man she no longer loved just to fulfill a cultural practice before the construction of a home. She narrated her case as:

“I was called by the elders and advised that my children were old and that we needed our own home so we had to construct a home and I had to come back and complete the relevant ‘*kwer*’ (forbidden /recommended acts). This had to be done to protect the children. So when the day came for construction of the home, I had to comply..... we did it despite the fact that we had separated with my husband”

In a related matter, she had to return again this time to perform ‘*kwer*’ before the planting time. However because her husband had married other women, some of whom had died, she insisted on using a condom, which is in defiance of culture. Following this incidence one of her grown up sons died, and society was quick to say it was ‘*chira*’ because she had used a condom.

It is clear that sex is used as a powerful tool in the hands of a man not to let go of a woman. In fact one male discussant said that even if a woman had separated with her husband there remains a thin string that the relationship hangs on; culture. Culture can force a woman to return to her husband for the safety of her children. Some respondents even called it ‘a litmus test’ for

relationships, because in some instances it works well for the woman who may still have hope of salvaging her marriage, and in others it works against one who may want to move on from a failed marriage. Hence cultural sex is a two edged sword which depends on the needs of the recipient.

This practice violates a woman's right to control her sexuality because she may be compelled to have sex at a time she may not want to, and with a person she may not want to have it with. Her sexuality is controlled by other people and circumstances. The state owes its citizens a duty to ensure they live in a positive cultural context as per Article 17 of the African Protocol on Women's Rights.

Cultural sex goes beyond the borders of the living and penetrates the land of the dead. When an un-inherited widow dies culture demands that she must be inherited in her death bed. Do the dead not deserve respect and dignified burials? Ordinarily the dead woman is "inherited" by a "jakowiny" before she is buried. The question would; be why sex? Is it the only way by which cleansing can be done? Doesn't an insane person have protection under the law? Why should a man's ill mental health be taken advantage of to the extent that he can be used as an object to fulfill cultural rites through sex and risk his own health? In this regard one of the respondents said that her mother died before she was inherited. When they took the body home for burial they noticed that there was a dirty looking insane man kept in a makeshift structure (*Akumba*) which was constructed for her mother since she did not have a house in the village. Because cultural sex goes with food, the in-laws hung meat in the "*akumba* with the intention of leaving the dead widow's body there until the *jakowiny* "inherited" her. The respondent would not take this, so they returned with the corpse to Nakuru and took the issue to court seeking injunction orders to restrain the in-laws. I argue that whether there is property in a dead body or not, the remains of a person are entitled to dignified treatment, and even the insane person has an inalienable right to be treated with dignity.

Further more in issues of widowhood rituals sex remains pivotal, and the widow is deemed unclean (*Chola/ okola*) until she is inherited. This means there are things that she or her children cannot do; for example if she builds a house she cannot live in it until she is inherited and has

performed *ter*. Even when her daughters are getting married she can not the dowry until she is inherited. One respondent Awino whose mother was widowed could not get married because her mother had not been inherited, and could therefore not receive her dowry. Awino could not even plaster her mother's dilapidated house as she would not be able to live in it in her state. Although Awino's mother did not want to be inherited, at the time of the study the inheritance had been scheduled for December 2009 as her in-laws insisted she had to do it for the sake of her daughter.

In this case we can see the violation of women's rights to their sexuality, their vulnerability sexually, and the forces that compel their submission to sex. At this point one may pause and ask whether the state has enacted legislation which protects women against culture and actions of third persons who compel them (women) to engage in cultural sex against their will. What about her right to housing? It appears that as long as she is not inherited she may continue living under uninhabitable conditions because she has not had sex. This is in clear violation of Article 5 of the African Protocol on Women's Rights.

- **It is in defiance of culture to use condoms when performing cultural sex.**

One of the issues that stuck out clearly in the study was that sex should be done without protection, and that if it is done with a condom the ritual will not be complete hence *chira* will follow. Out of the 41 women interviewed only two confessed having used condoms, and one of them lost her son thereafter; which people attributed to her defiance of culture. The other was a widow who negotiated the use of a condom with the young man who was going to play '*jakowiny*' in her cleansing ritual. She said:

“When my husband died I was told that I had to be cleansed (*chodo kode*) but not by my brother in law. I looked for a young man whom I talked to and we agreed to use condom and I had to pay him.....I did not want to be inherited, but because I was staying in my father in law's homestead I had to do it, because they said that if I did not it would ruin their home....”

From her narration it is evident that the extent to which a woman can negotiate her sexuality may be influenced by her economic, educational, and religious empowerment among other things.



However the fear of chira is the major coercive force that makes women submit to cultural sex in most cases.

It is interesting to note that in the era of HIV/AIDS such aspects of culture are still rampant which put women at risk of contracting the disease. One of the widows interviewed was actually blatantly instructed not to use a condom in her inheritance ritual. This was her story:

“My husband died in 2005, and I have 3 children whom I leave with at Rhonda estate in Nakuru-on my own plot. My parents in law have insisted that I must be inherited and that if I do not do so I will ruin my children. They say that if I have sex with before being cleansed a shadow (tipo biro goyo nyithindo) will come upon my children and they can die since they are boys. This is the reason I am compelled to look for a ‘Jakowiny’ to cleanse me and I have already talked to my brother in law who will then inherit me. I must meet both of them without condom.....these are instructions from my father in law.’

It is a glaring fact that cultural sex is in conflict with international instruments on women’s rights. Culture seems not to recognize that in the era of HIV/AIDS it is imperative that before they enter into sexual engagements individuals should know the health status of their sexual partners by taking HIV tests. Culture has denied women especially widows in this community that right and it is in violation of Article 14 which states women’s rights to reproductive health and 20 which states the rights of widows to marry a person of their choice. This practice takes away the widow’s right to be in control of her sexuality, to choose when to have sex and with whom.

#### **4.2.1 Male dominance and power**

**Assumption 2a: Men engage in cultural sex to prove their power, dominance, and to satisfy other needs.**

It was quite evident that what informs the cultural norms was a making of the males; some respondents said that the rules governing marriage were made by men, and women were meant to just comply. As one of the male discussants stated:

“It’s a man’s world; man makes the rules-sex rules. Women were bought with cows”.

This position was noteworthy in such practices as sex after child birth, and in inheritance rites. A husband had sex with his wife 3-4 days after childbirth essentially to set the man free to engage in sex with other wives or women. The discussants also mentioned that culture also demanded that the woman had to sleep with her husband first before sleeping with any other man (based on the belief that a wife is communal). The time frame was not stipulated for women but the essence was that before sleeping with any man she had to sleep with her husband or else she would not have other children.

The argument here is that the only reason a man would want to have sex with a woman who is still bleeding and “dirty” after child birth must be very serious. A man was to abstain from sex as soon as his wife delivered, and to have sex with her while she was still bleeding was only to set the man free. While this practice was a sacrifice for the woman who was still recovering from the aftermath of delivery, for the man there lay ahead of him the incentive of freedom to sleep with other women. A woman who was interviewed said:

“... I did this because I feared that if my husband strayed and had sex with other women before *Ngado imbo nyathi* it would harm my children.”

This introduces an element of power, which Ken Petress refers to it as coercive power. This is seen in the way the threat of *chira* was used to cajole women to give in despite the horrible state of affairs. As Petress continues to say, that force or power is not limited to physical means, but it is extended to the social status of a woman; she was merely supposed to be seen but not to be heard. It also had to do with economic empowerment; men were the sole breadwinners and a woman’s place was in the kitchen. She was a man’s property together with the cows and goats that the husband owned; therefore she could only be on the receiving end.

The same power dynamics are observed in remarriage following the death of a spouse. Sexual practices for purposes of cleansing are applied differently on widows and widowers, and men are given a wider discretion in cultural sexual issues than women. While men make their own decisions, women are decided for and monitored, not only by their immediate families but the

eyes of the society are also on them. All this is attributable to the fact that the makers of the rules and norms were males, and they made rules that favored them.

#### **4.2.2 Sex as a social construct**

One observation that interlaced the whole study was that in the Luo culture sex is a social construct. One of the discussants said that:

“Culturally marriage was about capturing women (*yuecho*) and since these two did not know about one another, rules were set that could enable them to engage in sex without having to put in a lot of effort, because it was difficult for people who did not know each other very well to talk about sex.....and it was also difficult for a woman to refuse sex because they used to be beaten with clubs.”

While yet another said that:

“The woman is under the law of man until the man is dead. It is biblical, irrespective of where a woman comes from; she must conform to the Luo traditions. Even biblically she has to conform to the standards of the man. Men made the rules so women are merely acting on them....”

The other contended that:

“Our sex was mainly man based, it is the man who initiates sex; the woman may just behave in a certain manner and the man will know that she wants. But the modern woman is different she can demand sex and can determine who enters her house.”

From the above narrations it is clear that even though we are discussing culture with its dynamism, society is still static as regards the position of both male and females. In the olden days we could argue that both men and women were not liberated but we see a clear line of socialization at work. It is this socialization process that entrenches the position of males as dominant and females as subordinate. We therefore cannot in totality disregard patriarchal power forming the societal norms of the Luo community. In as much as the state owes its citizens duty to make legislations and policies which may change notions of the people, it has failed in Kenya because the drafts which would have taken care of some of the anomalies depicted in Luoland

have been pending for well over three years i.e. the family protection bill. The legislators are predominantly male; which makes it difficult for the bill to be passed not only because it is uprooted from the language of international instruments but also because it seeks to curtail men's power.

This social construct with respect to cultural sex is evidenced even by the double standards with which society handles remarriage issues among widows and widowers. The men is trusted to be able to select a woman to marry after the death of his wife while the woman is given a limited choice between a select group of brothers in-law and monitored as if she were a mini person. Society even accepts as normal practice the tradition of using a mentally disturbed man to lie with the widow in a cleansing ritual, an act that blatantly violates both participants' basic rights to sexuality and health.

This is a clear finding that sex is a social construct. Treatment of human beings in similar circumstances is totally different; it is made quite easy for men while very long and complicated for women. While women have been constructed by the society as the 'other' a number of them have defied culture and perhaps innovated their own. The dynamics is discussed here below to show different powers informing women's choices and behavior.

#### **4.3 Other reasons why women engage in cultural sex.**

**Assumption 2b: Cultural sexual practices are obtained by coercion, intimidation and threat of harm against the woman, her children and her property.**

It was our finding that there were other reasons besides the power and dominance of men that make both men and women engage in cultural sex and these are fear of the consequences of taboo, and possible loss of property and being chased from the matrimonial home, among others. Most of these only befall women and children in case of defiance, and not the men.

Caren whose husband died when she was around 67 years old was faced with several calamities of death in her home; first her husband, then her daughter and then her sister in-law, and the only

way she thought it could be was a bad omen that needed cleansing. After burying her husband she could not bury the others because she was considered unclean. A *jakowiny* had to be sought for her quickly so she could lie with him and be cleansed, and then be able to bury her daughter. Siproso on the other hand lost her husband and her son later. Her daughter in-law wanted to be inherited but could not because Siproso had not been inherited yet. It then forced Siproso to be inherited at the age of 70 to avoid the consequences of *chira* and to pave way for her daughter in-law to be inherited.

Mary, who was widowed said that she was instructed by her father in-law to get somebody who will cleanse her (a *jakowiny*) because as long as she remained un-inherited she brought a bad omen to his house. She felt that she had to do it despite the fact that she did not want because she was still staying in the father in-law's homestead. So Mary did it for fear of the perceived consequences of *chira* and fear of being chased away from the matrimonial home. In fact she said:

“Once my husband died I had to follow culture. I was very vulnerable because my in laws said that I wanted to ruin their home when I attempted to say no to inheritance. They attempted to chase me away. When I informed my parents they told me I had to listen to my in laws because that is now my home. I had no choice but to be inherited. We did not go for HIV tests.”

#### **4.3.1 Women's empowerment.**

It is a common saying that “when you educate a woman you educate a whole nation”. As opposed to what literature gives, and the intention of the makers of the customs, five women gave their testimony for having defied culture. Gladys (a barrister) lost her husband nine years ago. The community expected her to be inherited and to even go through certain widowhood rituals all of which she defied. She said:

“One is forced to follow culture because we fear the consequences of not following culture...the consequences are attached to the children, in most cases they instill fear in you but there are those who have gone against culture.... I am one of them ... everything I was told I thought of how it was going to affect me. Fear is psychological, I questioned things.”

Gladys, unlike Josephine who refused to question culture and adhere to its requirements under the belief that if she fails then she will ruin her children, was able to question it through the power of education. Religion also influenced her take up issues with culture, and is instructing her children in the same way. Is this not another culture Gladys has created? The question is, is that against the human rights of anyone and is it repugnant to morality? It is evident from her case that *chira* and the taboos are all in the mind; it all depends on one's belief. That is why even in Christianity for everything to happen positively much emphasis is put faith; the evidence of things that are not seen. It's about changing attitudes and perception.

Alice's mother was a widow who had decided she was not going to conform to tradition, so she died un-inherited. When her children took her body home for burial they found that an "*akumba* had been built for her in which a *jakowiny* was waiting for her. The in-laws had hung meat in the make-shift house to show that the mad man was supposed to inherit her before she was buried. Alice and her siblings decided they could not let their mother be disrespected like that so they carried her body back to Nakuru and sought a court order to restrain the in-laws. The deceased was a Christian and her children were too, so Christianity became her empowerment against Luo culture. She created a culture of her own.

Sofia and Eunice are community workers with Amani self help group. (Sofia's voice is captured elsewhere in the text) They both defied culture, and refused to be inherited. Sofia constructed a home with the church presiding over the construction so that she was shielded from the repressive customs associated with the construction of a home. When her daughter got married she received her dowry regardless of the fact that Luo culture prohibited it considering her to be unclean. She said she does not believe in anyone controlling her sexuality, and she has a right to choose her sexual partner.

In a nut shell what has informed these women's thinking is empowerment; economically, educationally, socially and religiously. They have come up with their own cultures and nothing in the form of *chira* has manifested. This takes us back to Chidi's definition of feminism where

she stresses the desire to defeat inferiority complex and working towards recognition of self-worth.

‘Feminism means ... a rejection of inferiority and a striving for recognition. It seeks to give the woman a sense of self as a worthy, effectual and contributing human being [...] Women conditioning in Africa is the greatest barrier toward a fulfillment of self.’

Molara Ogudipe Leslie approaches feminism from a Marxist standpoint denotes a world view in which women are given the opportunity to play an active role in its transformation. She calls it stiwanism and defines it as:

“Stiwa” means social transformation including women of Africa”.

She voices the desire for social transformation in Africa: not about warring with men, the reversal of roles, or doing to men whatever women think that men have been doing for centuries, but it is trying to build a harmonious society. The transformation of the African society is the responsibility of both men and women, and is in their interest. I concur with Ogudipe in the sense that if African women will say no to oppressive culture and set their own ways of doing things in a manner that suits their life style, and refuse to do things for men, that will be the beginning of creating new positive cultures which may be carried on and eventually may end up defusing the present oppressive culture. This can only be achieved when women are empowered educationally, economically and socially like in the case of the women herein discussed.

#### **4.4 Emerging themes**

##### **4.4.1 Rural –urban dichotomy**

Luos as earlier on indicated are a conservative lot. There was linkage between the rural home commonly referred to as the ancestral land and culture. Luos believe that cultural practices are best observed in the ancestral land where the spirit of the fore fathers are, because they are the ones being appeased. In the cause of data collection the Luos leaving in Nakuru had a consensus that for proper and accurate data collection it was imperative that I go back to the village,

because that is where Culture is being practiced. It also emerged that when it comes to cultural practices like entering a new house in the urban, the married Luos still preferred 'entering the house with the wife/first wife for those in a polygamous set up, to allow the first wife to enter into that house. But in the event that the husband entered with the second or a third wife, the first wife cannot sleep in that house. Issues of inheritance, especially for ladies emerged that such rituals must just be done in the village including marriage rituals. But the people in the village observe culture more than those in the urban. The reason being that culture is best effective in the village.

#### **4.4.2 Sex, power and access to resources.**

In this regard it was noteworthy that cultural sex hinders access to resources. For instances in issues of farming ,before the husband has sex with the elder wife to denote an okay for the commencement of ploughing ,planting and harvesting, other members of the family cannot do the same. The fear of taboo is an impediment to access to resources and an urgent of poverty. In fact crops harvested in the absence of the husband cannot be taken to the home if the husband is not around. Some contend that the crops must be exchanged with the one who harvested in the correct way by selling the harvest and buying others.

In south Nyanza it was observed that in a bid to alleviate poverty and lift the economic empowerment of the women, it was discovered by Imani self help group officials that women were refusing to plant cow peas because it had a cultural significance and could not just have been planted anyhow.

Inheritance and cultural sex is total wastage of resources. For instances the idea of changing a house, is such an expensive venture to a widow who has suffered physical, emotional and monetary loss, to be compelled to get a jakowiny to construct for her another house while she is the one to bear the expenses. Even though there is a shift from the early days when the entire house had to be constructed, for now the expenses will go to buying at least an iron sheet or a shutter to symbolize a construction of a home.



#### **4.4.3 Age and culture**

The young men urban men seemed very passionate about the cultural sex/culture while the old Men were moderate about it. On the other hand the young women were not at all in support of the culture while the older women advocated for continuity of it. Mary who is about 70 years old and in the rural says that “I just like the restriction given by the culture on women, because we must be under the cultural rules placed by men over women (*Nyaka wabedie e buo chik*). Women cannot have excess freedom; she may go overboard. Mary’s age and her socialization process knows no other life apart from what she grew up seeing and that is what she has conceptualized as opposed to the young women, who despite their socialization process have been influenced by other factors such as education, religion, economic empowerment among other factors which informs there thinking. Young men on the other hand I argue are possessed with the patriarchal system which they have been socialized into, and the thought of emancipation of a woman sends a cold chill along his spine. They are better off with disempowered woman. In that way they are able to perpetuate their dominance.

Margaret on the other hand, an elderly rural woman said that:

“No, it’s your brother in law who should inherit you not any other Man I don’t agree with the fact we should have a wide freedom of choice across the board. The choice should be restricted among the in-laws, but due to the prevalence of HIV/AIDS we should have a chance to choose among the in-laws who are not positive-yes we should go for test because nowadays technology allows us to do it as opposed to long ago.”

## **CHAPTER FIVE: HUMAN RIGHTS, CULTURE AND THE STATE**

### **5.1 Introduction**

While women form a majority of the population in Kenya (52%) and play an active role in the development of the society, Kenya remains a very patriarchal society, and the status of women remains relatively low, with inequalities and iniquities prevailing in many aspects of life. Women continue to be marginalized and discriminated against in almost all aspects of their lives, and of course majority of them are among the illiterate and poor in the country. A number are still affected by customary laws and practices which have for so long perpetuated their subordination and oppression. This situation is reinforced by the existing laws and policies as well as the socio-cultural factors. (Kattambo et al 1995)

This chapter discusses the findings, conflict between culture and human rights and the state obligations. It shall discuss the domestic legislation where applicable its compliance with the international instruments and gaps if any.

Some of the assumption will be lumped together for purposes of discussion since they overlap one another. The chapter starts by just mentioning the findings under each assumption, then discussions under conflicts in relation to human rights will be done generally having all the assumptions discussed in chapter 4 in mind. It shall then look at the national legislations. This will be done under various thematic headings. It's important to note that most of discussions have been done in chapter 4 and this chapter focuses mainly on legal issues in relation to the findings.

### **5.2 Cultural sex is non-consensual hence marital rape**

The assumption was that cultural sex is not consensual hence marital rape and that the said cultural sexual practices fall within the paradigm of marital rape. Findings in this regard were:

- Women do not give full and informed consent to cultural sex since they have no choice.
- Cultural sex is like a decree passed which must be executed

- Cultural sex is done out of fear of the consequences of chira/taboo and intimidation among other reasons.
- Since all these practices occur within the context of marriage; between husband and wife it can be termed as marital rape.

Among the 71 respondents interviewed none confessed to having been involved in cultural sex voluntarily; the reason given was mainly and absolutely fear of the consequences of ‘chira’ which entailed ruining the children or home. Many voices have been captured in the previous chapters pointing to the fact that many women practice cultural sex because of fear of taboo.

### **5.3 Conflict between culture and human rights**

**Assumption: The values underlying cultural sex are in conflict with international instruments on human rights.**

It was observed that not every aspect of cultural sex was oppressive i.e. like sex done for purposes of farming activities and marriage of children which was associated with life and joy. The sex that is associated with construction of a home is associated with great joy and some say that whether it was cultural or not it is a celebration of achievement(s). The most problematic cultural sex was seen to be in inheritance procedures. It was found that:

There is gender discrimination on the performance of cultural sex which in turn violates a number of her rights; for instance the right to dignity, integrity, and respect for her person. It also violates her right to be protected against HIV/AIDS and other sexually transmitted diseases, and of course unwanted pregnancies. She has a right as a widow to choose her sexual partner, when to have sex and how to have it. A number of women confirmed that they would have wanted to live in a positive cultural context which right the state has not honored. A number of women and men expressed their concern and disappointment at the state of events. Margaret says that:

“Culture does not treat men and women equally. A woman was disrespected (Dhako nene ocha) this is quite evident from the parts of the chicken that they are suppose to eat such as the neck, wings, legs and intestines.”

Caren is about 68 years old now and her husband died 2 years ago. This is what she said:

“My husband died and before his burial my daughter also died, and soon thereafter my sister in law died. I could not burry them because I was unclean (*Chola*). Everything appeared as a bad omen. After burying my husband my in laws went around looking for a ‘*Jakowiny*’ for me whom they found in a hurry. The pressure was too much for me from my in laws and the fact that I could not burry my daughter. They said they were safe guarding the interest of my children.

Mary says that:

“Culture took away my right to choose my sexual partner. I was made to sleep with a man who stinks, no foreplay - no enjoyment, it is such a serious bossiness -I just hate it. You feel very unclean yet you go away feeling that your children are safe”

Monica says:

“Rules should be uniform; we are ashamed as widows who have gone through the same ordeal especially with the people we respect. I found it so difficult to face my children when I woke up in the morning. It was as if it was written all over my face that I had done it. We should be given a choice but culture does not give us the same choice given to men. When you are told to choose among a few in laws, is that a choice? Unlike the men they are the ones deciding a ‘*Jakowiny*’ for you. Even the ‘*jakowiny*’ are so scarce since there are many deaths in the village you simply pick the first one you come across for fear of taking too long before you get another....It’s a bad practice, it takes away ones dignity and it is filthy-I cannot describe it, please help us....”

Rose says:

“Culture does not allow you to be in love. It’s all about rape. I feel like I have been raped and forced into doing something I did not want. When doing sex with the *jakowiny*, your nose is far away, you long for the moment he will be done. They smell, sometimes there is no foreplay, he comes to just do what he was instructed by the in-laws-there is no feeling at all. You are forced to do it for fear of ruining the children”

It is true that times are changing and people have changed with the times. We have women who have defied culture and all these that are described above do not affect them. I am speaking for the minority who are still trapped into culture as their way of understanding the world around them, by virtue of their socialization.

#### **5.4 Analysis of Conflict between culture and human rights**

The United Nations considers some of these harmful cultural practices to fall under the definition of Violence against women. Indeed the importance of recognizing the breadth and scope of violence against women can be seen in plethora of international instruments and initiatives to tackle violence against women. I am not suggesting that men do not experience violence in terms of the cultural sex herein discussed, they do, but the major focus here is on women since, after all, the sexual rules were designed by men, little did they anticipate that some of them would be greatly injured by the said practices. In the general recommendation of the CEDAW committee, it raises a major concern that culture is a barrier to progress. Culture is often equated to customs, traditions and ancient practices. (Banda 2005).

The special Rapporteur on violence against women has defined violence within the family as including:

“Women battering ,marital rape ,incest ,forced prostitution, violence against domestic workers, violence against girls, selective abortions and female infanticide, traditional violent practices against women including forced marriage(my emphasis),son preference, female genital mutilation and honor crimes”

General recommendation 19 of CEDAW defines gender based violence as

“Violence directed against a woman because she is a woman or that affects woman disproportionately “

The organization of American states (OAS) convention on the prevention, punishment and eradication of violence against Women 1994 directly addresses the issue of Violence against women. It defines violence as:

“...any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere. (My emphasis)”

The General assembly adopted the declaration on the elimination of violence against women (DEVAW). It defines Violence against women in the family as including:

“Physical, sexual and psychological violence occurring in the family including battering ,sexual abuse of female children in the household , (dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women ,non spousal violence and violence related to exploitation”)(My emphasis)

The DEVAW came in handy to fill in the gap which CEDAW left. CEDAW does not talk about violence against women; the word violence does not appear anywhere in the convention. Having gone through the above definitions it is clear that the cultural sex among the Luo fall within what the international community term as domestic violence which happens in the private sphere. From the voices of the respondents, they detest what goes on. From having sex with the ‘*Jakowiny*’ they feel dirty and smelly because the *jakowiny* himself smells, and the psychological torture by the in laws insisting that they must be cleansed cannot be said to be going against the above definitions. It is my argument that cultural sex falls within the above definitions hence is a clear violation of a woman’s person.

#### **5.4.1 Discrimination**

The African charter provides:

‘Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his persons.’

Article 2 of the African charter guarantees the enjoyment of rights and freedoms without distinction of any kind such as race, sex, national and social origin among others. The theme in CEDAW is elimination of discrimination of women. This is the starting point of my analysis. As already seen from the findings, culture discriminates on the basis of sex. Women have an uphill task while men have walkovers in the procedures of inheritance. Stang Dahl (1997) quotes an American feminist as saying that ‘the sex class is so deep that it is invisible. The differences

comprise in reality almost every aspect of our lives and are so pervasive that one often fails to notice them....she continues to say that we have different social ties and different sexualities.

I argue that sex as a social construct creates a glaring discrimination which violates the women's rights. The fact that a man is left on his own to dream of having sex with the wife and then proceed on his own to get a woman of his choice at his convenience raises questions as to the capability of a woman to think, act and decide on her own. This treatment of a woman confirms Stang Dahl's (1987) position of how women are often considered 'mini persons': they have little moral aptitude, little intellect, little right to property and equality within certain limits. But a man has more of everything and therefore also position of authority. It is perhaps against this background that I argue that women's discrimination come from the deep belief of men that women are lesser beings and must always leave under someone's shadow. This is a total violation of her inherent human right which is inviolable.

Women have a much more elaborate widowed procedures and restrictions compared to their male counterparts. One troubling question is why should the women be made to have sex with a sexual perverse or psychopath? Why are men not subjected to the same? Even if men are supposed to pass through the cleansing procedures, theirs is so well defined; it is a matter of choice. From the women's treatment one can say that men's wives seem to be dying from very special deaths, but all women lose their husbands from weird circumstances which call for cleansing by psychopaths. Where are the '*Nyakowiny*' for men? Why are men who decide to remain single after the death of their wives' or those who were never cleansed (that is, if the society has means to catch those who did not), if in case of death, they are not subjected to sleep with an equivalent of a *jakowiny*? We have never heard in the history of the Luos of a man who was forced to be cleansed in his death bed as they insist on a '*jakowiny*' cleansing a dead woman. The double standards are too glaring and for some strange reason there is no proper explanation to it other than women being pushed to believe that rituals are for the widow's benefit and those of her children.

There is a distinct difference in terms of the time frame in widowhood/widower hood procedures. Women take between 1-2 years while men take as few as one day to start his sexual activities. The man who took long before having sexual intercourse took 20 days only, before he

dreamt of his wife. In essence the practices go against the human rights of women and it creates discrimination between the genders.

#### **5.4.2 Right to health: Article 14 of the protocol on the rights of women**

The fact that widows are made to have sex with the '*jakowiny*' without the people advocating for testing the '*jakowiny*' for any positive virus is a total violation of the woman's right to health. Of course the '*jakowiny*' has got no lesser rights than the widow. The Article stipulates that the woman on her own motion will have a right to protect herself even if the *jakowiny* or the levir does not want to protect themselves. The question is why she can't be allowed to exercise her part of self protection. Sex as an act, I argue is complete when penetration is achieved, whether a condom is used or not, it does not have a different name, it is still called sex. The Luos have got no different name for protected sex, they still regard it as sex, even in situations of an adulterous relationship it does not matter whether condom was used or not. Why is the usage of condom re in cultural sex regarded as incomplete sex? It is simply sex. My argument is that sex with or without condom is a complete sex and therefore, if the elders and the followers of this particular culture think they need to follow it, (but my position is that it is out dated, anyone who needs cleansing can use water) then the times we are in, cannot allow a woman to do sex without protection. That then explains why my contention is that the sexual cultural practices are in violation the above Article.

#### **5.4.3 Right to positive cultural context (dignity, respect and integrity)Article 4&17 (protocol on the rights of women)**

As already discussed from the voices above, women have expressed their concern at the way culture humiliates them. It is dehumanizing and a violation of a woman's dignity and privacy to cause her to have sex with a '*jakowiny*'. Gunga describes '*Jakowiny*' as a sexual perverse or psychopath who is capable of doing what normal human beings cannot do..." (Gunga 2009)

Why should women be made to have sex with a sexual perverse? This reduces a normal woman to the level and status of the *Jakowiny*. This is in dignifying. A woman is a giver of life and her body must be respected.



Why should someone have sex with her while she is still recovering? Her body deserves respect and it should be left for her to decide on her sexuality and health. Such violations of a woman's rights are contrary to the standards expected by the international conventions.

#### **5.4.4 Widows' rights: Article 20**

When one hears that in Luo land widows are allowed to choose their remarriage partners (*levirs*) they may think Luo culture is very progressive. Superficially it is true but put under scrutiny, one realizes that a right is given by one hand and it is taken away by another. From this study it was observed that after a widow undergoes other rituals preceding inheritance, elders convene a meeting to direction as to the range of in-laws within which she can choose from. Traditionally sons build their houses in a succession according to their age, grouped according to the order of the seniorities of their mothers in a polygamous home. When it comes to the inheritance of a widow preference is given to the brothers from the same mothers as the late husband in order of their houses. Although in some cases cousins and half brothers may be considered, the widow's choice is still limited, and the range predetermined for her. This is contrary to the choice that is envisaged by Article 20 which states that she has a right to marry the person of her choice. She should not be denied this right, after all a widower has that right.

One respondent said when he needed to be cleansed before remarrying he went to the pub and talked to a woman pretending to want a meaningful relationship with her. When the lady agreed to his proposal they had sex using a condom, and then he went off to marry the woman of his choice. It is this wide discretion given to men that women need, not as a favor done to them but as a matter of their inviolable and inherent right as human beings.

#### **5.5 National legislations (compliance and inadequacy)**

**Assumption: The national laws are either inadequate or not at all enacted to meet the needs of Luo women in redress to their situation.**

There was a general feeling from the discussions that the existing laws are inadequate, and the relevant laws capturing the misdemeanor have not been enacted to meet the needs of the Luo women. One of the respondents, Gladys said:

“The legislation may be there but only in books.”

This shows the inadequacy of the legislation and its implementation in practice.

In the light of the instruments discussed above the state owes its citizens a duty especially by virtue of ratification of the charter, to redress these inconsistencies. It would be imperative to note that Kenya ratified the African charter on human and people’s rights on the 23<sup>rd</sup> of January 1992 and the cultural charter on the 28<sup>th</sup> of October 1981. So far it has not ratified CEDAW and the protocol on the rights of women. Duty casts upon the states party to domesticate the instruments they are a party to. We will examine the relevant legislations, their efficacy and compliance or irregularities in relation to the cultural sexual practices already discussed.

### **5.5.1 The constitution**

The constitution is the supreme law of the land and any other law that is inconsistent with the constitution shall be, to the extent of the inconsistency be void. It takes precedence over all other forms of laws, written and unwritten, and if any law shall be inconsistent with it, the constitution prevails. Many acts of parliament are made pursuant to particular provisions in the constitution. Enjoyment of fundamental rights and freedoms is guaranteed to every person in Kenya, both men and women alike, though enjoyment of some of these rights and freedoms are subject “to respect for the rights and freedoms of others and for the public interest. Despite the above guarantees, one finds that Section 82 of the constitution which is concerned with discrimination affects women and men differently; women more negatively than men.

“Sec.82 (1) provides that no law shall make provision that is discriminatory “either of its own or in the effects subject to subsection (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the function of a public office or public authority.”

When the section is read on its own it depicts a nation which is focused on eliminating discrimination and is working hard to make sure no discriminatory legislations are enacted. It gives an impression of good intention towards its citizens especially when sec 82(3) defines discrimination elaborately as here below:

Section 82(3) In this section the expression “discrimination” for purposes of this section means giving preferential treatment to different persons attributable wholly or mainly to their race, tribe, place of origin or residence, or other local connection, political opinion, color or creed, or sex whereby persons of one such description are made subject or are accorded privilege or restrictions to which are not accorded privileges or advantages which are not accorded to persons of another such description.

While section 82 starts off with a very persuasive tone and intention, it quickly takes away the said right by inserting clause (b) which stipulates that the non-discrimination clause will not apply to personal laws and (c) which says that it shall not be applicable to people of the same tribe professing the same customary law. In essence it allows for discrimination on cultural matters, especially those which touch on marriage, burial, inheritance and the like. In the case of *Otieno vs. Ougo* and another it was held that personal laws mean the customary laws of a tribe under which a person belongs.

The current constitution grants customary law immunity from non-discrimination provisions. It is not progressive at all. The people who are likely to be affected by the said provision of the law are women because ordinarily, as seen from the findings of this research culture does not treat men and women equally, especially in issues of inheritance which include widowhood inheritance rights.

Kenya has a draft constitution, which is very progressive and embodies the human rights principles of equality and non-discrimination. In so doing the draft constitution fulfils the first state obligation of CEDAW, requiring the state to embody the principle of equality of both men and women in their national constitutions. The draft constitution acknowledges that some people have been subject to multiple forms of discrimination, including race and gender, and therefore provide that special attention should be paid to redressing the effects of the intersectional discrimination. The draft constitution is progressive in nature as opposed to the current constitution, which purports to give rights with one hand, but takes them away immediately with the other hand. The effect of this provision is seen in customary cases decided by courts in, for instance, Zimbabwe and Kenya.

The Zimbabwean constitution shares a similar provision under its section 23 (3). In the case of *Magaya vs. Magaya* where it was argued successfully that a woman did not have the right to inherit her father’s estate under the customary law of her group. Venia Magaya had wanted to

inherit the estate of her deceased father, which property she had helped to acquire. The supreme court of Zimbabwe held that the principle of non-discrimination did not operate in this case because customary law was a shield from the non-discrimination provision in the constitution by virtue of section 23(3). This ignores Zimbabwe's ratification of the African charter on Human and peoples' rights. The court whilst acknowledging the importance of advancing gender equality, adopted a static view of customary law that reinforced male privilege and noted:

“Great care must be taken when African customary law is under consideration. In the first instance, it must be recognized that customary law, has long directed the way the African people conduct their lives...in the circumstances, and it will not be readily abandoned, especially by those such as senior males who stand to lose their positions of privilege. (Banda 2005).

This was a highly sexist judgment, which was, in my opinion, repugnant to morality, and the court should have found so.

In Kenya there is a case that has since set precedence in customary laws; Otieno vs. Ougo and another (Civil Appeal No 31 of 87). Brief facts of the case were as follows:

The appellant was the widow of S. M. Otieno, a Nairobi advocate of Luo origin, who had died intestate. After his death, a dispute arose between the appellant and the deceased's clan regarding who had the right to bury his body.

The court of appeal then held (in part) that:

- Generally the personal law of Kenya in the first instance is customary law.
- That an African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal. The deceased having been born a Luo, remained a member of the Luo tribe and subject to the customary law of the Luo people which was patrilineal.
- It did not matter that the deceased was sophisticated, urbanized and had developed a different lifestyle. A different formal education and urban lifestyle cannot affect one's adherence to his personal law.
- There was nothing repugnant, immoral or inconsistent with written law in the customs of the Luo which provided that:

a) The deceased was a Luo and his wife became part and parcel of his household as well as a member of his clan upon her marriage;

- b) On the death of a Luo man, his clan takes charge of his burial taking into account the wishes of the deceased and his family;
- c) A Luo who has not established a home in accordance with customs will be buried at his father's home;
- d) A widow has no right under custom to bury her husband and she does not become the head of the family upon her husband's death;
- e) A man cannot change his tribal origins.

The customs did not violate section 82 of the Constitution with regard to discrimination as subsection (4) (b) of that section allowed for discriminatory rules regarding burial. There could have been other cases determined earlier on but this became a land mark case upon which cases touching on customs are decided.

One or two issues have become pertinent in this case and should be highlighted. This ruling is a blatant and total disregard to the woman as a wife. It is clearly seen that the customs have no room for a woman's voice, in the absence of her husband. The male clan members jump into the arena and decisions are then made by them. This is the same scenario with the Luo widows; once the husband is dead the male members step in to make decisions including who inherits who. The constitution being discriminatory as it is, is not adequate to protect the interests of women, hence they have nowhere to run to for redress. This situation is further entrenched by the fact that the judicature act reinforces Section 82 (3) (b) and (c) by articulating the jurisdiction of courts in customary matters. Section 3 (2) of the Judicature act considers the position of African customary law thus:

“The High court of appeal and all subordinate courts shall be guided by African customary laws in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”(Judicature act cap 8)

Customary law is seen to take precedence over common law and the courts must have it in mind as the guiding light and as the principal law. However the courts should not be limited by African customary law only, but should have the discretion to apply common or statutory law,

and even expand its horizons and use international instruments. Anyone who intends to invoke the repugnancy clause should demonstrate that the customs are detrimental to the welfare of the Luo, hence repugnant to justice. Even though, as seen in Otieno's case, the council for the respondents argued that any ritual that was being performed was in line with the status of the deceased and was to encourage people to work hard, in the context of the wife the rituals were violating her interests. For example in cases of inheritance by a *jakowiny*, the cultural norms require that a woman be cleansed so that the spirit of death is cleansed away from her and the home, and in the event that it is not done somebody stands to suffer irreparable loss. The predicament here is that if a party who feels that she is likely to suffer irreparable loss goes to court and prays that another person be compelled to do a certain act e.g. cleansing, claiming that culture deems that she will be set free by acts of another (either omission or commission), and the one being compelled refuses on the ground that performing the act violates their right to dignity, health, privacy and such like; then what will the court use as a yardstick to measure repugnancy and morality? Whose standards will be used to determine the morality of each case?

My argument is that at the end of the day we need proper codification of customs, and an express situation which will be considered to be repugnant and immoral to justice. I argue so because enjoyment of fundamental rights and freedoms is guaranteed to everyone in Kenya, both men and women alike, though enjoyment of some of these rights and freedoms are subject to respect for the rights and freedoms of others, and for public interest. This calls for legal reforms.

### **5.5.2 Sexual offences Act**

The Sexual Offences Act defines the offence of rape as:

A person commits the offence of rape if he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs OR the other person does not consent to the penetration OR consent is obtained by force or by means of threats or intimidation of any kind (my emphasis).

Kenya has not enacted or incorporated the clause dealing with marital rape in the sexual offences act or any legislation. One of the assumptions in this dissertation was that cultural sex is not consensual, hence it is marital rape. Parallels can be drawn of the definition of rape, given above,

against the conditions and pressures which lead to cultural sex, and this will be discussed against that background.

As it is glaringly seen from the findings and voices of both men and women, the young and the old, none of the discussants gave in to cultural sex out of free will. Both parties were compelled by the fear of ruining their children; a position that has emerged from what tribal elders had instilled into the minds of the both men and women. Women have been psyched into believing that rituals are for the benefit of women and children. Because a child is the heart of a woman, a woman will definitely yield to the intimidation and give in to cultural sex.

Cultural sex is so predetermined that it has to be done on the day and time set. Whether a woman is sick or is unable to do it for one reason or another, she still is forced to be involved in cultural sex for fear of the consequences of “*chira*” (taboo). It seems that the driving force in cultural sex is something else other than consent. The burden placed upon the prosecution is to prove that indeed consent did not exist. Though it is difficult to prove consent in a normal rape trial, and given that here we are not in a trial but dealing with the lived experiences of the women, with a view to recommend both legal and social change, even if we deem what goes on as consent, it would then be construed as ‘un-informed consent’ without the free and full will of the woman. We cannot sit back and watch this go on especially in a problematic situation of widow inheritance, where even if she does not want to be inherited or cleansed, there are semi autonomous social fields compelling her to be cleansed, not for herself but for those who believe that if she is not cleansed she will bring a bad omen and block their ways. It is these same people who with or without the consent of the widow look for “*Jakowiny*” to cleanse her and even intoxicate him to perform sexual act with the widow. I see this as “submission” to culture without consent.

Jeffrey Lamb a barrister contends that consent must be a conscious and intelligent decision. Customary laws are a body of norms, customs and beliefs relevant to most Luos, and because it is the law which regulates marriage, divorce, inheritance and land tenure, one subscribes to it as a matter of belief, perhaps not choice. Jeffrey’s contention is therefore true about the Luo

women; that the consent or submission by women to cultural sex is not conscious and intelligent, and is thus not consent.

Jeffrey points out that it is important to appreciate the distinction between one who submits to sexual intercourse and one who consents to it. The former may be submitting to the act as a result of fear through threats either to herself or to a close family member. Similarly the person who rapes her may not be the one who makes the threats but simply takes advantage of the victims fear, already instilled in her by the culture. Submission to sexual intercourse is not the same as consenting to it and this distinction was recognized as far back as the Victorian times when, in the case of *Camplin*, the court of appeal acknowledged that the offence of rape constituted sexual intercourse with a woman (then) who did not consent, and not merely having sex against her will. (Lamb, 2003)

The law is that the court must establish first that sex did occur and that there was no consent. Whichever way it is looked at, even though there is no offence by the definition of marital rape in Kenya, sex (cultural) taking place between married couples without consent but submission necessitates the enactment of legislation to capture the demeanor and the mischief that is created by culture. The law is inadequate in the sense that even the act of the third parties who take advantage of widows as abetting an offence are not provided for anywhere. In essence a widow has no recourse against a third party. This is what should be described as repugnancy to morality and justice as contained in the constitution.

Banda argues that the construction of women as sexual property is most clearly pronounced in the marital relationship and by the payment of the bride wealth which gives a man exclusive sexual access on demand; or at least the way men see it. She urges that we move away from the definition of rape solely based on penetrative sex and look at it differently. She defines non-consensual sex as:

“A woman is subjected to non-consensual sex in marriage by her husband if she is involved in sexual activity either without her consent or where her consent is obtained under coercive conditions.” (Banda 2005)



In my opinion, therefore, the privacy of the marital relationship leads to many women not being able to perceive forced sex within marriage as constituting rape, or unpacking the circumstances leading to cultural sex as rape. But at least a number of women I interviewed thought it was “like rape”.

Even though Section 29 of the Sexual offences Act stipulates that:

” Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence is liable upon conviction to imprisonment for a term not less than 10 years,”

This provision cannot be applied in the instant case of sex between married couples because the act is very clear that the definition of rape shall not apply to married couples.

The situation is rendered even more difficult by the legal system which has no recognition of the crime of marital rape in Kenya. This is a major stumbling block, for one cannot be heard to complain about the violation of a non-existent offence. This mischief can be cured by amending the constitution which besides having explicit clauses dealing with cultural laws will also establish community courts which will be dealing with customary issues.

### **5.5.3 Family Protection Bill (Domestic Violence Bill)**

This piece of legislation defines violence as including physical, sexual, verbal, emotional and/or psychological abuse. Intimidation and harassment derived from culture and customary practices, which include, among others, forced marriage and forced wife inheritance would fall in as categorical violations of this bill. The object is to ensure that where domestic violence occurs there is effective legal protection for its victims by ensuring that access to the courts is speedy and inexpensive. With the enactment of this bill most of the mischief will be taken care of, but again the statute cannot be inconsistent with the constitution; so the constitution may have to be repealed to allow for the full use of the Bill when it is passed. The Penal code provides for offences under assault and battery which the victims may invoke. However the code is still

inadequate because it only covers obvious beating, and excludes the rest of the offences covered by the Domestic Violence Bill.

## **5.6 State obligation**

Traditionally human rights norms are supposed to be provided for in the national constitution and laws for domestic application by the judicial and executive organs of the state as a matter of national sovereignty. But since states cannot be trusted sufficiently to protect the rights of all its persons and groups within its territorial jurisdiction, the idea of national protection emerged as means of ensuring certain minimum human rights standards globally. The traditional notions of state sovereignty over its citizens and territory must somehow be reconciled with the need to respect and protect universal human rights as rights due to every human being by virtue of his or her humanity, without distinction on such grounds as race, sex, belief, language or national origin. This concept found its first and most authoritative expression in the Charter of the United Nations 1945, and the Universal Declaration of human Rights 1948. It is clear by now that at least the basic idea of this paradigm has been established beyond dispute through development within the global United Nations (UN) system, the European, Inter-American and African Regional System, and the work of national and international non-governmental organizations (An-Na'im 2002). I will analyze the duty and obligation towards its citizens as per the requirements of the international standards.

It is the duty of the state to make legislation and policies that will protect the rights of its citizens. It is the state's duty to make sure that legislation is in place, which will enable the citizens live in a positive cultural environment. We cannot say with certainty that Kenya has done much to protect the Luo women and the rest who are in a similar situation. The state should incorporate the language and intentions of different Articles that deal with women's right and implement them by first ratifying the instruments. As can be seen from general recommendation 19 of CEDAW it raises a major concern that culture is a barrier to progress. Culture is often equated to customs, traditions and ancient practices. (Engle Merry 2003).

While it would be naive to blame the government of Kenya for all the disadvantages that women suffer, it must none the less be held accountable for its obligations to its citizens under both domestic and international law. The international standards, as already discussed above, have not been reflected in the legal status of women or in the government's domestic policies. Kenya has never had a cultural and heritage policy since independence and as at now, there was an indication that the minister would launch one on the 25<sup>th</sup> of February 2010 but so far nothing has been produced. In reality the Kenyan government has not only failed to respect its international commitment but has also violated the very standards it participated in setting.

An important feature of the state duties under the charter is that they are widely defined as including legislative and other measures. It is imperative to note that despite the situation of the women in terms of the customary practices which amounts to violence against women, the Kenyan government has no legislation to take care of domestic violence especially in the institution of marriage. The Family protection bill (Domestic violence bill) has been pending in parliament for over five years for approval. The sexual offences Act does not recognize marital rape as an offence.

Article 26 of the charter further requires states to ensure that their judicial arm of government functions independently and to establish and improve appropriate national institutions entrusted with promotion and protection of the rights and freedoms guaranteed by the charter. The charter thus conceivably measures which states may be required to adopt may broadly include legislative measures, judicial mechanisms to adjudicate complaints and disputes, administrative mechanisms which provide regulation or oversight roles, the promotion of company based, industry-based and multistate holder initiatives, and the establishment of national human rights institution.

State duties include duties to respect, to protect, promote and fulfill the rights in the charter. The duty to protect involves a consideration of the states' obligation to ensure that third parties, including corporations do not violate or assist in the violation of the rights in the charter. In fact Article 1 of the charter as the first point of reference held this to include the meaning that if a

state neglects to ensure the rights in the African charter, this can constitute a violation, even if the state or its agents are not the immediate cause of violation(Saifac, 2010).

The state is charged with a duty to investigate the harmful cultural practices brought to its attention or just cause investigations to be done in different cultures so that it can be established whether the citizens live in a positive cultural context. In the case of Valesquiz Rodriques vs. Honduras the inter America court on human rights held that;

“The state has a legal duty to take reasonable steps to prevent human rights violations and use the means at its disposal to carry out a serious investigation of committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victim adequate compensation. This obligation implies the structures through which public power is exercised, so that they are capable of juridical ensuring the free and full enjoyment of human rights” (Banda 2005)

Therefore duty casts upon the Kenyan government to investigate mal-cultural practices and provide the necessary legislation and policies and if need be prosecute the third parties who force women to perform cultural sex and other acts that violate their personal rights.

## CHAPTER SIX: CONCLUSION AND RECOMENDATIONS.

### 6.1 Introduction

The discussion has shown that there are a number of sex-related cultural practices among the Luo which do not require the consent of either the male or female party, yet must be performed for fear of suffering the taboo or punishments (i.e., ‘*chira*’ or ‘*kwer*’) which flow from the disobedience of not observing these practices.

Another issue that kept coming up was the concern about people living in the rural setup and the fact that there is a strong connection between culture, ancestral spirits and the rural setup. There was an outcry from women who implored that men should be encouraged to discontinue subjecting them to humiliating widowhood cleansing procedures. This shows that women regard men as a stumbling block to their achieving equality and exercising their freedom of choice. It also emerged that there are two categories of women. Firstly, there are those who are sufficiently empowered to act independently of men and determine their own value system and course of action. Secondly, there are those women who are not similarly empowered and remain dominated by men. The notable difference between the two groups of women is that the former are more educated and enjoy economic independence because they have a source of income of their own.

A number of women felt that the government owed them a duty to safeguard their bodily integrity and physical well-being against the exercise of these harmful sex-related cultural practices against them. Some said that the state had failed to discharge this duty. Others believed that the law alone was insufficient to protect women. One of the women remarked that “the law will not come into your bedroom”, in other words, that it is up to individuals to reform or abolish cultural practices and that starts with the women.

Based upon these above-mentioned observations, this chapter will put forward recommendations, some of which were suggested by the discussants themselves arising out of the experience of their ‘lived realities’.

## **6.2 Legal reforms and self motivation**

One of the methodological approaches used in this research was the Women's Law Approach which takes the woman as the starting point. This methodology focuses on the lived reality of women, not what it ought to be in the legislation. In order to create legally enforceable right which protects them from harmful practices laws must either be amended or enacted where none exists. At the same time women must be made aware of their social and legal rights. The danger is that if they are not the law will be of no use to them. Stang Dahl correctly says that:

“The affect explanation lies both in the structure of law and in women's increasing opportunities.....Law can only be evaluated if one, in addition to understanding the text of the law and the intention, has insight into the law's consequences for individuals. This is still not sufficient she goes on to say that “as long as we live in a society where Men and Women have different paths in life, different living conditions, with different needs and opportunities, legal rules will necessarily men and women differently. And silence strengthens inequality and injustice, regardless of the legislators' intentions.”(Dahl 1997)

Women must first of all oppose the status of inferiority imposed upon them by society. They must rise up and, using every means possible, including the law, to acknowledge their own worth and value to themselves and to society as a whole.

### **6.2.1 The Constitution**

On the issue of amending existing legislation and/or passing new legislation, Dahl says that:

“Even though Law is an arena where change is often slow in coming as an institution to a large degree contributes to the maintenance of the traditional male hegemony in society. At the same time law is fertile soil for vast changes, including the relationship between the two sexes. If the position of the Women is to be improved, this must also be done through the law, and this is acknowledged by today's lawmakers. Insight into the structure and effect of legal rules is therefore necessary for such comprehensive changes”. (Dahl 1987)

There should be an overhaul of the Kenyan Constitution. Like the Namibian Constitution, it should start by using gender neutral language throughout, and should explicitly forbid discrimination on the basis of sex. It should provide for equality in all aspects of marriage and all

personal laws which, following the case of *Otieno Ougo and Another*, is basically what culture is all about. The Kenyan Constitution purports to condemn discrimination against women in one breath but then, in the next, upholds it by means of claw back provisions. Instead of using ‘the repugnancy clause’, the Constitution should be amended to state clearly that customary law subsists to the extent that it does not conflict with the provisions of the Constitution. In other words, it should provide that customary law may not legally permit any form of sexual discrimination. This would accord men and women equal status. Kenya is recommended to take a leaf out of the Namibian Constitution, Section 66(1) of which reads as follows:

“Both the customary law and common Law of Namibia in force on the day of independence shall remain valid to the extent to which such customary law and common law does not conflict with this constitution or any other statutory law.”

It follows that Section 66(1) of the Namibian Constitution puts customary law on the same footing as any other law of the country as far as its constitutionality is concerned. This means that customary law must comply with the Constitutional provisions. (Rupell 2008)

### **6.2.2 The Creation of traditional authorities**

In the event that the above changes are made with regard to the Constitution, the Constitution must then provide for the creation of traditional authorities within traditional communities and defined powers and duties of specially appointed traditional leaders. If an appropriate Act is created it should contain a provision which clearly defines the scope of the mandate of traditional leaders (who may be chiefs or the Council of Luo elders) in order to prevent possible abuses of the exercise of their powers. Part of the current problem is that existing council of Luo Elders is not created by the Constitution or any other Act of Parliament and therefore their mandate is not clearly defined in regard to cultural issues. It is also noteworthy that the present council of Luo elders are determined by age, and if they are to continue acting, even as a traditional court, it is quite clear that most of them do not understand what Human Rights of a woman are and cannot be expected to protect them. Traditional leaders should be made to observe certain regulations when adjudicating disputes. Perhaps they should fall under the authority of the Ministry of Local Governments or Ministry of Justice and Constitutional Affairs-whichever is

workable- so that they are accountable for failing to observe constitutional provisions and statutory regulations. Namibia has successfully embarked on this kind of system for administering customary law.

### **6.2.3 The Creation of Community Courts**

The legal dynamics in a traditional rural community differ substantially from those in an urban setting. Therefore, rural community courts should be created to cater for this difference. This will ease the burden of potential litigants in traditional communities. Aggrieved persons should be able to institute legal proceedings in their rural communities under the laws that they know, trust and live by and they should be able to sue for remedies that they perceive as just. The law that is applicable in litigation should be the customary law of the community concerned. In the event that there are two parties claiming under different sets of customary laws, the court shall be compelled to apply the one it considers just and fair.

This kind of system has been introduced in Namibia and it is also working. It will take care of all cultural issues and be accessible to both the literate as well as the illiterate. Such a system should be an exercise of bringing the law to the people. Kenya is recommended to try this, as “paths are made by walking” (Ruppel 2008).

### **6.2.4 The Codification of Customs**

In the same way as Tanzania has managed to codify the customs subsisting within the different cultures which apply to its over one hundred and thirty ethnic groups, so the Luo should codify their cultural values and customs and be entitled to challenge them. A people must have an identity and I do not advocate the scrapping of culture. As a Luo I am proud to be identified with what identifies me and makes me none other than me- 'Luo'. In the course of my research what was so glaring is the fact that although one group of Luos will not agree with another on the form or procedure that cultural sex should take; but what they will agree on is that sex has to take



place. Sex is done either before or after ploughing or it is done with the first wife only not the rest of wives in a polygamous home. If you truly look at the purpose of sex or its original intention, you realize that cultural sex is not what sex is supposed to be used for. For instance in widowhood sexual cleansing, there is a common belief that this practice has been modified. In reality, however, it has not been modified, except in the case of elderly women of about seventy years old. Sex is still performed without condoms and at the risk of HIV/AIDS infection. It is my contention that men and women be brought together to discuss and agree upon what cultural policies and cultural sexual practices should be retained and why, and then they should be codified.

In the course of codification discriminatory cultural practices shall be taken into account, for instance if men have a silent “*Nyakowiny*” why can’t women be allowed to move out silently and have a *jakowiny* who may not be aware that he is being ‘*jakowinyed*’. In the cause of the sexual escaped they should be allowed to make informed choices whether they want to use condoms or not, or if they want to know their HIV status before one becomes a *Nyakowiny* or *Jakowiny*.

#### **6.2.5 The Sexual Offences Act**

The Sexual Offences Act should be amended to include marital rape, and Section 29 should be amended to punish sex-related cultural practices which are harmful to women.

#### **6.2.6 The Family Protection Bill**

This Bill should be passed into law as an Act of Parliament and it should clearly codify acceptable cultural practices.

### **6.2.7 Social Reforms**

The social and cultural pattern of the Luo should be changed through sensitization and education of young people in schools and colleges to help deconstruct what has been constructed about culture to them.

Other recommendations include education and sensitization of both girls and boys. Education may take different dimensions depending on the gender. Girls should be taught their cultural rights.

Women should have access to programs which will empower them socially and economically so that they do not fear economic dependence on the men in her life, a factor which forces her to submit to being culturally cleansed rather than being chased away from her matrimonial home. She should be so empowered to the extent that she can afford to rent a house, feed, and cloth and educate her children.

### **6.3 General Recommendations from the participants**

Participants in the research recommended that:

1. Women in the rural areas should strive to empower themselves economically by keeping some chicken cows, sheep and goats. They say this will bring respect to the woman and she can have a voice. Just as their counterparts in towns are independent they too will be independent.
2. Women should join community development activities which boost women with funds for small scale businesses, i.e., Kenya Women's Fund. Women groups which deal with what they term as 'Merry-Go-Round' (women contribute money and give to themselves from the first person to the last on a daily, weekly or monthly basis for a defined purpose). It is in this kind of

organization that they get forum to address practical issues which affect them and see how to solve them.

3. Government should provide structures and impartial, gender-sensitive actors to deal with cultural issues effectively. Currently, in the absence of appropriate training, although chiefs try to help women with cultural issues, they often cannot do so because they find themselves the sole beneficiaries of them and, hence, do not see anything wrong with them. All chiefs should be properly sensitized to gender issues so that they can carry out their work properly.

4. Women should be educated and be sensitized about the law, their rights under the law and how to enforce it for their benefit and that of the wider community.

5. Women and young girls should be educated on issues concerning their sexuality especially in the area of their reproductive and sexual health.

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