

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

SJD Dissertations

Academics

5-1-2018

Legal Pluralism and the Implementation of International Human Rights Law in Africa: The Case of the Convention of the Rights of Persons with Disability (CRPD) in Ghana

Christine Buamah
cbuamah@fordham.edu

Follow this and additional works at: <https://ir.lawnet.fordham.edu/sjd>

Recommended Citation

Buamah, Christine, "Legal Pluralism and the Implementation of International Human Rights Law in Africa: The Case of the Convention of the Rights of Persons with Disability (CRPD) in Ghana" (2018). *SJD Dissertations*. 11.
<https://ir.lawnet.fordham.edu/sjd/11>

This Dissertation is brought to you for free and open access by the Academics at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in SJD Dissertations by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**LEGAL PLURALISM AND THE IMPLEMENTATION OF
INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA:
THE CASE OF THE CONVENTION ON THE RIGHTS OF PERSONS
WITH DISABILITY (CRPD) IN GHANA**

A DISSERTATION SUBMITTED BY

BY

CHRISTINE NANA TIWAA BUAMAH

TO

The International and Non-J.D. Programs in Partial Fulfillment
of the Requirements for the Degree of

Doctor of Juridical Science (SJD)

In the School of Law of

Fordham University

May 2018

**FORDHAM UNIVERSITY
FORDHAM SCHOOL OF LAW
INTERNATIONAL AND NON-J.D. PROGRAM**

Christine Nana Tiwaa Buamah

We, the dissertation Committee for the above candidate for the Doctor of Juridical Science (SJD) Degree, hereby recommend acceptance of this dissertation

.....
Ethan J. Leib
John D. Calamari Distinguished Professor of Law
Fordham School of Law

.....
Chi A. Mgbako
Clinical Professor of Law
Director, Leitner International Human Rights Clinic
Fordham School of Law

.....
Raymond A. Atuguba
Professor of Law
University of Ghana School of Law

This dissertation is accepted by the Graduate Committee

**LEGAL PLURALISM AND THE IMPLEMENTATION OF
INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA:
THE CASE OF THE CONVENTION ON THE RIGHTS OF PERSONS
WITH DISABILITY (CRPD) IN GHANA**

ABSTRACT

Most African states are legally pluralistic. As a result, the universalism and cultural relativism approaches to the implementation of international human rights norms in African domestic settings are largely unsuccessful because they do not factor in legal pluralism. A better approach appears to be the cultural pluralism approach. This approach has fared well in Ghana's implementation of the international convention on the rights of the child. A thorough examination of this case study reveals that the cultural pluralism approach requires an additional step to make it more effective in domesticating international human rights norms. This dissertation identifies this third step: the creation of an interface between state and non-state law for international law and customary law to meet; examines its robustness, and tests it against the implementation of disability rights in Ghana as a measure to improve those set of rights in Ghana.

FIELDS OF STUDY AND FIELD SUPERVISORS

Law and Organizing

Ethan J. Leib

John D. Calamari Distinguished Professor of Law
Fordham School of Law
Fordham University

International human rights

Chi A. Mgbako

Clinical Professor of Law
Director, Leitner International Human Rights Clinic
Fordham School of Law
Fordham University

International law and conflict of laws

Raymond A. Atuguba

Professor of Law
University of Ghana School of Law

DEDICATION

To the DAM (Dominic, Anthony and Marie.) Thank you for letting mom be a student.

ACKNOWLEDGEMENTS

This research project was conceived, nurtured and carried through my work with the Constitution Review Commission of Ghana as Counsel and Associate Researcher. I therefore wish to thank Professor Emeritus Albert Kodzo Fiadjoe, Chairman of the Constitution Review Commission and the members of the Commission for the opportunity to serve my nation in that honorable position. I also thank members of the research team of the Commission for the countless hours we spent brainstorming on the Constitution of Ghana. Those debates helped develop my research ideas.

Next I will like to express my gratitude to the Ghana Education Trust Fund for sponsoring my graduate studies and to the Ministry of Gender, children and Social Protection (Ghana), for research support.

I wish to thank my main supervisor Professor Ethan Leib. You read my countless pieces and helped shape my research idea through your invaluable comments. You made various arrangements, which facilitated the research process for me, and I am very grateful to you. I also wish to thank the other members of my dissertation committee; Professor Chi Mgbako, for her very constructive feedback, and Professor Raymond Atuguba for his unwavering support throughout my graduate studies. I am equally indebted to the Faculty at Fordham School of Law especially Professor

Thomas Lee, Professor Clare Huntington, Professor Paolo Galizzi and Professor Jennifer Gordon for being always ready to offer helpful comments and guidance.

My deep and sincere gratitude goes to Professor Toni Fine, Director of the International and Non-J.D. Programs, for her kindness and very prompt responses to my requests. I am profoundly grateful to my LL.M Long Paper supervisor—Professor Gerald Neuman of Harvard Law School. Your guidance during my sojourn at Harvard Law School encouraged me to pursue the SJD degree. To my colleague SJD candidates, I am very grateful for your comments on my work and for your warm friendship.

To my husband Yaw, and my children Kwame (Dominic), Kwabena (Anthony) and Akua (Marie), thank you so much for bearing with me. You gave meaning to the process. I am exceptionally grateful to my visionary parents Dr. and Mrs. Buamah for making unusual investments in my education from a very early age. My immense gratitude to my brothers and sisters: Leonard, Thomas, Joan, Ivana, Chief and Adwoa Serwaa. I have called them up to provide me with different types of assistance during the period of my studies: from paying fees to baby sitting my children. I could not have made it without their support.

LIST OF ABBREVIATIONS

AFCHR	African Charter on Human and Peoples' Rights
CAT	Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against women
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the rights of Persons with Disability
CWD	Child(ren) with Disability
GFD	Ghana Federation for the Disabled
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on Migrant Workers

and Members of their Families

PWD	Person(s) with Disability
MP	Member of Parliament
NGO	Non-Governmental Organization
OHCHR	United Nations Office of the High Commissioner
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States of America

ABSTRACT

FIELDS OF STUDY AND FIELD SUPERVISORS

DEDICATION

ACKNOWLEDGEMENTS

LIST OF ABBREVIATIONS

TABLE OF CONTENTS

INTRODUCTION

1 CHAPTER ONE: 29

**APPROACHES TO IMPLEMENTATION OF
INTERNATIONAL HUMAN RIGHTS TREATIES 29**

1.1 INTRODUCTION 29

1.2 INTERNATIONAL HUMAN RIGHTS TREATIES AND
STATES OBLIGATIONS 29

1.3 INTRODUCTION TO UNIVERSALISM, CULTURAL
RELATIVISM AND CULTURAL PLURALISM 32

1.3.1 What Is Universalism 35

1.3.2 What is Cultural Relativism 36

1.3.3 What is Cultural Pluralism 38

1.4 DIFFERENCES BETWEEN UNIVERSALISM,
CULTURAL RELATIVISM AND CULTURAL
PLURALISM 40

1.5 CONCLUSION 42

2 CHAPTER TWO:

LEGAL PLURALISM AND ITS OPERATION IN AFRICA	44
2.1 INTRODUCTION	44
2.2 WHAT IS LEGAL PLURLAISM	45
2.2.1 History of Legal Pluralism	45
2.2.2 Definition of Legal Pluralism	47
2.3 LEGAL PLURALISM IN AFRICA	53
2.3.1 How Africa's colonial history engenders Legal Pluralism	53
2.3.2 The Distinctiveness of Legal Pluralism in Africa	57
2.4 FACTORS PROMOTING LEGAL PLURALISM IN AFRICA	64
2.4.1 Colonization created two streams of law within the state	64
2.4.2 The desire to maintain the African identity	65
2.4.3 Presence of alternative systems	66
2.4.4 Lack of Formal Education	67
2.4.5 Economic factors	67
2.5 FACTORS OBSTRUCTING LEGAL PLURALISM IN AFRICA	69
2.5.1 Decentralization	69
2.5.2 Education	70
2.5.3 Consolidation of State power	71

2.5.4 Cost of maintaining plural legal systems within the state	72
2.5.5 Conflicting value systems within the same social field	72
2.6 POSITIVES OF LEGAL PLURALISM IN THE LEGAL SYSTEMS OF AFRICAN POLITIES	73
2.6.1 Legal pluralism helps protect cultural identity	73
2.6.2 Legal Pluralism teaches history to future generations	74
2.6.3 Legal pluralism makes indigenous systems of governance relevant in modern African states	75
2.6.4 Legal pluralism offers alternatives to individuals	77
2.6.5 Legal pluralism has the potential to make implementation of international human rights more effective	78
2.7 NEGATIVES OF LEGAL PLURALISM IN THE LEGAL SYSTEMS OF AFRICAN POLITIES	79
2.7.1 Uncertainty whether to obey state laws or non-state laws	79
2.7.2 It makes the implementation of state law more difficult	80
2.7.3 Applicability of a subgroup's law to a particular transaction or conflict	82
2.7.4 Changing applicable law	82
2.7.5 Frustration of leaders and obstruction of national progress	83

2.8 DOMESTIC LEGAL PLURALISM IN AFRICA	
(The case of Ghana)	84
2.8.1 Chiefs implementing Customary Law	89
2.8.2 Muslim Imams implementing Islamic Law	91
2.8.3 Catholic priests implementing Canon Law	93
2.8.4 Mallams and soothsayers implementing Spiritual Law	93
2.8.5 Traditional / fetish priests implementing Spiritual Law	95
2.9 LESSONS FROM DOMESTIC LEGAL PLURALISM FOR THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS IN AFRICAN STATES WITH LEGAL PLURALISTIC CONTEXTS	96
2.9.1 Conflict of laws situation	96
2.9.2 Acknowledge differences between homogenous and heterogeneous societies	97
2.9.3 Acknowledge different types of gatekeepers in legal pluralistic societies	97
2.9.4 Tap into authentic indigenous knowledge	98
2.9.5 Create alternatives	99
2.10 CONCLUSION	100
3 CHAPTER THREE:	101
WHY AFRICAN STATES POORLY IMPLEMENT INTERNATIONAL HUMAN RIGHTS TREATIES	101
3.1 INTRODUCTION	101

3.2 HOW INTERNATIONAL LAW IS INCORPORATED INTO DOMESTIC COURTS IN AFRICA	
(The case of Ghana)	102
3.3 REASONS FOR AFRICAN STATES' POOR IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES	112
3.3.1 Domestic laws and practices violating international law obligations	112
3.3.2 Incorporating international law into domestic laws	114
3.3.3 Unrealistic provisions in international human rights treaties	116
3.3.4 Westernized International Law	117
3.3.5 Leadership	118
3.3.6 Poverty	119
3.3.7 Legal Pluralism	120
<i>3.3.7.1 Legal pluralism gives African state additional hurdles in the reception of international law</i>	120
<i>3.3.7.2 Legal Pluralism makes state implementation of international human rights treaties more costly</i>	122
3.4 WHO IS RESPONSIBLE FOR WHAT CAUSAL CONTRIBUTION TO AFRICAN STATES' POOR IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES	123
3.4.1 UN Treaty bodies	123
3.4.2 Non Governmental Organizations	124
3.4.3 State Leaders	125

3.4.4 Non-state level leaders	126
3.4.5 Ordinary citizens	127
3.5 WHO IS RESPONSIBLE FOR MAKING WHICH CONTRIBUTIONS TO ERADICATING THE PROBLEM OF AFRICAN STATES POOR IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES	127
3.5.1 UN Treaty bodies	128
3.5.2 Non Governmental Organizations	128
3.5.3 State Leaders	129
3.5.4 Non-state Leaders	129
3.5.5 Ordinary citizens	130
3.6 CONCLUSION	130
4 CHAPTER FOUR:	132
CASE STUDIES	132
(WOMEN'S RIGHTS IN ZIMBABWE AND CHILDREN'S RIGHTS IN GHANA)	132
4.1 INTRODUCTION	132
4.2 CASE STUDY OF WOMEN'S RIGHTS IN ZIMBABWE	132
4.2.1 What this case study is meant to establish	133
4.2.2 Background about the state	133
4.2.3 Background about the CEDAW	135
4.2.4 How the state actually implements the treaty and which approach it uses	136
4.2.5 Conclusion to CEDAW case study	144

4.3 CASE STUDY OF CHILDREN’S RIGHTS IN GHANA	145
4.3.1 What this case study is meant to establish	145
4.3.2 Background about the state	146
4.3.3 Background about the CRC	149
4.3.4 How the state actually implements the treaty and which approach it uses	151
4.3.5 What accounted for the Successful Implementation of the CRC In Ghana	161
4.3.6 Conclusion to CRC case study	162
4.4 STATEMENT OF THEORY	162
4.4.1 Explanation of Theory	163
4.4.2 Why this is a theory	167
4.4.3 Why this is a new theory	168
4.4.4 Robustness of the theory	170
4.4.5 Advantages and disadvantages of the theory	171
4.5 CONCLUSION	174
5 CHAPTER FIVE:	176
APPLICATION OF THEORY TO THE IMPLEMENTATION OF THE CRPD IN GHANA	176
5.1 INTRODUCTION:	176
5.2 CASE STUDY OF DISABILITY RIGHTS IN GHANA	177
5.2.1 What this case study is meant to establish	177
5.2.2 Background about the state	178

5.2.3 Background about the CRPD	178
5.2.4 How the state actually implements the treaty and which approach it uses	181
5.3 APPROACHES USED IN THE CRPD IMPLEMENTATION IN GHANA	195
5.4 THEORY FOR HUMAN RIGHTS IMPLEMENTATION IN AFRICAN STATES WITH LEGAL PLURALISM	196
5.5 APPLICATION OF THE THEORY TO THE IMPLEMENTATION OF THE CRPD IN GHANA	196
5.6 WILL THE THEORY HELP TO IMPROVE THE IMPLEMENTATION OF THE CRPD IN GHANA	198
5.7 DOES THIS CULTURAL PLURALISM THEORY HAVE ENOUGH TRACTION IN OTHER AREAS OF INTERNATIONAL HUMAN RIGHTS PROTECTION SUCH AS WOMEN’S RIGHTS?	199
5.8 CONCLUSION	204
6 CHAPTER SIX: CONCLUSION	206
6.1 INTRODUCTION	206
6.2 SUMMARY OF DISSERTATION	206
6.2.1 Summary of Thesis	206
6.2.2 Summary of Research Method	207
6.2.3 Outcome of Research	208
6.3 CONTRIBUTION TO LEGAL KNOWLEDGE	208
6.4 CONCLUSION	209
6.5 BIBLIOGRAPHY	210

INTRODUCTION

The main theme of this dissertation is implementation of international human rights treaties in African states with legal pluralistic contexts. Generally, states domesticate international law in a number of ways.¹ Absent automaticity, the absorption of international law by some states terminates at the state level and does not percolate to the non-state level.² This is particularly the case in African states with legal pluralistic contexts as they attempt implementing international human rights norms. My claim in this dissertation is that the legal pluralistic context of most African states presents unconventional challenges to the domestication of international human rights norms which are often ignored by human rights treaty bodies, state legislators and Non-Governmental Organizations (NGOs) working in local communities. My theory is that the various existing approaches to implementing international human rights law in Africa will not succeed in domesticating international human rights norms unless they factor in the unique situation of legal pluralism in African states.

¹ LOUIS HENKIN et al., HUMAN RIGHTS 397 (2nd ed. Foundation Press, 2009.): Generally, Monist states receive international law directly into their legal system after ratifying the treaty whilst Dualist states undertake further domestic processes in order for the ratified treaty to be incorporated into their municipal laws.

² Oxford Reference, *Reception of international law*: "This term refers to the effect of rules of international law within municipal legal system." [http://www.oxfordreference.com/view/10.1093/acref/9780195389777.001.0001/acref-\(\(a9780195389777-e-1896](http://www.oxfordreference.com/view/10.1093/acref/9780195389777.001.0001/acref-((a9780195389777-e-1896) (last visited on 23 March 2018) When a state ratifies a treaty at the international level and undertakes the required processes for incorporating the international law into the municipal laws, the international law becomes received into the municipal legal system.

Africa is a continent with about 3000 distinct ethnic groups, 2000 languages and as many customary laws and norms creating a degree of intrastate heterogeneity different from the intrastate homogeneity in Western states.³ After Independence most African states opted to continue the plural legal systems operated in those states during the colonial era, resulting in legal pluralism in the form of state law versus non-state law on the one hand and state law versus different types of non-state laws on the other hand⁴ – and the two are disconnected.⁵ This dissertation concerns itself with the second type. The latent automaticity in the process on reception of international law in African states with legal pluralism, is a function of this disconnect between the two legal systems operating simultaneously within the same state.

The problem with human rights implementation in Africa is that in most African states, local people implementing non-state legal systems for various reasons – including the need to preserve their cultural identities – do not concern themselves with the international law because it has not been absorbed into their (non-state) legal systems and therefore is not part of the laws by which they order their behavior. These local people usually continue enforcing customary laws, some of which are valid under their (non-state) ‘legal systems’ but invalid under the state’s laws and

³ Baylor University, Modern Languages & Culture, Division of Asian and African Languages, <http://www.baylor.edu/mlc/index.php?id=11594> (last visited on 23 March 2018): “The people and cultures of Africa are as diverse as its geography. Anthropologists have identified almost 3,000 different ethnic groups, which speak approximately 1,000 different languages.”

⁴ Jacques Vanderlinden, *Return to Legal Pluralism: Twenty years later* The Journal of Legal Pluralism, Vol. 21, Iss 28, (1989); ANNE HELLMUM, WOMEN’S HUMAN RIGHTS AND LEGAL PLURALISM IN AFRICA: MIXED NORMS AND IDENTITIES IN INFERTILITY MANAGEMENT IN ZIMBABWE 30 (Tano Aschehoug, 1999.)

⁵ In this dissertation, “state legal system” refers to the “municipal legal system” and “non-state legal system” refers to the normative orders operating within the state whose laws are not made by state actors such as state legislators.

violate the state's obligations under international human rights law. For instance, a state may become party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and make state laws mandating the education of all girls in compliance with its obligations under that treaty. However, non-state actors within that state, without breaking with pre-existing customary laws, may continue to discourage the education of girls. In such legal pluralistic contexts in Africa, my claim is that legal pluralism needs to be accounted for in the approach to state implementation of international human rights law in order for that approach to work.

Research has found that in African states with legal pluralism, the most effective approach to implementing international human rights treaties is cultural pluralism as opposed to universalism and cultural relativism.⁶ This was the conclusion of research conducted on women's rights in Zimbabwe by Anne Hellum.⁷ The cultural pluralism approach has subsequently been applied by state actors in Ghana to the implementation of the Convention on the Rights of the Child (CRC) and shown to improve the protection of children's rights in Ghana. However Ghana added an additional step to the cultural pluralism approach. This means that first, Ghana followed the cultural pluralism approach by doing two things: the state tapped into non-state level indigenous child protection knowledge and methods to enable it achieve the overarching international human rights principle of child protection; and

⁶ Hellum, *supra* note 4: Anne Hellum conducted research on women's human rights in Zimbabwe. Her research will form the subject of our CEDAW case study in Zimbabwe later on in this dissertation.

⁷ Hellum, *supra* note 4

developed a legal and policy framework for achieving that principle. After these steps, the additionally step Ghana took was to create an interface between state and non-state actors for continuous knowledge sharing and law (both customary and state law) updating to ensure a sustained compliance with the international human rights principle. This was the critical step that Ghana added to the cultural pluralism approach which enabled her succeed in implementing its child protection policy.

I aim to assess the portability of the cultural pluralism approach to the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Ghana. I would determine if this approach would help improve the protection of disability rights in Ghana as it was found capable of doing in women's rights in Zimbabwe. If it would not improve disability rights in Ghana, I will determine whether the additional step that was applied to cultural pluralism in the case of children's rights in Ghana would help improve disability rights in Ghana. If so I will research whether this version of cultural pluralism has enough traction in other sectors of international human rights such as women's rights and if so, if what I know would help improve the implementation of international human rights in African states with legal pluralism can be theorized.

This dissertation will comprise seven chapters. The first thing a reader needs to know is a detailed background of the approaches that have been used to attempt to domesticate international human rights in African states with legal pluralistic contexts, which approach has been found most effective, and what accounts for the

effectiveness of that approach. This requires a literature review of the nature of state party obligations under international human rights treaties and the main approaches that have been proffered to states to help them comply with these obligations – the universalism approach, the cultural relativism approach and the cultural pluralism approach. The nature of state party obligations under international human rights treaties and the approaches to treaty implementation will therefore constitute chapter one of this dissertation.

Having identified and discussed the nature of state party obligations and the prevailing approaches to complying with them in African states with legal pluralism, the next thing that the reader needs to know is the character of legal pluralism and why it is capable of determining which approach may or may not succeed in improving international human rights implementation in Africa. To this end, chapter two will examine the following issues: What is legal pluralism? How does it operate in Africa? What factors promote and retrogress legal pluralism in Africa? And how important is legal pluralism to understanding whether the domestication of international human rights norms will succeed in Africa? We will first find out what legal pluralism is generally, then we will narrow in on Africa and find out how has Africa's legal history engendered legal pluralism and what makes Africa's legal pluralism distinct from the legal pluralism seen elsewhere such as the United States of America (US). Next, we will find out the factors that promote and retrogress legal pluralism in Africa and how together they cause the situation as described to persist. Then we will determine the positives and negatives of legal pluralism in Africa. Finally

we will specifically examine domestic legal pluralism in an African state (Ghana) and then determine the lessons that can be drawn from the implementation of domestic legal pluralism for the implementation of international human rights in African states with legal pluralism. This detailed discussion of African legal pluralism is necessary because legal pluralism determines which approach to international human rights treaty implementation would work best within Africa.

After reviewing the various approaches to international human rights treaty implementation available for African states to use in implementing international human rights treaties within their legal pluralistic contexts in chapter two the next thing the reader would need to know is why African states still poorly implement international human rights laws. To show this, chapter three of the dissertation would first present the reader with an account of how international human rights law is incorporated into domestic law in Africa. Next, the reader will need to know why African states, after incorporating international law into their domestic law, still poorly implement them. Finally, the chapter will seek to identify those responsible for causing this situation in Africa and those who can help to solve the problem by examining the following questions: Who is responsible for what causal contribution to the situation? Who is responsible for making which contributions to alleviating or better eradicating the problem? This analysis will constitute chapter three of the dissertation.

In Chapter four, I will use two case studies to illustrate my thesis. The first case study will be on the implementation of CEDAW in Zimbabwe. We will see how the implementation of this human rights treaty was hindered by the situation of legal pluralism in Zimbabwe. Next we will examine how the application of the various approaches to state implementation of international human rights—universalism, cultural relativism and cultural pluralism—would help improve Zimbabwe’s domestication of the CEDAW. The case study will show that the universalism and cultural relativism approaches do not help improve the implementation of international human rights in Zimbabwe’s legal pluralistic context but rather what has been found capable of working is the cultural pluralism approach to implementing international human rights law.⁸ The question that arises is whether the cultural pluralism approach then has enough traction in other sectors of international human rights or if it works for only women’s rights. To answer this question, I will present a second case study. This second case study would be on the implementation of the CRC in Ghana, which, like Zimbabwe, is an African state with a legal pluralistic context. The purpose of this case study is to determine whether the cultural pluralism approach would help improve children’s rights protection in Ghana. To do this, we will examine how the CRC has been actually implemented in Ghana, how it succeeded or failed and what accounts for its present success. Based on these two case studies, I will formulate a feasible theoretical proposal for the successful implementation of international human rights in African states with legal

⁸ Hellum, *supra* note 4: The case study built on research work by Anne Hellum, a women’s rights’ expert.

pluralistic contexts. My diverse reflections would contribute toward my selecting, formulating, appreciating and implementing the theory of the dissertation. This will constitute chapter four of the dissertation.

Chapter five will be the application of my theory to the implementation of the CRPD in Ghana. In this Chapter, I will first present Ghana's obligations under the CRPD and the legislative and other measures undertaken by the state to meet these obligations. Next I will describe the actual - lived conditions of Persons with Disabilities (PWDs) in Ghana; the relevant contextual facts and trends: the situation and attitudes or "ideologies" of the general population, relevant politicians and civil servants towards disability. I will further examine the available funds and facilities for disability rights protections in Ghana, and the work of chiefs, individuals and NGOs in disability rights protection in Ghana. Next, I will explain why the rights of PWDs are not well protected in Ghana: what are the existing laws (customary laws, judicial pronouncements, statutes, and constitutional provisions), practices, culture, attitudes, influence of multiple domestic systems of law on disability protections and foreign influences, among others, and how they together cause the situation of PWDs as described to persist. I will then assess the current situation of PWDs in terms of national and international (including human rights) law as well as from the standpoints of social justice and morality. Some crucial questions to be asked here are that of responsibility: who is responsible for what causal contributions to the problems of PWDs in Ghana? Who is responsible for making (which) contributions to alleviating or better eradicating these problems? And who is responsible for making the various

systems of law co-existing in Ghana's legal system work together to improve the rights of PWDs in Ghana?

After presenting the disability rights situation in Ghana, I will apply my theory for the successful implementation of international human rights in African states with legal pluralism, which I developed in Chapter four, to the implementation of the CRPD in Ghana. I will determine whether my theory would succeed in improving the implementation of the CRPD in Ghana's legal pluralistic context. If it would, I will find out whether this theory then has enough traction in other sectors of international human rights protection such as women's rights. If it does, what accounts for it? To answer these questions I will apply my theory to the implementation of CEDAW in Zimbabwe to find out whether it would help improve the implementation of the CEDAW in Zimbabwe as it has been found capable of doing for the CRPD and CRC in Ghana. I would like to find out how the CRC success story in Ghana vindicates the CEDAW story in Zimbabwe. This will constitute Chapter five of the dissertation.

Chapter six will be the concluding chapter of this dissertation. In this Chapter, I will summarize the thesis, the method used in undertaking the research, the outcome of the research and the contribution this dissertation makes to legal knowledge.

I will employ traditional legal research and case studies on the implementation of international human rights treaties in African states with legal pluralism to establish my thesis. The traditional legal research will examine the following research

question: First, what are the prevailing approaches to implementation of international human rights in Africa? Second, what is legal pluralism, and why is it important to factor it into any approach to implementing international human rights law in Africa? Third, how has this factoring-in been done and what were the outcomes? And fourth, can the outcomes of the third research question be applied to the CRPD in Ghana? Furthermore can it help improve the implementation of the CRPD in Ghana? If not what else should be added? The thesis would involve two case studies. The first case study examines the implementation of the CEDAW in Zimbabwe, while the second case study examines the implementation of the CRC in Ghana. Then I would apply my theory, developed from the two case studies to the implementation of the CRPD in Ghana.

The possible outcome of my research is a retrofitted version of the cultural pluralism approach to help improve the implementation of international human rights norms in African states with legal pluralism.

1 CHAPTER ONE:

APPROACHES TO IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

1.1 INTRODUCTION

Various approaches have been proposed to help improve the implementation of international human rights norms in Africa. However, these approaches have generally not achieved the expected outcomes. In this chapter we will examine the nature of states' obligations under the human rights treaties they ratify, the three prevailing approaches for state implementation of their treaty obligations and identify what makes these approaches unsuccessful in improving international human rights' implementation in African states with legal pluralism.

1.2 INTERNATIONAL HUMAN RIGHTS TREATIES AND STATES OBLIGATIONS

There are nine international human rights treaties; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965); International Covenant on Civil and Political Rights (ICCPR, 1966); International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984); Convention on the Rights of the Child (CRC, 1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 1990); International Convention for the Protection of All Persons from Enforced Disappearance (CPED, 2006); and the Convention on the Rights of Persons with Disabilities (CRPD, 2006.)⁹ Of these, the CEDAW and the CRC are the international Conventions with the highest number of ratifications.¹⁰ For the purposes of this research, these two human rights treaties will be analyzed along with the CRPD.

The CEDAW, CRC and CRPD require states parties to change negative domestic customs and laws that constitute barriers to the enjoyment of the rights particular to those human rights treaties. States Parties comply with these treaties when they take

⁹ Specific information on each of the nine international human rights treaties is available at website of the United Nations Office of the High Commissioner for Human Rights (OHCHR), <http://www..org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited on 23 March 2018.)

¹⁰ United Nations Human Rights Office of the High Commissioner website (OHCHR), Status of ratification interactive dashboard <http://indicators.ohchr.org> (last updated on 13 March 2018 and last visited on 23 March 2018.) The CRC has 196 ratifications, CEDAW has 189 ratifications and the CRPD has 176 ratifications. The remaining international human rights treaties are ICERD, which has 179 ratifications. ICCPR, which has 170 ratifications, ICESCR, which has 167 ratifications, CAT, which has 163 ratifications, ICMW, which has 51 ratifications and the CPED, which has 58 ratifications.

actions targeted at removing those barriers and their actions succeed in removing them. According to UN Women, CEDAW “targets culture and tradition as influential forces shaping gender roles and family relations.”¹¹ Article 2 of CEDAW obligates States Parties to take legislative and all other appropriate measures “**to modify or abolish existing ... customs and practices which constitute discrimination against women**”¹² (emphasis is mine.) Article 5(a) specifically requires States Parties “to take all appropriate measures to **modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices** which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”¹³ The CRC obligates States Parties to “take all effective and appropriate measures **with a view to abolishing traditional practices prejudicial to the health of children.**”¹⁴ (emphasis is mine.) UNICEF extends these traditional practices to include child marriages.¹⁵ States Parties to the CPRD are required “to take all appropriate measures, including legislation, **to modify or abolish existing ... customs and**

¹¹ UN Women, United Nations Entity for Gender Equality and the Empowerment of Women, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited on 23 March 2018)

¹² Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 2(f), Text of the CEDAW is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited on 23 March 2018).

¹³ CEDAW, *supra* note 12, Article 5(a)

¹⁴ Convention on the Rights of the Child (CRC), Article 24(3), Text of the CRC is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited on 23 March 2018.)

¹⁵ *Early Marriage: A Harmful Traditional Practice (A statistical exploration)*, (UNICEF, 2005) Available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf (last visited on 23 March 2018.)

*practices that constitute discrimination against persons with disabilities*¹⁶
(emphasis is mine.) Article 8 specifically requires States Parties to adopt
*“appropriate measures ... to combat stereotypes, prejudices and harmful
practices relating to persons with disabilities...”*¹⁷ (emphasis is mine.)

The above analysis of the CEDAW, CRC and CRPD, show that State Party actions required to demonstrate compliance with international human rights treaties include taking measures that result in the changing of domestic non-state level customary laws in violation of the rights protected under international human rights law. How does a State Party change its domestic customary laws and bring them in compliance with international human rights treaties? Let us now consider the prevailing approaches for implementing international human rights treaties.

1.3 INTRODUCTION TO UNIVERSALISM, CULTURAL RELATIVISM AND CULTURAL PLURALISM

The Universal Declaration of Human Rights (UDHR) established the idea of the universality of Human Rights.¹⁸ This idea was reaffirmed forty-five years later at the

¹⁶ Convention on the Rights of Persons with Disabilities (CRPD), Article 4(1)(b.) Text of the CRPD is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited on 23 March 2018).

¹⁷ CRPD, *supra* note 16, Article 8(1)(b)

¹⁸ Universal Declaration of Human Rights (UDHR), Adopted by UN General Assembly 217A (III) of 10 December 1948 in Paris during the 183rd plenary meeting. Available at OHCHR website <http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx> (Last visited on 21 January 2018)

second United Nations World Conference on Human Rights held in Vienna, Austria, through the Vienna Declaration and Programme of Action.¹⁹ Despite the affirmation, many states, particularly the Asian ones argue that the principles captured in the UDHR are representative of Western culture and therefore not universal.²⁰ The effect has been a long-standing debate on “whether human rights are universal or culturally relative.”²¹ Professor Louis Henkin, a Western scholar, claims that human rights are universal²² whilst Professor Makau wa Mutua, a Kenyan-American scholar, insists that human rights are culturally relative.²³ Other scholars (and organizations) have approached the debate with a more nuanced look. For instance, Jack Donnelly prefers to identify a continuum ranging from extreme universalism to weak cultural relativism. Donnelly places human rights as basically universal but to be implemented with a degree of weak cultural relativism because for him, there are several degrees of cultural relativism; at one end of the continuum is radical cultural relativism and at the other end is radical universalism.²⁴ He suggests that the UDHR and the present International Human Rights Conventions would admit of weak cultural relativism because this means that they accept that certain rights are universal but then, at some

¹⁹ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993. Available at OHCHR website <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (Last visited on 21 January 2018)

²⁰ Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different socio-cultural contexts*, 16 Hum. Rts. Q. 740, 741 (1994.)

²¹ Bonney Ibhawoh, *Restraining Universalism: Africanist Perspectives on Cultural Relativism in the Human Rights Discourse* in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA, (Paul Tiyambe Zeleza and Philip J. McConaughay eds. University of Pennsylvania Press, 2004) 22

²² Henkin et al., *supra* note 1, Chapter 2: “Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development.”

²³ Makau wa Mutua, *The Ideology of Human Rights*, Virginia Journal of International Law 36 (1996.)

²⁴ Jack Donnelly, *Cultural Relativism and Universal Human Rights*, Human Rights Quarterly, Vol. 6 No. 4, 400-419 (The Johns Hopkins University Press, Nov., 1984.)

point, culture can be allowed to make modifications to these “fundamental / universal” rights; or the form in which the rights are implemented. Although the universalism – cultural relativism debate has been long established, in recent decades scholars have introduced a third theme to the debate called cultural pluralism.²⁵

The reason for the debate is the approach that must be given to the implementation of international human rights law by State Parties. If human rights are universal, then all States Parties must be held to the same standard of implementation of those rights irrespective of their “social, cultural or political differences.”²⁶ However if what constitutes human rights varies with culture then hold each State Party to a standard of implementation that reflects its culture because values vary with culture. Kory Sorrell explains this cultural variation thus:

“Different cultures rely on, and reproduce, narratives and practices that privilege some values over others, explain those regnant hierarchies, offer rules for resolving different sorts of conflicts among members of the community in significantly different ways. What counts as acceptable behavior, what marks the differences between, for example pain and pleasure, cruelty and discipline, rewarding initiation in a culture and subjection by a culture, acts worthy of praise and those demanding censure are all difficult to remove from the way of life that sustains and reproduces it.”²⁷

²⁵ Antonia Pantoja et al., *Towards the Development of Theory: Cultural Pluralism Redefined*, *The Journal of Sociology & Social Welfare*: Vol. 4 Issue 1, Article 11, 130-131 (1976).

²⁶ Cerna, *supra* note 20, at 741

²⁷ Kory Sorrell, *Cultural Pluralism and International Rights*, 10 *Tulsa J. Comp. & Int'l* 369, 371 (2002)

In the following sections we will explain each approach, the major critique against it and how its proponents expect State Parties to apply it in implementing their international human rights obligations.

1.3.1 What Is Universalism

Human rights, by definition, implicate the universalism theory. Cranston's oft-cited definition of human rights exemplifies this perfectly: "A human right by definition is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human."²⁸ Levesque explains that Universalists identify a core set of "truths" which they project as universal, inalienable and applicable to everyone, in every society.²⁹ Some argue that the core set of truths is the rights set out in the UDHR and that they have attained the level of customary international law or jus cogens.³⁰

²⁸ MAURICE WILLIAM CRANSTON, WHAT ARE HUMAN RIGHTS 36 (Bodley Head, 1973.)

²⁹ Roger J.R. Levesque, *Are (Should) Human Rights (Be) Universal*, 22 Update on L-Related Educ. 28 (1998)

³⁰ The Montreal Statement of the Assembly for Human Rights (22-27 March 1968), *Montreal Statement*, reprinted in J. Int'l Commission Jurists 94 (June 1968), statement issued by nongovernmental meeting of experts on human rights issues. Globalization 101, *A project of Suny Levin Institute*, Human Rights, 79: "Customary international law refers to rules of law derived from the consistent conduct of states acting out of the belief that law required them to act that way, ie persistent and customary practice of states can lead to the consideration of their behavior as creating a legal precedent for future action." Available at <http://www.globalization101.org/introduction-the-idea-of-human-rights/> (last visited on 23 March 2018.)

But this core set of truths or violations has been variously criticized as representative of a particular culture (Western culture), and that other cultures may not consider them as truths or even violations. For instance, Alison Renteln opines that the presumption in favor of the universality of human rights is flawed when examined across cultures.³¹

Universalists claim that the core universal truths should “serve as a common standard of achievement for all peoples of all nations”³² and should be implemented through a positivist approach.³³ They project the individual as autonomous³⁴ and as Louis Henkin et al suggest, the individual should be able to claim the enforcement of his or her rights from his or her society: “Every human being has, or is entitled to have, “rights” – legitimate, valid, justified claims - upon his or her society; claims to various “goods” and benefits.”³⁵

1.3.2 What is Cultural Relativism

For cultural relativists, a multicultural approach should be used for understanding what constitutes a human right, what constitutes a right violation and how State

³¹ ALISON RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM, (QUID PRO, 2013)

³² Mrs. Eleanor Roosevelt statement at the adoption of the UDHR, General Assembly Adopts Declaration of Human Rights (Statement by Mrs. Franklin D. Roosevelt, US Representative to the U.N. GAOR, 9 December 1948), DEP'T ST. BULL., 19 DEC. 1948, at 751.

³³ Levesque, *supra* note 29

³⁴ *Ibid*

³⁵ Henkin et al., *supra* note 1, Chapter 2: Henkin defines human rights as claims individuals have against their societies.

Parties should implement human rights within their states. One of the main proponents of the cultural relativism theory is Makau wa Mutua. In his celebrated article *The Ideology of Human Rights*,³⁶ Mutua criticizes the current approach to human rights as a political ideology in favor of Western liberal democracy. The so – called core set of “truths” is actually Eurocentric and varies in non-Western societies. Levesque adds that individuals live in the context of a society, and can only be understood within that context. Therefore the (cultural) context should not be isolated from the individual but rather respected in order to give full respect to one’s individuality.³⁷

Donnelly however argues that culture is deployed as an excuse to prevent human rights protections and project parochial interests. He considers that people hide behind “culture” to prevent the implementation of human rights because the Pre-colonial African culture or the native American culture or the strict Islamic religious systems have all in reality been westernized in some way over time. Therefore using them as reason for not employing human rights standards, which are westernized and an invasion of those cultures, is just an excuse. In a sum, allowing cultural derogations from international human rights standards the cultural basis must be “strong and authentic” and there must be “alternative mechanisms guaranteeing basic human dignity.”

³⁶ Mutua, *supra* note 23: Mutua suggests a multicultural approach to reform the Human Rights regime.

³⁷ Levesque, *supra* note 29.

These criticisms notwithstanding, cultural relativists maintain that universal values vary among societies and a positivist approach to implementation of State Party obligations under a treaty would not work. Ending one group's customs may mean ending the groups existing culture. Implementation of the skewed international human rights norms as we have them presently would erase cultural diversity. Consequently, international bodies should rather respect traditions and cultural practices.

1.3.3 What is Cultural Pluralism

Cultural pluralism refers to the situation where multiple cultural groups are located in the same society, they set certain universal values for themselves and allow for the different application of the societal resources by the different groups for the attainment of the universal value. Pantoja et al sum up the definition of cultural pluralism more succinctly:

*“Cultural Pluralism is the condition in a society in which individuals, on the basis of ascribed or attached characteristics, are able to form and develop communities along the differences of race, age, sex, religion, language and cultural life styles. These communities are open systems and members can select to belong to one or more communities at the same time. **This condition can only exist in a society where there are two or more culturally diverse function communities, and where these communities adhere to a universal value***

that promotes the use of the resources of the society to fulfill the needs of all of its members. This condition is considered realized in a society where culturally different communities exist, are recognized and permitted to participate and to control those functions and resources which they consider vital to their community's functioning. Cultural pluralism can not exist in a society where culturally different communities exist in isolation from each other or/and in competition under unequal conditions for the life sustaining/enhancing resources that the society produces."³⁸ (emphasis is mine)

In their article Pantoja, Perry and Blourock present Cultural pluralism as the best way society should operate rather than the present way in which certain cultures are the preferred and other cultures required to aim to be like those through integration, assimilation or acculturation. Using the United States as an example, the scholars show that beyond culture, there are other characteristics such as race (black race), gender (female), age (seniors), sexual orientation (homosexuals) that are considered not preferred because they deviate from the preferred ideal for the society which is the young adult white male. Rather than preferring one state of life or one culture to the other, the **society should make room for all cultures to thrive**. There should however be certain "regulative values" for everyone to adhere to, irrespective of culture, for the general society to thrive. According to Yvonne Donders, cultural pluralism allows individuals and communities to maintain their specific cultural

³⁸ Pantoja et al., *supra* note 25.

identity, provided that those identities are consistent with the laws, policies and values of the wider society.³⁹

In terms of the implementation of international human rights, cultural pluralists suggest that states adhere to universal values but adopt culturally appropriate methods in achieving those universal values.

1.4 DIFFERENCES BETWEEN UNIVERSALISM, CULTURAL RELATIVISM AND CULTURAL PLURALISM

Universalists believe that certain human rights values have universal validity and universal methods and standards should be applied to protect those values.⁴⁰ Cultural relativists are convinced that rights vary with culture and violations vary with culture. Therefore methods and standards of human rights protection should vary with culture”⁴¹ Cultural pluralists acknowledge that certain rights have universal value but permit different cultures to achieve those universal values differently using the same resources available to all in the society. Universalists push for “a more absolute hierarchy of values” whilst “culture relativists deny the existence of overarching values” and cultural pluralists support “a reasonable ranking of ...

³⁹ Yvonne Donders, *Cultural Pluralism in International Human Rights Law: The role of Reservations*, Interfaces Research Paper 02 (2013), ACIL 2013 – 02.

⁴⁰ RAINER ARNOLD (ed.), *THE UNIVERSALISM OF HUMAN RIGHTS* (2013)

⁴¹ Fernando R. Teson, ‘*International Human Rights and Cultural Relativism*’ 25 Va. J. Int’l L. 869 (1985)

values” based on an analysis of “the conflicting values found in the social and cultural context in which the individuals concerned live and act.”⁴²

Applying this in the area of disability rights for instance, whereas the universalists would suggest the creation of disability rights through legislative intervention; the cultural relativists would suggest that such legislative intervention to change cultural understanding of disability is a form of cultural imperialism; and the cultural pluralists would prefer to allow customary law on disability to evolve in interplay with legislative change in a situation-sensitive manner.

The significant lacuna in the universalism approach is that it anticipates the implementation of the international human rights law in a state with intrastate homogeneity. Universalists expect the state to be functioning through homogenous state laws which is very unlike the situation in most African states. The cultural relativism approach anticipates the operation of customs and practices within the state but does not elevate them to the level of laws with the same validity as state laws. So although cultural relativists are acutely aware of the myriad of customary laws within African societies, they do not account for the situation where customary laws have the force of law within the state because they flow from a valid stream of law (non-state laws) other than the state’s legal system, and therefore legitimately co-exist with the state laws (legal pluralistic contexts). Only the cultural pluralism approach accounts for situations of legal pluralism within a state. However, the caveat

⁴² Hellum, *supra* note 4.

in cultural pluralism is that the different legal systems are at equal level and that one is not preferred over the other.

Cultural pluralism anticipates multiple non-state laws having the same force of law within the state and operating simultaneously with state laws. Research has found that in African states with legal pluralism, the most effective approach to domesticating international human rights treaties is cultural pluralism as opposed to universalism and cultural relativism.⁴³ The cultural pluralism approach has been shown to improve children's rights in Ghana and hold the capacity to improve women's rights in Zimbabwe.⁴⁴ In this dissertation, I aim to assess its portability to the implementation of the CRPD in Ghana. If it would not improve disability rights in Ghana, I will find out whether cultural pluralism has enough traction in other sectors of international human rights such as the Convention on the Rights of the Child (CRC) and if so, why those sectors are different from disability; what can and should be done differently in the cultural pluralism approach to the implementation of the Convention on the Rights of Persons with Disability (CRPD) from that of the CEDAW and the CRC in legal pluralistic contexts to improve disability rights?

1.5 CONCLUSION

⁴³ *Ibid*

⁴⁴ *Ibid*

This chapter has presented the various obligations that States Parties to international human rights treaties assume, and the suggested approaches to achieving compliance with those obligations. However, the chapter has identified that in the case of African states with legal pluralism the universalism and cultural relativism approaches have limited capacity to improve implementation of human rights law, and that it is the cultural pluralism approach that holds more promise. In the next chapter, this dissertation undertakes an in-depth examination of the situation of legal pluralism in African states.

2 CHAPTER TWO:

LEGAL PLURALISM AND ITS OPERATION IN AFRICA

2.1 INTRODUCTION

Legal Pluralism is not a recent phenomenon. It has been in existence for centuries. In Africa, legal pluralism is considered to be the product of the interaction of different indigenous customary laws in Africa: within and across nations; the Islamic invasions and the interaction of Islamic law with African laws; and colonialism and the interaction of customary law with the laws of the colonial masters among others.⁴⁵ In this chapter we will discuss what legal pluralism is, its history, how it operates in fact in Africa and lessons that can be learnt from this operation to improve the domestication of international human rights norms in African states with legal pluralistic contexts.

⁴⁵ Sally Engle Merry, *Legal Pluralism*, Law and Society Review, Vol. 22 No. 5 869-896, 870(1988) "The Europeans were not the first outside influence bringing a new legal system to many Third World Peoples. Indigenous law had been shaped by conquests and migrations for centuries."

2.2 WHAT IS LEGAL PLURALISM

2.2.1 History of Legal Pluralism

The beginnings of legal pluralism can be traced to the medieval era.⁴⁶ As the medieval period came to an end, there was a shift towards state-building, and with that, the consolidation and implementation of laws through the state.⁴⁷ The form of legal

⁴⁶ Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney Law Review Vol. 30, 375, 377 (2007): “The mid-to-late medieval period was characterized by a remarkable jumble of different sorts of law and institutions, occupying the same space, sometimes conflicting, sometimes complementary, and typically lacking any overarching hierarchy or organization. These forms of law included local customs (often in several versions, usually unwritten); general Germanic customary law (in code form); feudal law (mostly unwritten); the law merchant or *lex mercatoria* – commercial law and customs followed by merchants; canon law of the Roman Catholic Church; and the revived Roman law developed in the universities. Various types of courts or judicial forums coexisted: manorial courts; municipal courts; merchant court; guild courts; church courts and royal courts. Serving as judges in these courts were, respectively, barons or lords of the manor, burghers (leading city residents), merchants, guild members, bishops (and in certain cases the pope), and kings or their appointees. Jurisdictional rules for each court, and the laws to be applied, related to the person involved – their status, descent, citizenship, occupation or religion – as well as to the subject matter at issue. ... Not only did separate legal systems and bodies of legal norms coexist, a single system or judge could apply distinct bodies of law. ... The mid through late Middle Ages thus exhibited legal pluralism along at least three major axes: coexisting, overlapping bodies of law with different geographical reaches; coexisting institutionalized systems; and conflicting legal norms within a system. In terms of the first axis – bodies of law – the *ius commune*, the *lex mercatoria*, and the ecclesiastical law spanned separate kingdoms across a large swath of Europe; this transnational law (loosely described as such, for nations were not yet fully formed) coexisted with codified Germanic customary law on a national level, and with feudal law, municipal law and unwritten local customary law on the local level. In terms of the second axis – coexisting institutionalised systems – in the words of medieval scholar Raoul van Caenegem, ‘there were also vertical dividing lines between legal systems: those which separated townsmen from countrymen, churchmen and students from laymen, members of guilds and crafts from those not so affiliated. The great (and smaller) ordines of society lived according to distinct sets of rules, administered by distinct networks of law courts, for it was understood that everyone should be tried by his peers.’ In addition, royal courts could hear cases in the first instance or on appeal from other courts. In terms of the third axis – conflicting legal norms, within a single system and social arena there could be different bodies of legal norms, especially of customary law.

⁴⁷ Tamanaha *supra* note 46, at 379: “Two famous treaties serve as early markers of the state building process. The Treaty of Augsburg in 1555 established the principle that sovereigns could decide the religion of citizens within their territory. Treaty of Westphalia of 1648 divided Europe into separate,

pluralism during this period was the incorporation of a state apparatus-engineered customary law into the municipal legal system. The state version of customary law however, frequently varied from actual custom.⁴⁸ From the late 18th century through the late 19th century, Europeans began exerting greater legal authority over the indigenous populations they had previously been trading with. Colonization often started with 'indirect rule,' which developed into 'direct rule.'⁴⁹ European colonization of non-western societies generally ended in the 1970s, having introduced a new wave of legal pluralism in which colonial officials incorporated local customary laws into their transplanted legal systems.⁵⁰ This form of legal pluralism persists in many post-colonial states.⁵¹ The late 20th century ushered in global legal pluralism which makes international law part of the state legal system.⁵²

secular territories under the authority of sovereigns. The treaty recognized that heads of state control internal affairs and have the right to defend territorial boundaries.”

⁴⁸ Tamanaha, *supra* note 46, at 379 - 378

⁴⁹ Tamanaha, *supra* note 46, at 382: The Europeans “relied upon pre-existing sources of political authority – using indigenous leaders – or involved the creation of so-called ‘native courts’ that enforced customary or religious laws. The result was, as in medieval Europe, a hodgepodge of coexisting legal institutions and norms operating side by side, with various points of overlap, conflict and mutual influence.”

⁵⁰ Merry, *supra* note 45.

⁵¹ *Ibid.* For instance this happens in Ghana and many other former British colonies in Africa.

⁵² BRIAN Z TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (Oxford University Press, 2001) Chapter 5: “Global legal pluralism is organized around 5 themes: First theme is ‘international legal pluralism’: the international legal system is internally pluralistic with ... separate tribunals and ... distinct bodies of legal norms tied to specific areas of regulation that are not coordinated with one another and can overlap or conflict. ... Not only is the international system fragmented, additional complications arise because domestic or national courts incorporate international law in different ways and to different extents. A second theme ... highlights the invocation of human rights norms, often by non-governmental organisations ..., to challenge state laws or actions or customary laws or cultural practices. Suits are being brought in supranational human rights courts, like the European Court of Human Rights ... by citizens seeking redress against their own state. In these situations the norms and institutions of one legal system are being pitted against another. Third theme of the global legal pluralist literature is the growth of ‘self-creating’, ‘private’, or ‘unofficial’ legal orders. A leading theorist, Gunther Teubner, suggests that functionally different systems have developed with a global or transnational reach – commercial transactions, the internet, and sports organisations, for example – generating their own legal orders. What observers have dubbed the new *lex mercatoria* is the example A fourth theme relates to the creation of ‘trans-governmental networks’ that have regulatory powers and implications. ... Active networks have also been created among judges, NGOs,

2.2.2 Definition of Legal Pluralism

What legal pluralism is, has been the subject of great debate.⁵³ Two sides of the debate are helpful for present purposes of implementation of international human rights: the positions of John Griffiths and Jacques Vanderlinden⁵⁴ who are two of the foremost authorities on legal pluralism.

Griffiths defines legal pluralism as “the presence in a social field of more than one legal order”⁵⁵ whilst Vanderlinden says ‘legal pluralism’ is ‘pluralism’ limited to the legal regulatory orders with which the ‘sujet de droits’ can be confronted.⁵⁶ Griffiths emphasizes the milieu within which the legal orders operate whereas Vanderlinden

and development organisations, among others. The multiplications of these networks beyond the direct control of any national or international agency, ... constitutes another form of legal pluralism. A fifth theme relates to the global movement of people. Within nations, people are moving in droves from the countryside to burgeoning cities in search of jobs and a better life. People are also moving in large numbers from one nation to another for the same reasons, often settling in immigrant communities in the new land. They bring their own cultural and religious norms, which may conflict with the official legal rules of the new land.

⁵³ Brian Z. Tamanaha, *The Folly of the “Social Scientific” concept of Legal Pluralism*, *Journal of Law and Society*, Vol. 20 No. 2 (1993); Anne Griffiths, *Pursuing Legal Pluralism: The Power of Paradigms in a Global World*, *The Journal of Legal Pluralism and Unofficial Law*, 43: 64, 173 – 202 (2013). Both Tamanaha and Griffiths argue that what is legal pluralism has not been settled but continues to be the subject of debate.

⁵⁴ Jacques Vanderlinden wrote an earlier article titled “*Le pluralisme juridique: essai de synthèse*” pages 19 – 56 in John Gilissen (ed.), *Le Pluralisme Juridique*. Brussels: Universite de Bruxelles. The position he expresses in this article is markedly opposed to the position he expresses in his later work Jacques Vanderlinden, “*Return to Legal Pluralism: Twenty years later*,” *The Journal of Legal Pluralism*, Vol. 21 Issue 28 (1989). In this dissertation we will be using the position of Jacques Vanderlinden as expressed in “*Return to Legal Pluralism: Twenty years later*.”

⁵⁵ John Griffiths, *What is legal pluralism?* *Journal of Legal Pluralism* 24, 1 (1986): John Griffiths is regarded as one of earliest scholars on legal pluralism. He used this 1986 article to describe the concept of legal pluralism.

⁵⁶ Vanderlinden, *supra* note 4.

emphasizes the subject of the multiple legal orders. According to Vanderlinden different social networks operate simultaneously through different regulatory orders – legal and non-legal. The individual is a member of these different social networks at the same time and therefore subject to the different regulatory orders of these social networks at the same time. “If, among the regulatory orders involved there is more than one ‘legal’ order, such a dialectical process is ... ‘legal pluralism.’” Therefore Vanderlinden considers legal pluralism from the stand point of the ‘sujet de droits’ – Man or the individual “who can be subjected to many legal orders as a member of many networks” and not from the standpoint of a given legal system as Griffiths does. So the difference is Vanderlinden looks at **who** the subject of these multiple legal orders is: ‘le sujet de droits,’ whereas Griffiths looks at **where** these multiple legal orders are operating: ‘a social field’ and both scholars define legal pluralism based on where they are looking. (emphasis is mine.)

I however identify two critical points of convergence of both scholars; first, is that Vanderlinden, like Griffiths, agree that the fundamental element of legal pluralism is the simultaneous operation of multiple legal orders and second is that both scholars disavow legal centralism within states albeit for varying reasons. The issue of the simultaneous operation of legal orders has been discussed above therefore I continue the discussion with legal centralism on the table.

Vanderlinden’s position is that it is not the state that has legal pluralism but rather it is the individual – le ‘sujet de droits’ – that finds himself in a situation of legal

pluralism because it is the individual who is faced with the different regulations (legal and non-legal) emerging from the various social networks to which he belongs and deciding at each point which laws he will allow to order his life. Vanderlinden criticizes those who approach legal pluralism from the standpoint of the state claiming that the state has legal pluralism. For him the problem with the state is that it seeks to be in total control of all laws, and when it realizes that it does not have the capacity to provide laws for all situations arising from the different social networks, it pretends to accommodate these other legal orders by incorporating them into its (the state's) legal order and calling them "subordinate" or "inferior" legal orders,⁵⁷ when in actual fact none of the legal orders is subordinate to the other. To appreciate that no one legal order is subordinate to the other, Vanderlinden considers legal pluralism from the standpoint of the individual when he has to choose at any moment to order his behaviour according to any of the multiple regulatory orders he is faced with. Griffiths also makes a similar critique of the state. He claims that the state prefers to project the idea that there is legal centralism – meaning that within the society, there is a hierarchy of laws that fit into one piece⁵⁸ (state law), have one source of legitimacy – the sovereign command (Bentham⁵⁹, Austin⁶⁰) or the ultimate norm – grundnorm (Kelsen⁶¹) or the rule of recognition (H.L.A. Hart⁶²); and one set of state institutions that implement the laws: the "law is and should be the law of the

⁵⁷ Vanderlinden, *supra* note 4, 153.

⁵⁸ Griffiths, *supra* note 55, at 3.

⁵⁹ Jeremy Betham, *An Introduction to the Principles of Morals and Legislation*, (18th Ed., London, W. Pickering 1823)

⁶⁰ John Austin, *The Province of Jurisprudence Determined* (1781)

⁶¹ HANS KELSEN GENERAL THEORY OF LAW AND STATE (Trans. A. Wedberg, 1949)

⁶² H.L.A. HART, THE CONCEPT OF LAW 91 (Oxford University Press, 1961.)

state, uniform for all persons exclusive of all other law, and administered by a single set of state institutions.”⁶³ But then Griffiths argues that this hegemonic claim of the state falls flat in the face of reality because within the state “not all law is state law nor administered by a single set of state legal institutions.”⁶⁴ Often, other laws operate alongside state laws within states, and non-state actors and non-state institutions administer these non-state laws. “Legal reality is rather an unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation.”⁶⁵ Therefore in actual life, legal pluralism rather than legal centralism is what actually happens.⁶⁶ Beyond the reality of legal pluralism, legal pluralism is what occurs regularly in states rather than legal centralism, and legal pluralism is what gives the full picture of what occurs in societies rather than legal centralism. Griffiths sums it up perfectly:

*“Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory.”*⁶⁷

Griffiths’ and Vanderlinden’s position is buttressed by Tamanaha thus:

⁶³ Griffiths, *supra* note 55, at 3.

⁶⁴ Griffiths, *supra* note 55, at 5.

⁶⁵ Griffiths, *supra* note 55, at 4

⁶⁶ Of course there are many scholars who argue that the idea of legal pluralism is misplaced. An example is Jacques Vanderlinden, *Return to Legal pluralism: Twenty Years Later* (*supra* note 4). At page 152 he argues thus: “Hence to speak of a legally pluralistic system as being a system in which many competing legal orders exist is redundant.”

⁶⁷ Griffiths, *supra* note 55, at 4

*“Legal pluralism, it turns out, is a common historical condition. The long dominant view that law is a unified and uniform system administered by the state has erased our consciousness of the extended history of legal pluralism.”*⁶⁸

So both Griffiths and Vanderlinden agree that there is no one single uniform law within the state ordering every aspect of the life of individuals within it.

Both scholars reference colonialism as the starting point of modern legal pluralism. Griffiths traces the modern origins of legal pluralism to 1772 when “a regulation for the new judicial system established in the territories administered by the East India Company provided” for different laws to apply to the cases of different groups of people within the population: “the laws of the Koran ... to the Mohamedans and those of the Shaster ... to the Gentoos...”⁶⁹ According to Vanderlinden, the colonial powers “carefully tolerated ‘native’ or ‘religious laws’ controlling their acceptability through the use of repugnancy clauses.”⁷⁰ During the colonial era therefore, admissible customary laws took their authority from the state but applied differently to different groups of people within the state for different purposes. Many states of the world today continue to *recognize* different rules for different people within their population in pursuit of different purposes. So both Griffiths and Vanderlinden agree that in a state there is no one uniform legal system. However the point of divergence of both scholars is that whereas Vanderlinden disagrees with legal centralism

⁶⁸ Tamanaha *supra* note 46, at 376.

⁶⁹ Griffiths, *supra* note 55, at 1: Griffiths cites HOOKER, M.B. LEGAL PLURALISM – AN INTRODUCTION TO COLONIAL AND NEO COLONIAL LAWS, (Oxford University Press, 1975) 61.

⁷⁰ Vanderlinden, *supra* note 4, at 6.

because those multiple legal orders give rise to multiple 'mechanisms' by which the subject or individual can order his behavior and are not all under the state's laws, Griffiths accepts legal pluralism to mean that the state's laws recognize "other legal orders" other than the state laws and these other legal orders operate under the authority of the state. An example of where multiple legal orders operate under the authority of the state is where the Constitution of the state makes provision for customary laws and state law to operate and order the lives of groups within the population to facilitate governance.

This debate raises various questions: How do we operate the social contract we have entered into if a person decides today to kill because he chooses to follow the laws of a particular religious order he belongs that justifies such killing rather than follow the law of another group he also belongs to that does not justify the killing? How does the state regulate such behavior? Does the state have to know all the possible legal orders of each individual within the state – for the sake of enforcing the social contract we have entered into with it? Would it be better that the state receives some laws from our social networks into the state's laws and retrofits them, where possible, to be consistent with the basic law/norm (Constitution or grundnorm) which all members of the state acknowledge, and by allowing this accommodation, create a situation of legal pluralism?

2.3 LEGAL PLURALISM IN AFRICA

2.3.1 How Africa's colonial history engenders Legal Pluralism

During the Pre-colonial era, Africans governed themselves through indigenous customary laws.⁷¹ Colonization in Africa saw the transplantation of European legal system over customary law.⁷² The “imported” laws did not completely eliminate the indigenous laws; instead, indigenous (customary) law operated “alongside” the imported laws.⁷³ The colonialists raised their imported laws to the level of official state law, and used the repugnancy clause or test as a process to admit indigenous (customary) laws into the official state legal system (European law) to achieve a uniform hierarchy of laws for their colonies.⁷⁴ Thus in British colonies such as the Gold Coast (present day Ghana) and Lagos (in Nigeria), the customary laws of the natives living in the Gold Coast and Lagos⁷⁵ were subjected to admissibility tests in order to be made part of the official state laws of the colonies, which were essentially

⁷¹ Christian N. Okeke, *The Use of International Law in the domestic Courts of Ghana and Nigeria*, 32 *Ariz. J. Int'l. & Comp. L.* 371, 381 (2015): “When the British entered Ghana, like in other colonial African states, they met a system of customary laws practiced by different ethnic groups.” At 384 Okeke further states: “In Nigeria, the common law sits uneasily against the customary law to which the people had been accustomed even before the beginning of colonialism.”

⁷² Tamanaha, *supra* note 46.

⁷³ Okeke, *supra* note 71, at 382: “As it was not practical for the British to completely eliminate customary law, they had to recognize it and allow its application alongside the common law.”

⁷⁴ Okeke, *supra* note 71.

⁷⁵ Okeke, *supra* note 71, at 381 and 384: Here, Okeke makes the point that in both Ghana and Nigeria the people were governed by their own customary laws before the British introduced the Common law.

the English common laws operating in England. Admissible customary laws were those that were considered not to be “repugnant to natural justice, equity, and good conscience.”⁷⁶ Inadmissible customary laws were those that were considered otherwise. The natives however continued to observe both their admissible and inadmissible customary laws during the colonial era.

After independence, most post-colonial African states continued the system of governance introduced by the colonial rulers: the transplanted system of governance introduced by the colonial rulers became the official state legal systems and indigenous customary laws generally operated as non-state laws.⁷⁷ Thus for instance, English common law and customary law continued to intersect in post-colonial African states such as Ghana and Nigeria. Okeke says that “***There is no other area in which the clash of legal cultures is more manifest than the interaction of common***

⁷⁶ Okeke, *supra* note 71, at 381 - 382: In Ghana, “[T]he tasks faced by the British were to impose their own Western system of laws on the people and “civilize” the Africans, as well as protect British possessions ... The British Common Law became operational through the enactment of The Gold Coast Supreme Court Ordinance 1876, 439 & Vict. 1, § 14 (Eng.) which provided that “***the common law, doctrines of equity, and statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court.***” As it was not practical for the British to completely eliminate customary law, they had to recognize it and allow its application alongside the common law... The Supreme Court was [therefore] required to enforce customary law in situations where the parties were Africans, provided the law was “not... repugnant to natural justice, equity and good conscience ...” Gold Coast Supreme Court Ordinance, 1876, 39 & 40 Vict. 1, § 19 (Eng.): Nothing in this Ordinance shall deprive the Courts of the right to observe and enforce the observance, or shall deprive any person of the benefit of any native law or custom existing in the Gold Coast, ***such law or custom not being repugnant to natural justice, equity, and good conscience***, nor incompatible either directly or by necessary implication with any ordinance for the time being in force. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives, and particularly, but without derogating from their application in other cases, in causes and matters relating to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in causes and matters between natives and non-natives where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law.[
](Emphasis is mine.)

⁷⁷ Tamanaha, *supra* note 46.

law and customary law in the post-colonial African states.⁷⁸ (emphasis is mine)

Consequently, “[i]n Nigeria, the common law sits uneasily against the customary law to which the people had been accustomed even before the beginning of colonialism”⁷⁹ and in Ghana, Ghana at 50 years after independence is “Colonized and Happy” because the country is still governed by colonial laws and rules of common law which remain in its statute books and are valid law in Ghana.⁸⁰ This means that in most post-colonial African states, two main types of laws operate: the official state law which is the transplanted legal system of the former colonial power, and the non-official laws which are the indigenous customary laws of the people.

Today, many people within modern African states still pattern their lives in accordance with other systems of law apart from the official state legal systems for various reasons. One of the main reasons is that the colonial legal systems were unable to reach those people in their rural societies during the colonial period in the first place: “While some people were completely transformed, [under colonial rule] others hardly knew the European rulers were here before they began to leave.”⁸¹ Such communities continued to live according to their own indigenous legal systems during the colonial era, and since the post-colonial state’s legal systems largely

⁷⁸ Okeke, *supra* note 71, at 384

⁷⁹ *Ibid*

⁸⁰ Raymond Atuguba, *Ghana @ 50 Colonised and Happy*, in GHANA LAW SINCE INDEPENDENCE, HISTORY, DEVELOPMENT AND PROSPECTS CONSTITUTION, (Henrietta J.A.N. Mensa-Bonsu et al., ed., Black Mask for Faculty of Law University of Ghana, Legon, 2007); Constitution of the Republic of Ghana, 1992, Article 11 shows that the English common laws are still part of the Laws of the Politically independent Ghana; and Okeke, *supra* note 71, at 383 Okeke also supports this position thus: “On the whole, Ghana has not substantially truncated its colonial attachment to the British common law system...”

⁸¹ JF Ade Ajayi, *The Continuity of African Institutions under Colonialism* in T.O. Ranger, ed., EMERGING THEMES OF AFRICAN HISTORY 189, 195 (East Africa Pub House, 1968).

continued in the stead of the colonial legal system, also failed to affect those normative orderings. Thus it is common to find many communities within African states untouched by the state's laws and living according to their own indigenous or native laws. Other reasons accounting for the prevalence of multiple legal systems within African states is that rural dwellers have no knowledge of state law.⁸² Some local communities that know the state law, persist in ignoring it, "carry[ing] on as if the new law had not been passed"⁸³ because they are "unwilling to surrender their cultural heritage and embrace a legal system that they can hardly identify with"⁸⁴ Those that could be amenable to reconsidering their heritage to embrace the state legal system also find themselves lacking the "requisite capacity to engage with the formal state system and its institutions."⁸⁵ For these reasons in many African states multiple systems of law operate simultaneously; in many territories people are still governed by their own ethnic laws;⁸⁶ there are situations where in the absence of a central legal system within a social sphere people behave orderly;⁸⁷ and situations

⁸² Edward Kutsoati and Randall Morck, *Family Ties, Inheritance Rights, and Successful Poverty Alleviation: Evidence from Ghana*, NBER Working Paper No. 18080, 23-24 (2012). Available at www.nber.org/papers/w18080 (Last visited on 23 March 2018.)

⁸³ Antony Allot, *THE LIMITS OF THE LAW* (Butterworths, 1980) 197

⁸⁴ Victor Gedzi, "Principles and Practices of Dispute Resolution in Ghana: Ewe and Akan Procedures on Females Inheritance and Property Rights" PhD thesis, International Institute of Social Studies of Erasmus University, Rotterdam, The Hague, Netherlands, (2009) 109-111, available online: repub.eur.nl/res/pub/32640/90-423-0372-7_DOK%5B1%5D.pdf

⁸⁵ Ama Fowa Hammond, "Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana, PhD thesis, The University of British Columbia, Vancouver, (2016), available online: <http://docplayer.net/48486835-Towards-an-inclusive-vision-of-law-reform-and-legal-pluralism-in-ghana-ama-fowa-hammond-a-thesis-submitted-in-partial-fulfilment-of-the-requirements.html> (last visited on 23 March 2018.)

⁸⁶ *The Rights of Indigenous Peoples, Kenya*, Country Report of the Research Project by International Labour Organization and the African Commission on Human and People's Rights (2009).

⁸⁷ Griffiths, *supra* note 55, at 3.

where other laws operate legally within the state but do not fit neatly into the compartments of the state's hierarchy of laws.⁸⁸

2.3.2 The Distinctiveness of Legal Pluralism in Africa

Legal pluralism does not exist solely in Africa. It also occurs in other parts of the world. However the form of legal pluralism found in Africa is different from that which occurs elsewhere. In the following paragraphs we will compare the form of legal pluralism that occurs in African societies to what occurs in Western societies to tell the difference between the two and highlight the distinctiveness of African legal pluralism.

First, there is the argument that customary law is not law at all, and that in Africa, the state legal system is the only legal system. Menski masterfully sums up Okupa's response to such incorrect representation of African customary law thus:

"Okupa (1998:1) indicates that early visitors to Africa found all kinds of legal Systems in operation and recognised familiar features, but their view were probably dismissed as romantic infatuation. Later, for legal scholars infused with Western positivism, African law was not law because it was just a vast jumble of local customary laws. Due to the prevalent orality of African cultures, lack of dependence on written documentation, and reliance on unacceptable

⁸⁸ Griffiths, *supra* note 55.

'primitive' value systems, it was considered impossible to find proper law. While such difficulties may exist for foreign observers, Africans knew that they had laws, and their ancestors had laws, too, and they experienced their respective 'living law.' Such manifold breakdowns in communication when it comes to understanding culture-specific concepts of law are again marked by meaningful silences and gaps of communication."⁸⁹

Second, Sally Engle Merry distinguishes African legal pluralism from American or Western legal pluralism in the following way: she classifies the simultaneous operation of indigenous and European law in colonial and post-colonial societies such as African states, as *classic legal pluralism*, and classifies the operation of state law and other forms of orderings within the same social field in non-colonized societies such as the U.S. and Britain since the 1970s as the *new legal pluralism*⁹⁰:

Legal Pluralism has expanded from a concept that refers to the relations between colonized and colonizer to relations between dominant groups and subordinate groups such as religious, ethnic, or cultural minorities, immigrant groups, and unofficial forms of ordering located in social networks or institutions."⁹¹

Most post-colonial African states fall into the category of Merry's classic legal pluralism. This is because during the colonial era European law was superimposed

⁸⁹ WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEM OF ASIA AND AFRICA*, (2nd ed., Cambridge.) Menski quotes Okupa Effa with approval: Okupa Effa, *INTERNATIONAL BIBLIOGRAPHY OF AFRICAN CUSTOMARY LAW IUS NON SCRIPTUM*, (Lit verlag, 1998) 1

⁹⁰ Merry, *supra* note 45 at 872.

⁹¹ Merry, *supra* note 45 at 872.

over indigenous law in those African societies and the colonial law assumed the position of official state law in those colonial societies over the pre-existing indigenous laws. Today, the European and indigenous laws coexist and operate simultaneously in those same African societies. Another form of legal pluralism is experienced in Western societies such as the U.S. and this type of legal pluralism falls into the category of Merry's new legal pluralism. This is because those Western societies exhibit the following necessary ingredients of the new legal pluralism: First, there is an official legal system on the one hand, and then other forms of orderings on the other hand, and both systems operating within the same social field. Second, the other forms of orderings "connect with the official legal systems" but are "separate from it" and "dependent on it" at the same time. Thus for example, the official state laws could guarantee the use of an individual's personal law under certain circumstances within the state. In such a case, the provision made in the official state laws for the non-state law demonstrates a connection between the state law and the other forms of orderings yet, the state laws constitute a legal ordering different from the other forms of orderings. At the same time, for the other orderings to be applied to an individual's situation at the official state level, the state laws must prescribe it; making the other forms of orderings dependent on the state laws. Thus new legal pluralism is manifested by plural normative orders operating simultaneously in a society with one of them being the official one, and being connected with the other ones, but at the same time separate from them and they in turn depend on it. In the US for instance, several normative orders operate simultaneously yet state (either Federal or state level) law is the official one. This state law connects with those

normative orders such as religious norms but those norms depend on it. For instance, if a religious norm permits polygamy in the United States, the state laws must additionally permit it, otherwise an individual cannot engage in polygamy.

Third, customary laws in Africa form a separate legal system from the state legal system unlike the plural normative orders found in western societies like the US. Therefore in Ghana for instance, the Constitution of Ghana recognizes and upholds customary law as a distinct and separate legal order from laws enactment by Parliament. Legal Pluralism (which involves the co-existence of state law and customary law) is upheld and recognized by the Constitution of Ghana. This is because Article 11 of the Constitution of Ghana recognizes the existence of more than one legal order—Article 11(2) provides that common law is a separate and distinct source of law and Article 11(3) provides that the rules of law which by custom are applicable to particular communities (meaning, customary law) is recognized by the Constitution.⁹²

Fourth, in African societies there is multiple plurality unlike the uni-dimensional plurality found in Western societies like the US. Using the example of Native Americans in the US, Native Americans are a single group of people whose laws

⁹² Constitution, supra note 80, Article 11(1) The Law of Ghana shall comprise-(a) This Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law. Article 11(2): The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature. Article 11(3): For the purposes of this article, “customary law” means the rules of law which by custom are applicable to particular communities in Ghana.

conflict with the national laws in the US. However in Africa, there are thousands of ethnic groups with different identities lumped together to coexist⁹³, different languages facilitating the way of life of the many ethnic groups⁹⁴ and different chieftaincies from which the ethnic groups take their authorities;⁹⁵ whose laws conflict with the national laws. The cultural organization of African peoples is held together by different customary laws which ordered their lives in the pre-colonial era, remained during the colonial era despite the introduction of European colonial laws, and continues to thrive even under current state laws of African states. For instance in Nigeria alone there are more than 200 ethnic groups and each group applies its specific customary laws within its community⁹⁶ and these laws conflict with the national law. Multiculturalism has resulted in the unique situation where in Africa, not only are individual rights guaranteed but Peoples' rights are also guaranteed under the African Charter on Human and Peoples' Rights (AFCHR).⁹⁷ The AFCHR therefore supports and protects the African version of legal pluralism. For instance, The AFCHR reaffirms the rights of Peoples' and obligates states to protect traditional values enshrined in customary laws observed by the community.⁹⁸ Thus if the customary laws prohibit the participation of PWDs in cultural activities, a violation of

⁹³ African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa* (2006) 23: Africa is characterized by *multiculturalism*. Almost all African states host a rich variety of different ethnic groups, some of which are dominant and some of which are in subordinate positions."

⁹⁴ Baylor University, *supra* note 3 <http://www.baylor.edu/mlc/index.php?id=11594> (last visited on 23 March 2018): The people and cultures of Africa are as diverse as its geography. Anthropologists have identified almost 3,000 different ethnic groups, which speak approximately 1,000 different languages.

⁹⁵ E. Adriaan B. van, Rouveroy van Nieuwaal, *States and Chiefs: Are Chiefs Mere Puppets?* *Journal of Legal Pluralism and Unofficial Law*, Issue No. 37-38 (1996.)

⁹⁶ Okeke, *supra* note 71 at 385.

⁹⁷ African Charter on Human and Peoples' Rights (AFCHR), Preamble and Articles 2, 3, 5, 17, 19, 20, 21, 22 and 60.

⁹⁸ AFCHR, *supra* note 96, Article 17(3).

which could anger the gods and cause the annihilation of the community, the individual PWD's right to participate in that cultural activity under the state laws, would have to give way to the communal right to survival under their customary laws, and in fact, both the individual and the State have a duty to protect the community's right. Anne Hellum suggests that this creates a situation of conflict of values.⁹⁹

Fourth, the amount of subject matter left by state law for determination by customary law in African societies is more than what Western societies reserve for determination by non-state law. For instance in Ghana the amount of subject matter left for determination by customary law is more than what US laws leave for Native American Indian law to determine. For example customary law predominantly governs family law issues, land law issues and chieftaincy issues in Ghana's legal pluralistic context. About 80% of lands in Ghana are held under customary law.¹⁰⁰ Allodial title (the highest land title in Ghana) usually belongs to stools or skins or families and not individuals or the state. All other titles derive from the Allodial title. Therefore the validity of land title in Ghana is determined by the customary law of the particular people involved, and not by state law. Consequently, most people asserting land ownership in Ghana will find their root of title under one customary law or the

⁹⁹ Hellum, *supra* note 4, 31-32

¹⁰⁰ W. Odame Larbi, *Ghana's Land Admin Project: Accomplishments, Impact and the way ahead*, Annual World Bank Conference on Land and Poverty, 2011, Available at <http://siteresources.worldbank.org/INTIE/Resources/475495-1302790806106/GOV5Pres2Larbi.pdf> (last visited on 23 March 2018): Odame Larbi, Chief Executive Officer of the Lands Commission of Ghana, gave a powerpoint presentation at a World Bank programme in which he indicated that 78% of land in Ghana is owned by traditional authority (stool, skin, clan and family), 20% by state and 2% through split ownership.

other.¹⁰¹ About 90% of marriages in Ghana are celebrated under customary law even if they are subsequently converted into civil law marriages.¹⁰² The norm is to be married first at customary law according to one's custom before being married under the Marriages Act. Marriage licenses issued by marriage officers authorizing parties to marry usually require parties to state who their spouses are under customary law. This practice has elevated the practice to the status of law: everyone is expected to marry under customary law before converting the customary law marriage into a marriage under the Marriages Act. Some people end up not performing the marriage under the Act after the customary law. The customary law marriage as is, is valid, or it can be registered as it is – a registered customary law marriage – or converted to a marriage under the Marriages Act.¹⁰³ Additionally, the Ghanaian Constitution reserves Chieftaincy matters to customary law.¹⁰⁴

Finally, due to the unique relationship between state law and indigenous laws in African societies with legal pluralism, there are certain instances where the indigenous laws actually take precedence over state law. For instance, the Ghanaian

¹⁰¹ Land Title Registration Act, P.N.D.C.L. 152

¹⁰² Raymond A. Atuguba, "Seven Phases in the Evolution of Customary Law in Africa: Signposts from Ghana," Lancaster University of Ghana, 2nd Colloquium on Law for Development: "Almost 100% of marriages in Ghana are (first) celebrated or wholly or partially performed according to the rules of customary law.

¹⁰³ Marriages Act of Ghana, 1884-1985, CAP 125; Customary Marriage and Divorce (Registration) Law, PNDC Law 112: Both Laws recognize a Customary Marriage as valid marriage in Ghana.

¹⁰⁴ Constitution, *supra* note 80, Article 270(1) provides that: "The institution of chieftaincy, together with its traditional councils as **established by customary law and usage**, is hereby guaranteed;" Article 270(2) provides that "Parliament shall have no power to enact any law which – (a) confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purpose whatsoever; ..."; and Article 270(3) (a) provides that: "Nothing in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, clause (1) or (2) of this article if the law makes provision for – (a) the determination, **in accordance with the appropriate customary law and usage**, by a traditional council..." (emphasis is mine)

Courts Act tries to privilege customary law in the resolution of civil disputes.¹⁰⁵ The Courts Act of Ghana privileges customary law in the resolution of civil disputes in the Courts Act of Ghana, 1993 (Act 459) sections 50-60. Under the choice of law provisions of Ghana's Courts Act, section 54 permits the court to use the personal law of parties to resolve civil disputes and has set out some rules to regulate this. The intended law of the parties as to the transaction is what will prevail where the intention is not clear. Law applicable to the devolution of estates shall be the personal law of the person and Law applicable to title where the persons involved have the same personal law, shall be that (their) personal law.

2.4 FACTORS PROMOTING LEGAL PLURALISM IN AFRICA

2.4.1 Colonization created two streams of law within the state

Legal pluralism was the natural consequence of colonization in Africa. In the pre-colonial era African societies had their own systems of governance. Most of these societies were lead by chiefs or traditional religious leaders. During the colonial era the colonial rulers were torn between directly ruling the population and indirectly ruling the population through indigenous leaders such as chiefs.¹⁰⁶ Where they chose

¹⁰⁵ Courts Act of Ghana, 1993, Act 459, sections 50-60.

¹⁰⁶ Rouveroy van Nieuwaal, *supra* note 95.

to indirectly rule the people, the leaders of the people: the chiefs, largely acted as intermediaries between the people and the rulers in administering the colonial state.¹⁰⁷ This allowed the chiefs to maintain their indigenous legal systems, allowing the people to keep their indigenous rules whilst continually finding ways for the people to obey the colonial rules. With time, and in some colonies, certain avenues were created by the colonial government through which they would give credence to some of the indigenous rules by first subjecting the indigenous or customary laws to a repugnancy test.¹⁰⁸ The Western European colonial masters superimposed Montesquieu's branches of government including Western-style formal legislative system on the indigenous system of governance and most post-colonial African states maintained the status quo with slight variation.¹⁰⁹

Colonization therefore created legal pluralism through the transplantation of formal state legal system and destabilization of lawmaking at the ethnic group level (without eliminating it.) Today ethnic group leaders continue to make rules recognized under the state laws just as the Legislature continues to enact state legislation.

2.4.2 The desire to maintain the African identity

¹⁰⁷ *Ibid*

¹⁰⁸ Courts Ordinance, Cap 4 (1951 Rev), section 87(1) *inter alia*, provided as follows: "Nothing in this ordinance shall deprive the Courts of the right to observe and enforce the observance ... of any native law or custom existing the Gold Coast, such law or custom not being repugnant to natural justice, equity and good conscience..."

¹⁰⁹ Rouveroy van Nieuwaal, *supra* note 95.

The preservation of Legal pluralism in Africa has been largely attributed to the claim to African identity. Generally Africans maintain a firm belief in the spiritual or metaphysical as part of their identity. They consider that such beliefs often have proper representation only in their customary laws and not in state laws. The result is their inability to relinquish their multiple and complex customary laws in favour of a unifying and homogenous state laws.

2.4.3 Presence of alternative systems

In Africa, there is the presence of an alternative system of everything – Politics, economics, social ordering, education, and science among others, that are in abeyance and are easily recalled in times of crises. Thus, for instance, whenever internal conflicts arise, such as through a coup d’etat or civil war, the state justice system falls into abeyance and it is usually the non-state justice system that delivers justice. In section 2.6.3 below I give an example of how Tanzania and Rwanda resurrected their non-state justice systems after conflicts to deliver justice when the state system was incapacitated owing to the conflict. Thus the presence of alternative indigenous systems in Africa that are easily recalled to fill a lacuna in governance in times of crises ensures that legal pluralism persists.

2.4.4 Lack of Formal Education

Lack of formal education in many parts of Africa engenders legal pluralism. People in most parts of Africa, particularly in rural communities, have limited access to formal education. Consequently, they gravitate towards the customary legal system which they are more familiar with and which does not appear complicated to them. For instance, when a crime is reported at a Police station (state legal system), the complainant may be required to make a formal report. Where the complainant has no formal education, simple acts such as a formal report may appear intimidating to him. Consequently such a person would prefer to access the customary legal system where he can fully understand his interaction with the chief or traditional leader. The lack of formal education therefore does not encourage access to the state legal system but rather encourages people to access their non-state legal systems thereby promoting legal pluralism within the African state.

2.4.5 Economic factors

Closely related to how the lack of formal education fosters legal pluralism in Africa is how economic factors also contribute to legal pluralism in Africa. Economic factors largely account for the prevalence of legal pluralism in Africa. The operation of the non-state legal system is not as costly and complicated as the formal state legal system. In a sense, to those who believe it, the non-state system delivers a much more

efficient dispute resolution mechanism than the state system. For instance in a land dispute with a neighbor a threat of invocation of a powerful deity to punish a neighbor who has encroached on your land without permission is likely to yield a positive and instantaneous result more quickly than the threat of a law suit knowing how slowly the wheels of justice turn. To invoke this deity all that one may need may be a few items within his household such as eggs, and the deity could work to kill the offending party. Due to the intersubjective knowledge about the power of the deities, the offending party immediately halts the mischief.

On the other hand, to go to court one may need to hire a lawyer and pay for his services, pay to file her case in court and bear transportation cost to attend court whilst leaving her work unattended. What is worse, the outcome of the case is not guaranteed to be in his favor. Again, a new law, Revenue Administration Act of Ghana, 2016, requiring a person to have a Tax Identification Number (TIN) before he or she could file a case in court, further increased the difficulty in access to formal justice. This law would have denied more than half of Ghana's population access to the justice through the court system because very few people at the non-state level have TIN numbers. Fortunately the High Court has overruled this law in the case of *Eric Asae v Ghana Growth Fund Company* (Suit No. IL/0034/2017). The informal system is therefore more accessible to the ordinary person, provides more efficient results for her, and is faster.

2.5 FACTORS OBSTRUCTING LEGAL PLURALISM IN AFRICA

2.5.1 Decentralization

Most African states have embraced the decentralized system of governance, making state agencies available at community levels to enforce state laws, and this accessibility to state law discourages the enforcement of non-state law at the lowest level of the governmental structure. There are traditional rulers in every community in most African states enforcing their rules in measured ways. During the colonial era when the traditional rulers functioned as intermediaries between the colonial rulers and the population the traditional rulers found innovative ways to continually enforce their traditional laws.¹¹⁰ In the post-colonial era, most post-colonial African governments stopped ruling the population through intermediaries and extended government agencies directly to community and district levels. The availability of government agents such as the Police is gradually shifting reliance for security and other concerns from the traditional rulers to the government agents at their community and district levels. This phenomenon has the potential of rendering non-state laws over issues redundant and eventually scrapping out other systems of laws in operation within the state.

¹¹⁰ *Ibid*

On the other hand, sometimes the local people, particularly those in the rural areas, find the operation of government agents such as the Police difficult to relate to. For instance, when a person commits an offence and is arrested by the Police, the remedy of the justice system and imprisonment is not something that the people can identify with. It is not their own. They would rather have the Chief reprimand the culprit and obtain restitution. So instead of the decentralized system achieving uniformity in the legal system, it promotes legal pluralism by encouraging local people to seek other systems of law they can identify with.

2.5.2 Education

The more educated people are, the less likely they are to consult fetish priests for solutions to their problems, and the more likely they are to seek redress in the state's courts rather than the chief's court and the more likely they are to challenge some of the laws of the non-state actors such as banishment from their communities. Formal education of the population is therefore likely to discourage reliance on non-state laws and non-state actors in favor of state-laws and state actors, resulting in the rejection of legal pluralism. Currently large populations in Africa are uneducated in the formal system but there is a movement towards improvement in education through policies such as Free Compulsory Universal Basic Education (FCUBE.) In Ghana, the government has introduced a Free SHS (Senior High School) Policy which ensure that students attend senior high school for free. The effect of this Policy is that

if one chooses to attend public school in Ghana, the she does not have to pay fees at all levels until College. Such policies will significantly reduce the numbers of people without formal education.

Of course, it can be argued in the alternative, that education promotes legal pluralism. As people acquire education, they realize that their indigenous legal systems are actually better-suited to their lifestyles than the transplanted legal systems that their states have inherited. They therefore seek various ways to hold on to the non-state level systems of law, including writing them into their state laws and ending up with a legal pluralistic system.

2.5.3 Consolidation of State power

The state is gradually reaching all unreached parts of the country, imposing its Montesquieu governance systems, obliterating the traditional governance systems, and thereby legal pluralism. For instance, these days it is commonplace to find the Police service in very remote parts of the country enforcing the state level laws. People report cases to them rather than the chief because the work of the Police is backed by the powers of the state. This practice shifts the confidence of the local people from their traditional governance systems to the state's (Montesquieu) governance system. The effect is the gradual erosion of legal pluralism.

2.5.4 Cost of maintaining plural legal systems within the state

The cost of maintaining more than one legal system within the state discourages some states from pursuing legal pluralism and they rather settle for a unified legal system being the state legal system. When a state gives recognition to more than one legal system within it, it ultimately bears responsibility for incidents flowing from the implementation of that legal system. Some of the responsibility is financial. For instance, in some parts of Africa, chiefs are paid by the state.¹¹¹ Such extra financial burdens discourage some governments from maintaining a plural legal system within their states.

2.5.5 Conflicting value systems within the same social field

Legal pluralism results in conflicting value systems within the same social field which does not allow for societal harmony so to maintain social harmony, people prefer to order their behavior according to a unified order. When people within the same social field order their behavior after different legal orders it can produce conflicting value systems and disharmony within the society. Lloyd Fallers of Princeton University says it can generate:

¹¹¹ Carolyn Logan, Traditional Leaders in Modern Africa: Can Democracy and the Chief co-exist? *Afrobarometer working Paper* No. 93, February 2008: "Traditional leaders have been banned, deposed and **paid state salaries** ..." (emphasis is mine.)

“... situations in which incompatible values and beliefs widely held by members of the same social system, where individuals are regularly motivated to behavior which in the eyes of others is deviant and where other individuals have conflicting motivations corresponding with discontinuities among the values of the social systems.”¹¹²

For instance, one person can decide to steal the goods of another because according to his value systems such goods should be freely accessible to all. Where the one whose goods were stolen does not share such values it can result in conflict within that society with each person feeling justified by his conduct because he acted according to the dictates of the legal system he follows.

2.6 POSITIVES OF LEGAL PLURALISM IN THE LEGAL SYSTEMS OF AFRICAN POLITIES

2.6.1 Legal pluralism helps protect cultural identity

In a modern state, state actors seek to present one identity for the whole nation at all times – whether in international affairs or in domestic budgets. Yet, as seen in most African countries, a nation may consist of many different sub-groups with different cultural identities, which are increasingly eroded as various aspects of nationhood

¹¹² Lloyd Fallers, *The Predicament of Modern African Chief: An instance from Uganda*, American Anthropologist, Vol. 57, 290; 295 (1955)

(including laws) compete for a single identity rather than multiple identities representing the nation. This erosion of the identities of subgroups within the state can negatively affect a people's "self-conception and self-perception..."¹¹³ and identity. Legal pluralism on the other hand allows for the operation and preservation of such cultural identities whilst protecting the national identity because it permits non-state laws stemming from the various cultural identities, and state laws stemming from the national identity to operate simultaneously within the state. This situation protects cultural identity because it gives non-state laws room to operate and develop to accommodate the evolving needs of its constituents.

2.6.2 Legal Pluralism teaches history to future generations

Flowing from the above advantage of legal pluralism is that the operation of multiple systems of laws will give future generations the benefit of a first hand understanding of their cultural and national histories. The enforcement of customary laws in the domestic lives of children – such as child naming ceremonies, rites of passage into adulthood, customary law marriage ceremonies and funeral rites connect the new generations with their predecessors. Although some parts of customary law may have been modified in keeping with official state laws and modern trends, observing and sometimes participating in the performance of those ceremonies in fulfillment of the

¹¹³ Definition of Cultural Identity, Wikipedia, available at https://www.google.com/?gws_rd=ssl#q=what+is+cultural+identity&* (last visited on 23 March 2018)

law, give younger ones practical knowledge of their culture and society which is not available in their history text books.

2.6.3 Legal pluralism makes indigenous systems of governance relevant in modern African states

Most post-independence African states operate according to Montesquieu government's separation of powers. However, the states' structures have been increasingly confronted with the insufficiency of this system to provide real solutions to the peculiar issues of African polities. Many African governments have therefore begun to tap into resources available through the indigenous systems of governments to resolve some of its challenges. For instance, the "sungusungu" institution in Tanzania was revived by (male) lineage-elders to solve crimes that modern-day courts could not solve in Tanzania after the war with Uganda, and after some resistance, was accepted by the state apparatus.¹¹⁴

"Sungusungu are vigilante groups that have been brought into existence in order to fight crimes such as murder, rape, cattle-theft and witchcraft. ... In the beginning the actions of the sungusungu groups were condemned ... and they were felt to be in competition with the judicial organisation. Therefore, people in the sungusungu groups were arrested. But as judicial forces continued to be incapable of fighting

¹¹⁴ Rouveroy van Nieuwaal, *supra* note 95, 66: "The following concerns the sungusungu that has come into being under the Sukuma and Nyamwezi in Tanzania since the 1980's."

the increasing stream of crime and the faith of the Tanzanian population in the Sungusungu groups grew, the opinion of the state also swung round. There then came a reactivation of a pre-colonial institution, the sungusungu, that was able to establish security and order. This was followed by legal recognition of the sungusungu as a successful alternative to the state judicial organization.”¹¹⁵

At the October 2017 TEDGlobal conference Chika Ezeanya-Esiobu, an indigenous knowledge expert and researcher on Africa’s knowledge system, specifically original authentic traditional knowledge, gave this enlightening account of how Rwanda used its traditional judicial system in the aftermaths of the 1994 genocide to solve over a million criminal cases within a record time.

“Gacaca is Rwanda’s traditional judicial system that was used after the genocide. In 1994, when the genocide ended, Rwanda’s national court system was in shambles; no judges, no lawyers to try hundreds of thousands of genocide cases. So the government of Rwanda came up with this idea to resuscitate a traditional judicial system known as Gacaca. Gacaca is a community-based judicial system, where community members come together to elect men and women of proven integrity to try cases of crimes committed within these communities. So by the time Gacaca concluded its trial of genocide cases in 2012, 12,000 community-based courts had tried approximately 1.2million cases. Most importantly, is that Gacaca emphasized

¹¹⁵ Rouveroy van Nieuwaal, *supra* note 95, at 66 – 67.

*Rwanda's traditional philosophy of reconciliation and reintegration as against the whole punitive and banishment idea that undergirds present-day Western style."*¹¹⁶

The *Sungusungu* and *Gacaca* accounts clearly show the value in maintaining indigenous legal systems alongside the official state legal system because the modern state legal system can tap into the indigenous knowledge of the indigenous legal system to help solve new challenges the state faces.

2.6.4 Legal pluralism offers alternatives to individuals

Legal pluralism offers alternatives to citizens in determining how they want to order their lives. The availability of multiple systems of law within the same social sphere of the state means that a citizen could choose and pick a suitable one and is not restricted to a particular legal order. For instance, where the law permits marriage under customary law and ordinance, a man may choose to marry only under customary law and therefore enjoy the benefit of unlimited number of wives instead of marrying under the ordinance and restricting himself to only one wife. Multiple systems of law therefore present alternative lifestyles to citizens which they can take advantage of to make live more enjoyable.

¹¹⁶ Chika Ezeanya-Esiobu, TED Talk 2007 https://www.ted.com/talks/chika_ezeanya_esiobu_how_africa_can_use_its_traditional_knowledge_to_make_progress (last visited on February 20 2018.)

2.6.5 Legal pluralism has the potential to make implementation of international human rights more effective

Flowing from the point made above, if traditional institutions can reach into traditional phenomenon to retrieve indigenous institutions or activities that can offer real solutions to today's problems in African polities, then legal pluralism has the potential to bring solutions to facilitate implementation of international human rights laws, which are different from the solutions already known, but which the population can identify with and which can be more effective. This capacity makes the chiefs potentially important actors in the processes of improving international human rights implementation. For instance, child marriage usually operates at the non-state level because customary laws permit marriage right after puberty whereas state laws, consistent with intentional human rights law, forbid the practice. The practice has been stopped inspite of the state laws. Recently, traditional leaders instituted fines to stem child marriage.¹¹⁷ This means that they abolished the customary law permitting child marriage and instituted punishment for the violation of the new customary law. When a traditional leader makes such laws it resonates more clearly with the people and is likely to achieve the attitudinal change required by the international law rather than the state law.

¹¹⁷ Myjoyonline <http://www.myjoyonline.com/news/2017/March-7th/traditional-rulers-institute-fines-to-stem-child-marriage.php> (last visited on 23 March 2018.)

2.7 NEGATIVES OF LEGAL PLURALISM IN THE LEGAL SYSTEMS OF AFRICAN POLITIES

2.7.1 Uncertainty whether to obey state laws or non-state laws

In situations where there is both state law and non-state laws on an issue citizens may be uncertain whether to obey the state laws or non-state laws. For instance, in the area of education of CWDs, whereas state laws may require CWDs to be educated, customary laws may require the killing of such a child to ensure the survival of the community. A parent of such a child may be torn between obeying the state law and enduring shame and stigmatization for the rest of his life whilst the child may never get a fair chance in life or obeying the customary law and losing the love of a child forever. If the situation of legal pluralism had not been present, the parent would not have been presented with these choices. Tamanaha aptly summarizes the point thus:

“They [pluralism of laws] may make competing claims of authority; ... This potential conflict can generate uncertainty or jeopardy for individuals and groups in society who cannot be sure in advance which legal regime will be applied to their situation.”¹¹⁸

¹¹⁸ Tamanaha, *supra* note 46, at 375.

“From the standpoint of a legal authority trying to consolidate its rule, legal pluralism is a flaw to be rectified. From the standpoint of individuals or groups subject to legal pluralism, it can be a source of uncertainty, but it also creates the possibility of resort to alternative legal regimes.”¹¹⁹

2.7.2 It makes the implementation of state law more difficult

When non-state laws co-exist with state laws within the state, implementation of state laws become problematic because individuals could opt to conduct their lives in accordance with non-state laws which they find more suitable to their beliefs. In Tamanaha’s view,

“This state of conflict also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims. ... pos[ing] a challenge to the legal authorities themselves, for it means that they have rivals. ... Law characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim.”¹²⁰

For instance, during the outbreak of the Ebola virus in 2014, state laws were passed in Liberia in August 2014 banning the burial of persons who died from the virus and

¹¹⁹ Tamanaha, *supra* note 46, at 385

¹²⁰ Tamanaha *supra* note 46, at 375

requiring that all such corpses be burnt.¹²¹ The reason was that “an Ebola victim is most contagious in the moments and days after death, when unprotected contact with infected bodily fluids carries an extremely high risk of transmission.”¹²²

Until the passage of this state law, when people die, customary laws on funeral and burial require bathing, dressing and even kissing the corpse.¹²³ Relatives buried the corpses and would subsequently visit the departed person’s grave. This ensured that close linkage with one’s ancestors. The new state law requiring cremations to be held in the capital and the burial of Ebola victims in body bags outside Monrovia (the Capital) without the presence of relatives, meant that people would not be able to identify their deceased loved ones or even locate their burial places to honour them. Consequently, “decoration days, where people flock to cemeteries to clean and decorate the graves of relatives, will come with many not knowing where the location of the remains of their loved ones [is].” The state law was therefore forcing a disconnect with dead loved ones which is an ideal promoted under customary law. It was therefore met with resistance. Consequently, rather than obeying the new state law in Liberia which would have curbed the spread of the virus quickly, people with the Ebola virus stopped attending health centers for treatment¹²⁴ and others secretly

¹²¹ The Guardian, <https://www.theguardian.com/world/2014/oct/24/ebola-cremation-ruling-secret-burials-liberia> (last visited on 23 March 2018)

¹²² Time, <http://time.com/3478238/ebola-liberia-burials-cremation-burned/> (last visited on 23 March 2018)

¹²³ *Ibid*

¹²⁴ The Guardian, *supra* note 121: “a recent analysis of bed space at Ebola treatment unit concluded that out of 742 spaces, only 351 were occupied.”

buried their loved ones who died of the virus in order to maintain their connection with deceased relatives.¹²⁵

2.7.3 Applicability of a subgroup's law to a particular transaction or conflict

Flowing from the preceding negative effect of legal pluralism, is the fact that legal pluralism creates the need for determining when a subgroup's law applies to a particular transaction or conflict and when it does not. As previously illustrated, in some African countries like Ghana, certain areas of the law such as Chieftaincy and land law has been designated by state law to be determined according to the subgroup law. Therefore, for instance, determining who should be rightful successor to a "throne" is done according to the laws of the particular subgroup to be governed. However there are still many grey areas of the law, especially family law, that not do fall under state law but under customary law but state law may not have designated them as such. It is necessary to fully designate which matters are to be determined according state law or sub-group law to ensure order within the state.

2.7.4 Changing applicable law

¹²⁵ *Ibid*

In states with legal pluralism there is the need for robust ways for people to change which laws apply to them or not. People's situations vary constantly. For instance marriage can change the applicable laws. For instance, a surviving wife would not be considered a member of her deceased husband's family under the customary law of Asantes in Ghana but would be considered a member of the deceased's family under state law.¹²⁶ Similarly, a child born to an Asante mother and an Ewe mother can choose whether to belong to the father's family and therefore observe patrilineal laws on inheritance or to belong to the mother's family and observe matrilineal laws on inheritance or change applicable customary law to maximize inheritance when it suits him or her. Changing applicable law creates unpredictability to people's situations and is unhelpful for social interaction.

2.7.5 Frustration of leaders and obstruction of national progress

From the above discussion, the situation of legal pluralism obstructs efforts at nation-building by national leaders. Legal pluralism creates additional hurdles for national cohesion. Leaders cannot assume a centralized system of governance to facilitate dissemination and implementation of laws but must consider an environment-appropriate solution at all times to maximize outcomes. For instance, in Ghana, Article 39(2) of the Constitution, 1992 provides that "The State shall ensure that

¹²⁶ T.E. Kyei, *Marriage and Divorce Among the Asante: A study undertaken in the course of the Ashanti Social Survey*, Cambridge African Monographs 14 (1945), 76: "Death of a spouse."

appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the person are abolished.” Since traditional practices are community specific, abolishing one community’s practice whilst accepting the other community’s practice could present obstacles that could be frustrating to state leaders.

2.8 DOMESTIC LEGAL PLURALISM IN AFRICA

(The case of Ghana)

The Constitution of Ghana recognizes the operation of multiple systems of law within Ghana: state law, customary law, and the common law.¹²⁷ However, the two systems of law that most Ghanaians rely on daily are the state law and customary law. Between these two systems of law, most rural Ghanaian rural dwellers rely more on customary law than state law whereas as urban dwellers rely more on state law than customary laws.¹²⁸ Of the two systems of law, customary law is the more prevalent legal system in Africa. Professor Muna Ndulo states that “In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law.”¹²⁹ A typical African can easily recall the customary law that governs an aspect of his life such as marriage but would likely not know the

¹²⁷ Constitution, *supra* note 80, Article 11.

¹²⁸ Hammond, *supra* note 85

¹²⁹ Muna Ndulo, African customary law, customs, and women’s rights (2011) *Indiana Journal of Global Legal Studies*, Vol. 18:Iss. 1, Art. 5.

appropriate state law governing the same issue. On the issue of the validity of customary law as a source of Nigerian law, Obaseki, J.S.C. (as he then was) put it thus: “Customary Law is organic or living law of the indigenous people [of Nigeria] regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of those entirely subject to it.”¹³⁰

Atuguba identifies seven types of customary laws in operation in Africa, using Ghana as a case in point.¹³¹ These are Pristine customary law¹³², Judicial customary law¹³³,

¹³⁰ *Oyewumi v. Ogunesan*, Judgment delivered on Friday the 4th of May 1990 in the Supreme Court of Nigeria, judgment of the Court delivered by Andrews Otutu Obaseki, J.S.C., See also *Lewis v. Bankole* [1908] 1 NLR 81, 100-01 (Nigeria.)

¹³¹ Atuguba, *supra* note 102.

¹³² Atuguba, *supra* note 102, explains Pristine customary law thus: Pristine customary law describes the elaborate law that Africans made for themselves and lived by before contact with Islam (and then Euro-Christianity) and before colonialism.” The Islamic invasion, the Christian invasion and subsequent colonial rule diluted the pristine customary law. Although the invaders and colonial rulers kept records of what they considered to be the customary laws of the people, their recordings are questionable due to ‘recording errors, translation errors, self-serving accounts, biased accounts’ and the ‘general African belief and practice of keeping the outsider away from the details of what it does.’

¹³³ Atuguba, *supra* note 102, explains Judicial customary law thus: Judicial customary law. This type of customary law evolved from the application of the European colonial rulers’ repugnancy clause to customary law “to ensure that only rules of Customary Law which are consistent with European notions of “natural justice, equity and good conscience” are recognized and enforceable.” (Raymond, 2017) Today the Constitutions of various African countries with legal pluralism permit only customary laws that are consistent with the Constitution

Codified customary law¹³⁴, Statutorily instituted customary law¹³⁵, Complementary customary law¹³⁶, Insular customary law¹³⁷, Declared customary law.¹³⁸ Other customary law scholars such as Hammond identify a fewer number of customary law types in Ghana: The Living customary law¹³⁹, Judicial customary law¹⁴⁰ and Islamic customary law¹⁴¹.

¹³⁴ Atuguba, *supra* note 102, explains Codified customary law thus: Codified customary law describes the situation where the rules of customary law are written into statute or distilled by authorities on customary law or customary law publicists. For instance, Ghana's intestate succession law and the Wills Act are statutes that have customary law written into them; Ghana's National House of Chiefs has been constitutionally mandated to undertake a process of codifying customary law and assimilation customary law into the common law and distilling customary law; and publicists such as Dr. J B Danquah and Professor Kludze have written treatises on customary law that are now used as authorities on defining customary law.

¹³⁵ Atuguba, *supra* note 102, explains statutorily instituted customary law thus: Statutorily instituted customary law refers to situations where new state laws are made which have the effect of setting down new rules of customary law. Sometimes the new customary laws may be found in the writings of publicists. This change to customary law can be used to improve implementation of international human rights domestically. The only issue is that sometimes the people reject the new rule and other times the people accept the new rules.

¹³⁶ Atuguba, *supra* note 102, explains Complementary customary law thus: Complementary customary law describes the situation where customary law is used to fill gaps in basic rules of statute and of common law to facilitate daily. Therefore the customary law rules complement the basic law. For example, Family law tribunals use customary law. Customary law used in interpersonal arbitration.

¹³⁷ Atuguba, *supra* note 102, explains Insular customary law thus: Insular customary law is used to describe the situation where the state (or basic) law complements customary law rules; particularly in the areas of land law, family law and Chieftaincy, customary law is supplemented by the basic law. Other form of law operate in tandem and parallel to rules of customary law in particular domains in social life, leaving the rules of Customary law intact, allowing them to evolve on their own.

¹³⁸ Atuguba, *supra* note 102, explains Declared customary law thus: Declared customary law refers to situations where new rules of customary law are declared as such and old rules of customary law are declared as invalid customary law.

¹³⁹ Hammond, *supra* note 85 explains Living customary law thus: Living customary law is the customary law as practiced by people on a daily basis. When issues arise from such practices the Courts decide the validity of such customary laws.

¹⁴⁰ Hammond, *supra* note 85 explains Judicial customary law thus: Judicial customary law is living customary law that has been subjected to judicial modification. Courts may amend some of the customs and practices of various groups to make them consistent with the provisions of the Constitution. The outcome of such judicial processes is a form of customary law that is usually described as judicial customary law (because it is detached from the actual customary law as practiced by the population.)

¹⁴¹ Hammond, *supra* note 85 explains Islamic customary law thus: Islamic customary law is the Islamic law practiced in the courts in Ghana. Often people in the Muslim communities in Ghana practice their tribal laws in addition to Islamic laws so when issues such as marriage are presented to the courts the courts apply the Islamic law to Muslims as their customary law in order not to get mixed up on which law should apply to a particular issue.

Customary law is very relevant in Ghana and Africa today. The reasons for the continued relevance of customary law in modern day Africa are many. First, customary law is not static – it continually evolves to accommodate changes in the lives of its subjects.¹⁴² For this reason many scholars in their field are against the codification of customary law as this could undermine the evolving character of customary law. In many African countries, judges still refer to treaties of African scholars who lived almost a century ago to ascertain the customary law governing particular issues such as land law. This practice undermines any changes to the customary law that may have occurred subsequently. Second, Africans need their customary laws in order to survive. Okupa asks why ‘African customary law has not fallen into abeyance despite the onslaught of authoritative modernity in the form of state laws?’ The answer she gives is that people in Africa need their local laws as before to survive¹⁴³. Thirdly, customary law provides the kind of dispute resolution/judicial system that Africans understand best. The Senior Vice President and General Counsel at the World Bank aptly sums up this position:

“Customary law systems in common law African countries help meet a fundamental need for justice, and thus provide an important complement to formal justice institutions. Their enduring popularity is an indication of their importance to the lives of the majority of people in Africa. They are also a testament to the fact that the States in many countries have failed to provide access to justice to most of the

¹⁴² Christopher Tomlins and John Comaroff, “Law as...” *Theory and Practice in Legal History*, available at <http://www.law.uci.edu/lawreview/Vol1No3Articles/TomlinsandComaroff.pdf> (last visited on 23 March 2018.)

¹⁴³ Menski, *supra* note 89 at 391.

population¹⁴⁴. Customary law tribunals have many valuable features which are well known to all of you. They are infinitely more accessible to the average person in Ghana than the formal courts. Traditional tribunals are inexpensive, efficient, and often geographically very close to users. Their proceedings are easily understood by users because they generally use a vernacular language and avoid legalese. They thus provide communities with a sense of ownership and social cohesion.¹⁴⁵”

He further stated that where appropriate, customary law encourages mediation and reaches decisions that “are restorative and tend to rebuild community relations, as opposed to the formal judiciary which can be adversarial. The laws applied by these customary tribunals tend to be flexible and to take into account current local values and mores. These laws evolve naturally with the communities.¹⁴⁶”

The range of the people implementing other laws and creating situations of domestic legal pluralism within African states include the following:

- a) Chiefs implementing customary laws
- b) Muslim imams implementing Islamic laws across a variety of issues; for instance marriage, inheritance and succession
- c) Catholic priests implementing canon laws
- d) Mallams and soothsayers implementing spiritual laws

¹⁴⁴ Roberto Dañino, World Bank: <http://siteresources.worldbank.org/INTLAWIUSTICE/214576-1139604306966/20817148/CustomaryLawGhana120505.pdf> at 1.

¹⁴⁵ Dañino, *supra* note 144 at 2

¹⁴⁶ *Ibid*

e) Traditional or fetish priests implementing spiritual laws

2.8.1 Chiefs implementing Customary Law

As mentioned in the preceding section, most African communities were chiefdoms before they were colonized. The chieftaincy institution remained during colonization and still continues in this post-colonial era. In Africa today, some Chiefs trace their legitimacy, authority and power from pre-colonial era¹⁴⁷ whilst others trace theirs to the colonial governments because the colonial masters created them during the colonial era. Chiefs' powers have been modified over time and are not the same across Africa. Their relation with their post-colonial states is not the same across Africa and their relation with their subjects is no longer the same. For instance, the Berbers of north west Africa, for instance Morocco, had chiefs but their colonizers and the people did not attribute the same kind of authority to those chiefs as for instance, Asantes of southern Ghana attribute to their chiefs who "could, and still can, make claims to political legitimacy, authority, and even sovereignty on grounds that predate the colonial and post-colonial states in terms of time, and can make these claims on the basis not only of politics but also of religion."¹⁴⁸ We now examine how the chieftaincy

¹⁴⁷ E. ADRIAAN B. VAN ROUVEROY VAN NIEUWAAL and WERNER ZIPS eds., SOVEREIGNTY, LEGITIMACY, AND POWER IN WEST AFRICAN SOCIETIES: PERSPECTIVES FROM LEGAL ANTHROPOLOGY, (Lit Verlag, 1998): Chiefs in Ghana occupy a unique position. They have their "own roots of legitimacy" – sacred authority, which pre-dates the pre-colonial era and through which they have retained various degrees of sovereignty through the pre-colonial, colonial and post-colonial eras.

¹⁴⁸ Donald I. Ray and E. Adriaan B. van Rouveroy van Nieuwaal, *The New Relevance of Traditional Authorities in Africa: The Conference; Major Themes; Reflections on Chieftaincy in Africa; Future Directions*, Journal of Legal Pluralism and Unofficial Law, The Ghana Conference, Vol. 37-38 (1996), 13.

institution operates alongside the state legal system as an example of how legal pluralism operates in fact in Africa today.

The chief is the head of his community. In the pre-colonial era, chiefs had their own political structure.¹⁴⁹ A Chief exercised executive, legislative and judicial authority over his subjects. Chiefs made laws with their elders (council members) and enforced their laws through their elders, sub-chiefs and subjects.¹⁵⁰ During the colonial era, the colonial masters created administrative chieftaincy through their state administrators; turning existing chiefs into intermediaries between the state and his people and creating new chieftaincies to rival non-complying ones and using the new chiefs to administer those territories.¹⁵¹ Post-colonial era saw both the continuation of the administrative chieftaincy and the introduction of the political chieftaincy.¹⁵² The bases of power and authority of African chiefs had begun to shift in favour of the state during the colonial era and in the post-colonial era, chiefs now depended on the central administrative apparatus for their legitimacy thereby politicizing chieftaincy.¹⁵³ The central government assigned chiefs some roles whilst restricting

¹⁴⁹ Rouveroy van Nieuwaal, *supra* note 95.

¹⁵⁰ Peter Skalnik, *Authority Versus Power: Democracy in Africa Must Include original African Institutions*, *Journal of Legal Pluralism*, (1996): Peter argues that African indigenous institutions were genuinely democratic but did not necessarily conform to the European conceptions of representative democracy.

¹⁵¹ Rouveroy van Nieuwaal, *supra* note 95. For example, Togo, South Africa and Rhodesia.

¹⁵² The Chiefs' Act of Kenya, Chapter 128 of the Laws of Kenya, section 6: 'It shall be the duty of every chief or assistant chief to maintain order in the area in respect of which he is appointed, and for such purpose he shall have and exercise the jurisdiction and powers by this Act conferred upon him over persons residing or being within such area.' Chiefs and assistant chiefs in Kenya were assigned administrative roles by the state.

¹⁵³ The Chiefs Act of Zambia, Chapter 287 of the Laws of Zambia, sections 1 and 3: A person must be recognized as a chief by the President of the country in order to hold the office of a chief. Section 4 of the Act permits the President to suspend or withdraw the recognition.

the powers of the chiefs and in some post-colonial states, some Chiefs have been destooled or demoted for falling out of favour with ruling governments.¹⁵⁴

One of the important roles maintained by chiefs from the pre-colonial era, through the colonial era to the present post-colonial era is implementation of customary law. Chiefs have found innovative ways to enforce these customary laws even in the face of state laws. The enforcement of these customary laws raises the following questions for their subjects: are those subjects “persons-as-citizens” of their states or “persons-as-subjects” of their chiefs or are they both? For instance if the person wants to travel outside of the country he has to go under the umbrella of person-as-citizen of the state – because he needs a passport; but if for instance he has a land dispute to settle with his kinsmen then he becomes a person-as-subject of the chief. This tension between ‘citizen’ and ‘subject’ continues in many African states¹⁵⁵ and has arisen because chiefs have found ways to maintain some of their authority and to continue enforcing customary laws.

2.8.2 Muslim Imams implementing Islamic Law

¹⁵⁴ In Malawi, Twenty-two Chiefs were demoted in 2015: <http://mwnation.com/22-malawi-chiefs-demoted/> In Togo during Gnassingbe Eyadema’s term as President he found a way to make chiefs a part of his ruling political party; Rouveroy van Nieuwaal, *supra* note 94, 42 – 43 “For instance, in 1987 General Eyadema, the President of Togo ... added the chiefs, who had been united in 1972 in an *Union Nationale des Chefs Traditionnels du Togo*, as an *aille marchante* (marching wing) to his *Rassemblement du Peuple Togolais*.”

¹⁵⁵ Donald I. Ray, *Divided Sovereignty: Traditional Authority and the State in Ghana*, Journal of legal pluralism 1996, 12: Ray uses the Konkomba and Nanumba conflicts in Ghana to exemplify this.

The Islamic religion is one of the major religions in Africa. An Imam is the leader of a Muslim community or the worship leader of a Mosque. He implements Islamic religious rules across a variety of issues such as marriage, inheritance and succession for members of the Muslim community. Those rules are sometimes different from the state laws on the same issues as marriage, inheritance or succession. This raises a variety of questions. For instance in the area of marriage: is the marriage contracted under Islamic law valid in a non-Islamic state? Since the Holy Quran permits a Muslim man to be married to up to four wives at a time¹⁵⁶ yet most statutory marriages in Africa admit of one-man-one-wife what recognition is to be given to the one-man-multiple-wives marriage contracted under valid Islamic law?

In the area of inheritance, when the Imam facilitates the distribution of the estate of a Muslim who dies intestate according to Islamic laws of inheritance can this distribution be valid in the face of a state law permitting the distribution of the deceased's estate in a different manner? Whereas state laws do not generally distribute property on the basis of gender, the Quran permits a male to receive twice the share of the property that the female receives.¹⁵⁷ Thus where children including a non-Muslim daughter survive a deceased Muslim, the daughter would be entitled to less property under Islamic laws of inheritance but more property under the state's laws of inheritance.

¹⁵⁶ Quran 4:3: "Marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess."

¹⁵⁷ Quran 4:11: "Allah commands you regarding your children. For the male a share equivalent to that of two females."

2.8.3 Catholic priests implementing Canon Law

The Catholic Church is a prominent Christian denomination in Africa.¹⁵⁸ The Church has its own laws which are canon laws and Catholics are supposed to abide by those laws as part of the practice of the faith. The Catholic priest administers the canon laws on a daily basis in addressing various issues confronting members. One of such issues is marriage. There are strict canon law rules on validity of marriage. For instance, a marriage is not valid until it is consummated. Non-consummation of a marriage is a valid grounds for annulment of a catholic marriage whereas it is not a ground for annulling a statutory marriage. Consequently, a priest may implement the canon laws to declare a marriage as non-existing or invalid whereas that same union exists and is valid under the state's family laws.

2.8.4 Mallams and soothsayers implementing Spiritual Law

Mallams and Soothsayers are spiritual leaders who are believed to have the power to foresee future events.¹⁵⁹ They warn their patrons about those events and advise them on what they need to do to avoid the negative consequences of those events. The

¹⁵⁸ As at 2007 there were about 176 million Catholics in Africa

<http://www.usatoday.com/story/news/world/2013/03/12/catholic-church-africa/1963171/>

¹⁵⁹ Definition of Soothsayer: <https://en.oxforddictionaries.com/definition/soothsayer>

spirituality attached to these warnings make the patrons of the Mallams and soothsayer follow through with their advice. For instance a soothsayer in the northern part of Ghana may declare a child whose birth coincides with a major family tragedy as one born to undermine the economic advancement of his or her family and therefore advice that the family brings the child to him to be killed if the family wishes to prosper financially.¹⁶⁰ When such a child is brought the soothsayer implements his spiritual law by killing the child. The right to life of that child which is guaranteed under the Constitution¹⁶¹ and under the Children's Act of Ghana¹⁶² is violated by the soothsayer in the implementation of his 'said' spiritual laws.

Mallams are frequently consulted in Africa for spiritual protection and guidance for every situation. The Mallams, like the soothsayers, prescribe activities for their patrons to undertake in order to achieve their desired goals. In 2014, President Goodluck Jonathan of Nigeria, in an attempt to solve the problem of the Boko Haram terrorists consulted Mallams from Senegal. He invited them to his Presidential villa

¹⁶⁰ Anas Aremeyaw Anas, is the Ghanaian investigative journalist who uncovered the story of "spirit children." The practice is that a parent experiencing financial hardships (usually, the father) consults a soothsayer (traditional spiritualists; different from herbalists) who upon divination attributes the father's economic woes to one of his children. He advises the father to present the child to be killed as remedy. When the child is brought the soothsayer administers a poisonous concoction to the child orally, killing the child. In the report, Anas posed as a father who was facing economic hardship and consulted a soothsayer. The soothsayer attributed the hardship to Anas' son (except that Anas did not have any children but had pretended to the soothsayer that he had a son.) The soothsayer then invited him to present the son to be killed as solution to the hardship. At the appointed time, as the Soothsayer was about to administer the poisonous concoction to the dummy child presented by Anas, the Police moved in and arrested the Soothsayer. The full documentary is available at <http://www.aljazeera.com/programmes/peopleandpower/2013/01/201319121124284358.html> (last visited 23 March 2018.)

¹⁶¹ Constitution, *supra* note 80, Article 13(1): "No person shall be deprived of life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted."

¹⁶² Children's Act of Ghana, 1998, Act 560, section 6(2): "Every child has the **right to life**, dignity, respect, leisure, liberty, health, education and shelter from his parents." (emphasis is mine.)

to undertake spiritual exercises aimed at bringing an end to crisis caused by Boko Haram.¹⁶³

2.8.5 Traditional / fetish priests implementing Spiritual Law

Various communities in Africa usually have an oracle, voodoo or fetish they consider as protecting them. The fetish priest acts as the liaison between the oracle or fetish and the people (collectively and individually.) He is therefore the spiritual head of people in the community and thus highly revered. Usually he gives rules of conduct purporting to emanate from the oracle or god for the community. It is believed that when the community or individual follows the rules laid down by the god they prosper but when they violate those rules it angers the god and misfortune may befall them. Sometimes the very survival of the community or individual may be threatened. To avoid the misfortune, the community or person who consults the fetish priest usually abides by all the laws of the god as relayed to them by the fetish priest. For instance, there are certain specific days of the week that the gods usually set aside for rest. On those days members of the community may not farm or fish. When a member of the community violates this rule by farming or fishing on those days reserved for the resting of the gods the consequence is that he or she must be banished from the community. The fetish priest implements this rule by leading the person to the

¹⁶³ Story of President Goodluck Jonathan of Nigeria and the Mallams is available at: <http://nationalmirroronline.net/new/boko-haram-jonathan-invites-senegalese-mallams-for-prayers/> (last visited on February 22 2017.)

outskirts of that township or community and performing the necessary rituals before physically driving the person out of the area. The fetish priest implementing these “laws” is at variance with international norms guaranteeing the dignity of the person and the individual’s right to independently live and be included in a community.

2.9 LESSONS FROM DOMESTIC LEGAL PLURALISM FOR THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS IN AFRICAN STATES WITH LEGAL PLURALISTIC CONTEXTS

2.9.1 Conflict of laws situation

In colonial times conflicts arose and continue to arise in the post-colonial African states between the various systems of law in operation within those jurisdictions. In Ghana categories of internal conflict of laws that can arise include conflicts between customary law and statute; customary law and common law; customary law and Islamic law; customary law and customary law; statute and common law; statute and Islamic law; statute and statute; and common law and Islamic law. The internal conflict of laws that occur in African states with legal pluralism is resolved through certain rules¹⁶⁴; but those rules for the resolution of internal conflict of laws do not

¹⁶⁴ Rules for the resolution of internal conflict of Laws in Ghana are found in the following case law: *Re Canfor: Canfor v Kpodo* [1968] GLR 177 [note reversed by CA on 5th August 1969]; *Owusu v Agyepong* [1971] 1 GLR 56; *Whittaker v Choiteram* [1971] 2 GLR 267; *Youhana v Abboud* [1974] 2 GLR 201 CA;

apply to conflicts that arise in the domestication of public international law—conflict between national and international law; and conflict between customary law and international law. A different approach is therefore required in order to achieve domestication of international human rights laws in African states with legal pluralistic contexts.

2.9.2 Acknowledge differences between homogenous and heterogeneous societies

Again, the process of domesticating one type of international law in different systems of law (heterogeneous societies) is more complex than domesticating one international law in one system of national law (homogenous societies). This is the fundamental. Generally societies are homogenous, and after receiving an international law into the state's municipal laws the assumption is that there is a straightforward process by which the individuals within the state make the international law their own. This straightforward process is absent in heterogeneous societies and it is important to acknowledge the difference between the two societies.

2.9.3 Acknowledge different types of gatekeepers in legal pluralistic societies

In re Larbi (deceased) Larbi v Larbi [1977] 2 GLR 52; King v Elliot [1972] 1 GLR 54 CA; Yirenkyi v Sakyi [1991] 1 GLR 217; Dr. Owusu Afriyie Akoto v Adwoa Abrefi [2011] 1 SCGLR 533; and the following statutes Matrimonial Causes Act, 1971 (Act 367); Choice of law rules in section 54 of the Courts Act, 1993 (Act 459) particularly rule 6.

States with legal pluralism acknowledge that there is a range of people implementing other laws within the state and creating situations of legal pluralism such as chiefs implementing customary laws and traditional or fetish priests implementing spiritual laws. That acknowledgement is very necessary if the state is to ensure compliance with its own official state laws because it shows state officials the potential gatekeepers who can allow or obstruct the successful implementation of the state laws in that society. State officials therefore develop appropriate strategies to work with these gatekeepers to achieve the state goals. Similarly, in implementing international human rights treaties in African states with legal pluralism, it is necessary for the state, human rights treaty bodies and NGOs to acknowledge that there are gatekeepers who are already enforcing their non-state laws and they must develop strategies for working with these gatekeepers to ensure the successful implementation of human rights treaty. Targeting individuals in the community directly without recourse to these gatekeepers will result in limited successes in the treaty implementation.

2.9.4 Tap into authentic indigenous knowledge

The cases of *sungusungu* in Tanzania and *Gacaca* in Rwanda discussed above¹⁶⁵ demonstrate that Africa's own traditional, authentic, original, indigenous knowledge is a wealth of resource available to the official state system which the state system

¹⁶⁵ See Section 2.6.3. above.

can tap into to help resolve modern day challenges. Applying this to the implementation of international human rights, instead of UN human rights treaty bodies insisting that African states demonstrate compliance with the relevant international human rights treaties by following the same universal one-size fits all method used by all other states, it can allow African states to tap into sub-group level indigenous knowledge to enable them achieve the overarching principles of the human rights treaties.

2.9.5 Create alternatives

Human rights treaty bodies should give African states with legal pluralism alternatives to the overarching principles enshrined in the treaties and this would facilitate treaty implementation in those states. For instance, in African states with legal pluralism, state laws recognize different types of marriages which reflect the different legal systems operating within those African states. Similarly, UN Human rights treaty bodies could begin to give alternatives in their recommendations to State Parties during their state reporting which show an acknowledgement of legal pluralism within states. That kind of latitude would make it easier with African states with legal pluralism to comply with the treaty.

2.10 CONCLUSION

Most post-independence African states have multiple systems of law in operation within those states. In this chapter we have examined what legal pluralism is and what makes African legal pluralism distinct from what occurs elsewhere. We also examined how legal pluralism operates within African states, its advantages and disadvantages, and the factors promoting and obstructing legal pluralism in Africa. Additionally, we attempted to draw lessons from the operation of domestic legal pluralism in Africa for the domestication of international human rights norms in Africa. We will now examine why African states poorly implement international human rights treaties.

3 CHAPTER THREE:

WHY AFRICAN STATES POORLY IMPLEMENT INTERNATIONAL HUMAN RIGHTS TREATIES

3.1 INTRODUCTION

An examination of African state party reports to United Nations treaty bodies shows that generally the degree of implementation of international human rights treaties does not meet the standard required by the treaties.¹⁶⁶ In this chapter we will examine: how international human rights law is incorporated into domestic legal regimes in Africa, the reasons why African states still poorly implement international human rights treaties even after incorporation, who is responsible for causing this situation and how they cause it; and finally, who is responsible for improving the situation and how they can do so.

¹⁶⁶ OHCHR Webpage makes available state party reports of all state parties to all the UN Human Rights treaties: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en

3.2 HOW INTERNATIONAL LAW IS INCORPORATED INTO DOMESTIC COURTS IN AFRICA (The case of Ghana)

There are many ways by which international law is incorporated into domestic courts in Africa. This section uses the situation in Ghana to identify these methods of incorporating international law into domestic laws in African states with legal pluralism.¹⁶⁷

International law is not expressly listed as a source of law in the Constitution of Ghana, 1992.¹⁶⁸ However Ghana incorporates international law into its domestic Law in the following seven ways: incorporation by the dualist process; incorporation by resolution of Parliament; incorporation by international law and domestic law coinciding; incorporation by reference; incorporation by interpretation; incorporation by using international law to fill the lacuna in domestic law and incorporation of customary international law through the common law.¹⁶⁹

The first process is incorporation by the dualist process. Ghana like most common law African states, subscribes to the dualist approach of incorporating international law domestically. Therefore, after the President of Ghana executes or causes the

¹⁶⁷ It is noteworthy that Ghana is a former British colony and therefore she follows the common law dualism tradition unlike other civil law African states such as Togo, which follow the monism tradition.

¹⁶⁸ Constitution, *supra* note 80, Article 11: This Article lists the sources of law in Ghana and it does not expressly include international law.

¹⁶⁹ Raymond A. Atuguba, Kofi Annan International Peacekeeping Training Centre (KAIPTC) Executive Master of Arts Degree in Conflict, Peace and Security (EMCPS 2) 2017 – 2018 Academic year. Lecture 1 (9th March 2018.)

execution of a treaty, agreement of convention, the Parliament of Ghana must enact an enabling legislation to domesticate the international law, which the President will assent to. When these are done (usually in the form of an Act of Parliament with the Treaty or Convention annexed to it as a schedule to the Act), the enabling legislation carries the full force of law in Ghana.¹⁷⁰ This requirement is laid down in Articles 75(2)(a) and 106 (1) of the Constitution of Ghana, 1992. Article 75 (2)(a) of the Constitution of Ghana, provides that “A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by [an] Act of Parliament.”¹⁷¹ Once the enabling legislation receives the Presidential assent, it assumes the same status as any other Act of Parliament in Ghana and overrides any other prior laws that may be inconsistent with it. This is because, Article 106(1) provides that once the present assents to a Bill that Bill becomes Law in Ghana: “The power of Parliament to make laws shall be exercised by bills passed by Parliament and assented to by the President.”

The second process of domesticating international law in Ghana is incorporating by resolution. The Constitution of Ghana, 1992, Article 75(2)(b) provides that “A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.”¹⁷² However ratification by resolution does not incorporate the international law into the domestic laws of Ghana in the

¹⁷⁰ Constitution, *supra* note 80, Article 106

¹⁷¹ Constitution, *supra* note 80, Article 75(2)(a).

¹⁷² Constitution, *supra* note 80, Article 75(2)(a)

same way that ratification by the enactment of an enabling legislation does. This is because, unlike ratification by Act of Parliament, ratification by resolution does not give the international agreement force of law in Ghana and the international agreement cannot override other prior Acts of Parliament (and Regulations) in Ghana. It only signifies that Ghana is bound by the agreement internationally.

The following decisions by the Supreme Court of Ghana clearly explain the difference between ratification by an Act of Parliament and ratification by resolution of Parliament. First, in ***Republic v. High Court (Commercial Division) Accra; ex parte Attorney General (NML Capital – Interested party)*** (2013), Date-Bah JSC states: *“...treaties, even when the particular treaty has been ratified by Parliament, do not alter municipal law until they are incorporated into Ghanaian law by appropriate legislation. This position of the Law is usually referred to as reflecting the “dualist” school of thought, as distinct from the monist approach followed by some other States... . The mere fact that a treaty has been ratified by Parliament through one of the two modes indicated above does not, of itself, mean that it is incorporated into Ghanaian law. A treaty may come into force and regulate the rights and obligations of the State on the international plane, without changing rights and obligations under municipal law. Where the mode of ratification adopted is through an Act of Parliament, that Act may incorporate the treaty, by appropriate language, into the municipal law of Ghana... . The need for the legislative incorporation of treaty provisions into municipal law before domestic courts can apply those provisions is reflective of the dualist stance of Commonwealth common law courts and backed by a long string of authorities...”*

Second, in ***Faroe Atlantic Co. Ltd v Attorney General***¹⁷³, the Supreme Court of Ghana confirmed that an international agreement which does not receive the required Parliamentary resolution would be set aside. In that case Date-Bah JSC said: *“The plain meaning of article 181(5) would appear to be that where the Government of Ghana enters into “an international business or economic transaction” it must comply with the requirements, mutatis mutandis, imposed by article 181 of the Constitution. Those requirements clearly include the laying of the relevant agreement before Parliament. The agreement is not to come into operation unless it is approved by a resolution of Parliament. On the facts of this case, since the Respondent neither pleaded nor proved any such Parliamentary approval, this provision would be fatal to their claim in this action, unless an examination of this issue is foreclosed by res judicata... In my view, the Power Purchase Agreement was clearly an international business transaction and therefore needed to comply with the obligations imposed in relation to it by article 181(5).”*

Finally in the case of ***Martin Amidu v Attorney-General, Isofoton & Forson***¹⁷⁴, the Supreme Court of Ghana referred to the case of *Faroe Atlantic Company Ltd v. Attorney-General* (above) where it had held *“that an economic or business transaction between the Government of Ghana and a foreign registered and resident company was an international business transaction within the meaning of Article 181(5) of the 1992*

¹⁷³ *Faroe Atlantic Co. Ltd v Attorney General* [2005-2006] SCGLR 271

¹⁷⁴ *Martin Amidu v Attorney-General, Isofoton & Forson* [2013-2014] 1 SCGLR 167

Constitution and therefore it had to be laid before Parliament and approved by it. Failure by the Executive to secure such Parliamentary approval would result in the nullity of the relevant agreement.”

In spite of the above decisions, Articles 40 and 73 of the Constitution of Ghana, 1993, urge government to fulfill its international legal obligations even when those obligations have not been domesticated.¹⁷⁵ This was the holding by the Supreme Court in the celebrated case of ***New Patriotic Party v. Inspector-General of Police***: *“The Court would not decline an invitation to apply international human rights instruments in the enforcement of the provisions of the Constitution merely on the grounds that such instruments are not incorporated into domestic law.”*¹⁷⁶

The third process is incorporation by international law and domestic law coinciding. Where the clear words of the Constitution and the Laws of Ghana coincide with the international law it incorporates the international law into Ghana’s domestic laws. For instance, Article 29 of the Constitution of Ghana, 1992, contains provisions on the rights of Persons with Disabilities. The provisions in Article 29(1)-(3) of the Constitution of Ghana and sections 1, 2, and 3 of the Persons with Disability Act of

¹⁷⁵ Constitution, *supra* note 80, Article 40 provides that “... In its dealings with other nations, the Government shall (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means; (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of – i) the Charter of the United Nations; ii) the Charter of the Organisation of African Unity; iii) the Commonwealth; iv) the Treaty of the Economic Community of West African States; and v) any other international organisation of which Ghana is a member.” And Article 73 of the same Constitution provides that “The Government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana.”

¹⁷⁶ *New Patriotic party v Inspector General of Police* (1993-94) 2 GLR 459

Ghana, 2006 (Act 715) coincide with Article 9 of the 1975 Declaration by the United Nations General Assembly (UNGA); the provisions in Article 29(4) of the Constitution of Ghana and Section 4 of the Persons with disability Act of Ghana, coincide with Article 10 of the 1975 Declaration by the UNGA; and the provisions in Article 29(5) and the provisions of section 5 of the Persons with Disability Act of Ghana coincide with the second half of the provisions in Article 11 of the 1975 Declaration by the UNGA. By the provisions in the domestic laws of Ghana coinciding with the provisions in the international law, the international law is domesticated in Ghana.

The fourth process is incorporation by reference. When the Laws of Ghana make reference to international law, by that reference, they incorporate the international law into the domestic laws of Ghana. For instance, Article 33(5) of the Constitution, 1992, provides that *“The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.”*¹⁷⁷ This reference rights “inherent in a democracy and intended to secure the freedom and dignity of man” has been interpreted by the Supreme Court in the case of ***New Patriotic Party v Inspector – General of Police***¹⁷⁸ to mean that the Constitution incorporates all the body of international human rights law. In that case, Plaintiffs sought a declaration that sections 7,8,12(c) and 13 of the Public Order Decree, 1972

¹⁷⁷ Constitution, *supra* note 80, Article 33(5)

¹⁷⁸ *New Patriotic Party v Inspector General of Police*, *supra* note 176.

(NRCD 68) which gave the Minister for the Interior power to permit or prohibit the holding of public meetings or processions are inconsistent with and a contravention of the Constitution because they breach Article 21 of the Constitution, 1992 which grants, among others, freedom of assembly and movement of all persons. Hayfron-Benjamin JSC held that “[I]n chapter 5 of the Constitution, 1992 appropriate procedures for redress and enforcement of these rights are provided for in article 33 of the Constitution, 1992. It is interesting to note that **article 33(5) of the Constitution, 1992 extends the scope of human rights enjoyment when it says that the rights mentioned in chapter 5 “... shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.”** I have no doubt in my mind that the framers of the Constitution, 1992 intended that the citizens of this country should enjoy the fullest measure of responsible human and civil rights. Therefore, any law which seeks to abridge these freedoms and rights, must be struck down as unconstitutional. The requirement of a permit or license is one such abridgement of the constitutional right.” (emphasis is mine.)

The fifth process is incorporation by interpretation into Ghana law by way of interpretation and exposition of particular provisions of Ghana’s laws. For instance, in ***Gladys Mensah v Stephen Mensah***, a case involving the devolution of marital properties upon divorce, the Supreme Court referred to provisions in two international human rights laws—the UDHR and CEDAW to draw out the elements of

Article 12(1)&(2), Articles 22(3)¹⁷⁹ and 33(5) of the Constitution of Ghana, 1992. Jones Dotse JSC stated: *“It is to be understood that discrimination and violence against women differ from country to country and each situation has to be considered on a case by case basis. In our Ghanaian context, we have referred to the provisions of article 33 (5) of the Constitution...Article (1) of the Universal Declaration of Human Rights provides as follows:*

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood.”

Article 12 (1) and (2) of the Constitution 1992 give the scope and content of the fundamental Human Rights and Freedoms which the individual is entitled to enjoy. As a matter of fact, even though the Universal Declaration of Human Rights is not a binding treaty, its principles and underpinning philosophy has been incorporated into national constitutions and referred to by several national courts. This is the context into which our national Constitution 1992 has to be understood in relation to this principle of Jurisprudence of Equality. Ghana is also a signatory to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)...Furthermore, article 5 of CEDAW adds a key concept to international equal protection analysis; the need to eradicate customary and all other practices which are based on the idea of the

¹⁷⁹ Constitution, *supra* note 80, Article 12(1)&(2) provides that: and Article 22(3) provides that: “With a view to achieving the full realization of the rights referred to...(a) spouses shall have equal access to property jointly acquired during marriage; (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.

inferiority or the superiority of the sexes or on stereotyped roles for men and women.” Consequently he held that *“On the basis of the above conventions and treaties and drawing a linkage between them and the Constitution 1992, it is our considered view that the time has indeed come for the integration of this principle of “Jurisprudence of Equality” into our rules of interpretation such that meaning will be given to the contents of the Constitution 1992, especially on the devolution of property to spouses after divorce”*

The sixth process is incorporation by using international law to fill the lacuna in Ghana law. “In *Ghana Lotto Operators Association v National Lottery Authority* [2007-2008] SCGLR 1088, the Court referred to the International Convention on Economic, Social and Cultural Rights to fill a lacuna in the Right to Work in Ghana law.”¹⁸⁰

Finally, the seventh process is incorporation of customary international law into domestic law through common law. Under Article 11(e) of the Constitution of Ghana, 1992, the Common Law is a valid source of law in Ghana.¹⁸¹ The argument is that Common Law includes customary international law and therefore by making Common Law a valid source of law in Ghana, Ghana has incorporated customary international law into its domestic law. Date-Bah JSC gave the following explanation in *The Republic v High Court; Ex parte Attorney General, NML Capital Ltd, the*

¹⁸⁰ Atuguba, *supra* note 169

¹⁸¹ Constitution, *supra* note 80, Article 11 provides: The Laws of Ghana shall comprise - (e) The Common law.

Republic of Argentina: *“Ghanaian law on this basic question is no different from the usual position of Commonwealth common law jurisdictions. It is that customary international law is part of Ghanaian law; incorporated by the weight of common law case law (for instance, *Triquet v Bath* (1764) 3 Burr. 1478 (Court of King’s Bench) and per Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (Court of Appeal)). In *Chung Chi Cheung v The King* [1939] AC 160, the Judicial Committee of the Privy Council, speaking through Lord Atkin, stated this common law position as follows (at p. 168):*

‘The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.’

However, treaties, even when the particular treaty has been ratified by Parliament, do not alter municipal law until they are incorporated into Ghanaian law by appropriate legislation.”

According to Atuguba, when Ghana ratifies an international treaty and incorporates it into the domestic law of Ghana, she is bound by it. However even when the international law is not incorporated domestically, Ghana is only bound by it at the international level and not at the domestic level. Consequently Ghana cannot conduct herself in a manner that defeats the object and purpose of the international

instrument.¹⁸² Neither can she invoke provisions of domestic law to justify failure to perform it.¹⁸³ The major exception to this rule concerns principles of customary international law and principles of jus cogens. This is because for common law states such as Ghana, these principles are part of common law, which is already a part of the domestic laws. therefore the state does not need to have ratified a treaty containing these principles to become bound by them. the state, having incorporated common law into its domestic law, is considered to have additionally incorporated principles of customary international law and principles of jus cogens into its domestic laws and therefore is bound by them.¹⁸⁴

3.3 REASONS FOR AFRICAN STATES' POOR IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

3.3.1 Domestic laws and practices violating international law obligations

A state party cannot be said to be in compliance with its international human rights obligations if its domestic laws and practices are in violation of the international treaty. The principle of *pacta sunt servanda* requires a state party to perform its

¹⁸² Atuguba, *supra* note 169.

¹⁸³ Atuguba, *supra* note 169: Vienna Convention on the Law of Treaties, Article 27 (with the exception of a few constitutional principles.)

¹⁸⁴ Atuguba, *supra* note 169.

obligations under a treaty, and one way for a state to demonstrate that it is performing its obligations is to ensure that its domestic laws are not at variance with the treaty. Ghana's old marital rape law offers an example of how a state party's existing laws can present obstacles to its successful implementation of its international obligations. Ghana's Criminal Code provided that once consent had been given for marriage, that consent could not be revoked for sex.¹⁸⁵ Invariably, although Ghana was a party to the CEDAW, ICCPR and ICESCR without reservation, its domestic law permitted marital rape in violation of those treaties. This was the situation until 2007 when the offending domestic law was changed.¹⁸⁶ Interestingly, one man, Justice Crabbe, who had been assigned the task of revising the Laws of Ghana, did the removal. Consequently, many people still question his authority to have amended a Law of Ghana and claim that having acted *ultra vires* his powers, the removal was invalid and therefore marital rape is still permitted in Ghana. In any case, the enforceability of the revised law is in question because it goes against Ghanaian culture for a wife to file charges against her husband for marital rape—to date, no such charges have been filed.

There are many domestic practices in Ghana that violate Ghana's international human rights obligations. For instance, the Trokosi (slavery) system violates the CRC, CEDAW, African charter on the rights and welfare of the child and the UDHR¹⁸⁷. Trokosi is a system that requires a virgin girl to be sent to the shrine of a god to serve

¹⁸⁵ The Criminal Code of Ghana, 1960, Act 29, section 42(g)

¹⁸⁶ Elizabeth A. Archampong, *Marital Rape, a women's equality issue in Ghana*, 2 (2010),

¹⁸⁷ UDHR, *supra* note 18, Article 5

the god in atonement for the offence of a relative and to avoid the punishment of the entire family for that offence.¹⁸⁸ Ghana has enacted domestic legislation criminalizing the trokosi system¹⁸⁹ yet the practice continues. This same trend is observed in inheritance practices. Here, although the state has enacted the Intestate Succession Law to regulate the distribution of property of a person who dies intestate¹⁹⁰, in rural communities people use customary law to distribute a deceased's property rather than the state law, and the customary law violates women's equality guaranteed under various international laws to which Ghana is party.¹⁹¹

3.3.2 Incorporating international law into domestic laws

Many African states have not expressly stated that international law is part of their municipal laws. For instance in Ghana Article 11 of the Constitution, 1992 which spells out the laws of Ghana does not expressly include international law.¹⁹² Yet international law is reflected in many of the human rights provisions in Ghana's Constitution and international law is implied in a reading of other laws. For instance, Article 15 of Ghana's Constitution, which is on respect for human dignity draws inspiration from UDHR, ICCPR, African charter, CAT/CID Treatment or punishment, all of which outlaw torture and cruel and inhuman treatment in order to protect

¹⁸⁸ Amy Small Bilyeu, *Trokosi, The practice of Sexual slavery in Ghana: Religious and Cultural Freedom vs Human Rights*, IND. INT'L & COMP. L. REV. Vol. 9:2, 457 (1999)

¹⁸⁹ Criminal code of Ghana, Act 29, 1998, Section 314A

¹⁹⁰ Intestate Succession Law of Ghana, 1985, PNDC Law 111

¹⁹¹ Okeke, *supra* note 71

¹⁹² *Ibid*

human dignity.¹⁹³ Okeke argues that there is creeping monism even in common law countries that were usually dualist and therefore those countries do not always wait to pass an enabling legislation to recognize the international law, but have other ways of giving recognition to the international law domestically.¹⁹⁴ For instance Article 144 of the Constitution of Namibia, 1990 provides that “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”¹⁹⁵ This trend is also found in the Constitution of Kenya: Article 2 of the Constitution of Kenya provides that “the general rules of international law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”¹⁹⁶ But the most profound recognition of international law in the national Constitution of a dualist African state seems to come from Article 11 of the Constitution of Cape Verde, 1992. It provides that: “General or common international law, insofar as it is in force in the international legal order, shall be an integral part of the Cape Verdean legal order ... Legal acts emanated from the relevant organs of the supranational organizations of which Cape Verde is a member, shall enter directly into force in the domestic legal order, provided that that is so established in the respective constitutive instruments.

¹⁹³ Constitution, *supra* note 80, Article 15 provides: 15(1) The dignity of all persons shall be inviolable. (2) No person shall, whether or not he is arrested, restricted or detained, be subjected to-(a)torture or other cruel, inhuman or degrading treatment or punishment; (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being. (3) A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons. (4) A juvenile offender who is kept in lawful custody or detention shall be kept separately from an adult offender.

¹⁹⁴ Atuguba, *supra* note 169

¹⁹⁵ *Ibid*

¹⁹⁶ *Ibid*

The rules and principles of general or common international law and of conventional international law, validly approved or ratified, shall prevail after their entry into force in the international and domestic legal orders, over all legislative and domestic normative acts of an infra-constitutional value...”

3.3.3 Unrealistic provisions in international human rights treaties

It is common to have situations where African states cannot relate to some of the provisions of the international human rights treaties they ratify. The reasons for which such African states ratify international human rights treaties are varied.¹⁹⁷ After ratification most of these African states realize that it is impossible to implement the treaty provisions within their domestic contexts because they are not guaranteeing things that the population can relate with or which are of immediate importance to the population. For instance, the CRPD’s provisions on participation of the PWD in cultural activities of the community and the provisions protecting the rights of the PWD to his independence have been variously criticized by African scholars for not reflecting the African culture.¹⁹⁸ The scholars have argued that whereas the Western lifestyle is built on independence the African culture is built on interdependence. So if the CRPD’s provision on independence is fully implemented

¹⁹⁷ BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS*, (Cambridge University Press, 2009)

¹⁹⁸ Eskay, M., et al., *Disability within the African culture* US – China Education Review 473 - 484 (2012)

the African PWD would rather be unhappy than happy. When the treaty provision is disconnected from the realities of the African states, it is very common for the state to be labeled as “poorly implementing the treaty” because the realities within the state would ensure that the treaty’s provisions would not receive full implementation. Okeke notes that “[e]very law should take cognizance of the socio-cultural background of the people for whom such law is made.”¹⁹⁹ Okeke makes this statement whilst creating doubt about how Ghana would implement a “new law” that appears to criminalize marital rape in response to pressure from the international community in view of its socio-cultural background: “Perhaps the law repealing the marital rape exemption in Ghana is one of the laws that are easy to pass but difficult, if not impossible to enforce.”²⁰⁰

3.3.4 Westernized International Law

One of the reasons why African states implement international human rights norms poorly is that those norms are predominantly “Western.” According to Matua Makau “the human rights corpus, though well meaning, is fundamentally Eurocentric, and suffers from several basic and interdependent flaws. . . . [F]irst, the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast

¹⁹⁹ Okeke, *supra* note 71, at 391.

²⁰⁰ *Ibid*

into superior and subordinate positions.”²⁰¹ According to Okeke, associating the beginning of international law with the Peace of Westphalia is flawed because in African countries such as Egypt, international law had “existed since antiquity” but contributions to the development of international law by African states are deliberately ignored when recounting the history of mainstream international law and western viewpoints are deliberately highlighted.²⁰² International law as we have now, also emphasizes the underlying colonial mentality of civilizing the uncivilized states.²⁰³ Consequently, Africa is viewed as an “object” of international law and not a “subject” of the law,²⁰⁴ and being mere recipients of international law, African states fail in their attempt to domesticate those “foreign” concepts in international human rights norms.

3.3.5 Leadership

In many African states, leaders try to serve life terms or near life terms and therefore do not encourage the implementation of international human rights treaties that could ultimately threaten their tenure of office. International human rights treaties such as the ICCPR guarantee political rights and although most African states are

²⁰¹ Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L. J. 201, 204 (2001).

²⁰² Okeke, *supra* note 71

²⁰³ *Ibid*

²⁰⁴ HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW 22, 23 (2008) “the legal history of international law and American legal history have treated most African-heritage peoples as objects and not subjects of law when they have not ignored them altogether”

parties to the ICCPR without reservations, their leaders would rather limit the implementation of such instruments than limit the number of years they spend in political office. So the interest of African leaders to hold on to political office negatively affects how well they would implement international human rights treaties within their states. The longer they hold on to public office, the less inclined they are to implement international human rights treaties. African leaders are also uneager to implement international human rights treaties within their states because of fear of being tried under those treaties when they leave power.

3.3.6 Poverty

Most African states fall within the bracket of least or less developed countries.²⁰⁵ Due to high poverty levels, the immediate priorities of those states are often not the implementation of international human rights treaties. The resolution of some of the poverty-related issues such as education, nutrition and shelter may ultimately satisfy international human rights obligations, however the satisfaction of the international obligation is usually not the aim of the state from the on-set.

²⁰⁵ United Nations Conference on Trade and Development, UN List of Least Developed Countries, available at <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> (last visited on 24 March 2018)

3.3.7 Legal Pluralism

3.3.7.1 Legal pluralism gives African state additional hurdles in the reception of international law

As explained in the introduction to this dissertation, generally states are supposed to absorb international law into their domestic legal systems after ratification. Unfortunately situations of legal pluralism, creating state and non-state systems of laws, mean that for the international law to be absorbed into the domestic legal system it must be absorbed into the state system and also the non-state system. This multi-layered approach to state reception of international law, made necessary by the condition of legal pluralism, inhibits automatic state absorption of international law. Thus although after ratification the international law is part of the domestic law theoretically, practically the international law does not become part of the actual domestic law of the state because it does not order the lives of an important section of the population – the non-state actors. Legal pluralism creates a kind of block between state and non-state laws, and the international law must permeate this block to reach the non-state level.

Whether the African state follows the monist or dualist tradition it must undertake further steps after ratification to ensure that norms of the treaty reach the non-state level within its state. Taking the additional steps to achieve this could be frustrating for state actors because it requires the spending of extra resources, which do not have

to be spent in other states without the feature of legal pluralism. However, without undertaken those additional steps, the international norms will not reach the non-state level, which is very necessary, because the violations targeted by international human rights treaties usually occur at the non-state level. For instance, child bride practices targeted by the CRC²⁰⁶, widowhood rites targeted by the CEDAW²⁰⁷ and the non-education of CWDs targeted by the CRPD²⁰⁸ usually occur at the non-state level. Unless non-state laws reflect the international human rights norms and the non-state actors and institutions accept the international norms, the international treaty will continue to be violated at the non-state level, the intended benefit of the international treaty would not be achieved, and the state will be considered as poorly implementing the international human rights treaty.

For non-state laws in legal pluralistic African states to reflect international human rights treaties norms, State actors cannot limit their efforts to the enactment of domestic legislations and other state level activities. They need to take extra deliberate steps to extend the norms into the non-state milieu for the two streams of law (international law and the customary or other non-state law) to meet. Without undertaking this additional step, the state is unlikely to effectively comply with the treaty. Yet, if the state had not had the feature of legal pluralism, this extra step would not have been necessary because the state level actions would have been sufficient to

²⁰⁶ Early Marriage, *supra* note 15

²⁰⁷ UN Women, *supra* note 11

²⁰⁸ UNICEF, Promoting the Rights of Children with Disabilities, Innocenti Digest No. 13, 2007.

ensure that the whole population is ruled by that one state – level law and no other law.

3.3.7.2 Legal Pluralism makes state implementation of international human rights treaties more costly

As explained above African states with legal pluralism have to go through multiple stages in order for international law to be received into their municipal laws. Going through these stages imposes additional costs on states. These additional costs would be spent in ratifying the international law and then in getting non-state actors to accept the international human rights norms. The more difficult of the two stages is at the non-state level. There are so many different actors at the non-state level that would need to be consulted to facilitate the reception of the international law at the non-state level. The consultations would need to take different forms and occur under different circumstances. For instance, approaching a chief would require the performance of various ceremonies, which need to be paid for.

As mentioned above, many African states are poor²⁰⁹, and their governments are skeptical about spending their meager resources just to domestic international human rights laws. Consequently they would rather just complete the state level ratification and expect the international law to trickle down to the non-state level. Without state actors making the proper investment to bring the law to the non-state

²⁰⁹ United Nations Conference on Trade and Development, *supra* note 205.

level, the required change (usually expected from non-state actors) will not be achieved and the state will be accused of poorly implementing the international human right treaty. Also non-state actors such as chiefs (who act as gate-keepers of customary law) can make it easy for others (for instance, the subjects of the chiefs) to receive the international law by doing away with the ceremonial hurdles that make it expensive for state actors to reach them with the international laws.

3.4 WHO IS RESPONSIBLE FOR WHAT CAUSAL CONTRIBUTION TO AFRICAN STATES' POOR IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

3.4.1 UN Treaty bodies

UN Treaty bodies emphasize approaches to state implementation of international human rights treaties, which are alien to African societies, and when the African states are unable to perform according to those approaches, the treaty bodies consider them as poorly implementing the human rights treaty. The UN treaty bodies are mandated to monitor state implementation of the relevant treaties they have signed and to facilitate their work, they often require state parties to demonstrate compliance in a similar way. Other times the treaty bodies give interpretations to the treaty which the state parties had not contemplated at the time of becoming parties

to the treaty and which they find unacceptable in their circumstances. For instance the Human rights Committee has interpreted non-discrimination on the basis of sex to include sexual orientation.²¹⁰ Several African states have criminalized same-sex unions in their domestic legislations and struggle to incorporate these new interpretations of the international law into their domestic laws. In the meantime, as those African states struggle to adjust their societies to the shift in the international law, the Treaty body keeps evaluating the state as poorly performing its obligation under the treaty. So the UN Treaty bodies' interpretation of the treaties to reflect concepts that are alien to Africa and were not in the contemplation of the states at the time of becoming parties to the treaty contribute to African states' poor implementation of the human rights treaties.

3.4.2 Non Governmental Organizations

NGOs have almost become a permanent fixture in African states. Usually, they pursue projects without a proper understanding of the socio-cultural context in which they are operating resulting in the failure of those projects and they accusing the state actors of not doing more to improve the human rights of their people. For instance, it is common knowledge that rural African women work extra hard in their homes; travelling long hours to fetch water for household use, travel to farm, and have limited

²¹⁰ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Kirichenko K. *United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics, 2016* (Geneva: ILGA, November 2017)

education among others. An NGO seeking to empower these rural African women may start a school for the women to educate them. Although well-intentioned, such initiatives would be unsuccessful unless the NGOs approach involve bringing the patriarchal head of the communities to an acceptance of the project. His disapproval of the women spending time away from their marital homes could cause the collapse of the entire project. Subsequently the NGOs in their shadow report to the UN treaty body would accuse the state party of not doing more for women's empowerment causing the state to be classified as poorly implementing its treaty obligations.

3.4.3 State Leaders

In most African countries, government leaders often act in violation of the rights of their citizens and therefore were not inclined to implement the international human rights treaties. Some corrupt government leaders use public funds to their personal benefit rather than provide social goods for their citizens as required under the ICESCR. Military leaders often come into power after a coup d'etat and prefer to rule without the control of the law. Consequently, they violate many international human rights treaties. In Nigeria, there have been "instances of unlawful and arbitrary detention, unfair trials without a right of appeal, torture by the military or their agencies, mass public executions, and extrajudicial executions and public killings; these actions were adjudged to be antithetical to the UDHR, African Charter, ICCPR, ICESCR, CAT/CIDTorP" which Nigeria had ratified. The killing of Ken Saro-Wiwa and

eight others in Nigeria is an example of military leaders' disregarding international human rights principles.²¹¹ The leaders of the state discourage the enforcement of international human rights treaties because this enables them rule the way they want. In the long – run, the state will be deemed to be poorly implementing its international human rights obligation because of the actions of its leaders.

3.4.4 Non-state level leaders

In most African states with legal pluralism, non-state level leaders can use their authority to enforce sub-group norms that violate international human rights norms and cause the entire state to be classified as poorly implementing international human rights laws. Non-state actors such as chiefs and religious leaders wield a lot of authority among their people some of the non-state laws they implement actually violate international human rights norms. For instance, in Northern Nigeria, under sharia law as punishment the punishment for engaging in unlawful sexual intercourse is death by stoning. According to Okeke “from the perspective of international law, this crude administration of criminal justice is incompatible with Nigeria’s obligations under a number of international treaties (1999 Constitution of Nigeria, ICCPR, CAT/CIDTorP, African Charter and even customary international law (*jus cogens*)²¹²

²¹¹ Okeke, *supra* note 71.

²¹² Okeke, *supra* note 71, at 403

3.4.5 Ordinary citizens

The actions of individual citizens of a state can also cause the state to be classified as poorly implementing its international human rights obligations. For instance, ordinary South Africans who consider that migrant workers are taking over their jobs kill many African migrant workers in South Africa.²¹³ Although South Africa has not ratified the Convention on the protection of the rights of all Migrant Workers and members of their families (CMW), this is in clear violation of South Africa's obligations under the Convention on the Elimination of All Forms of Racial Discrimination. Such actions by ordinary citizens contribute to a poor rating of state in the implementation of its international human rights obligations.

3.5 WHO IS RESPONSIBLE FOR MAKING WHICH CONTRIBUTIONS TO ERADICATING THE PROBLEM OF AFRICAN STATES POOR IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

²¹³ The Guardian, Xenophobic attacks in South Africa. <https://www.theguardian.com/world/2015/apr/20/south-africa-xenophobic-violence-migrants-workforce> (last visited on 26 March 2018)

3.5.1 UN Treaty bodies

UN treaty bodies can allow more flexibility to State Parties in determining how they achieve their treaty obligations and interpret treaties in a manner consistent with the understanding State Parties had at the time of entering into the international agreement. The flexible approach will help African states develop context-appropriate approaches to maximize outcomes in their implementation of the international human rights treaties. Secondly, Adherence to the original understanding of the treaty will provide predictability and encourage African State Parties to make long-term commitments in initiatives that would improve their domestication of international human rights norms.

3.5.2 Non Governmental Organizations

NGOs working in African states can do proper socio-cultural context examination of the communities they seek in to encourage acceptance of their interventions and contribute to the improvement in the state's human rights record. To avoid over-concentrating resources on one human rights area such as women's empowerment, NGOs could work with the state to identify other human rights areas they can help improve. If NGOs would work with state actors and take extra steps to understand the socio-cultural context of the African societies in which they seek to work, their work would help states improve their implementation of their treaty obligations.

3.5.3 State Leaders

State actors representing the state at the international level must apply their knowledge of both their state and the requirement of the international treaty to help the state perform its obligations under the treaty. State leaders should make and domestic laws that reflect the international human rights norms and facilitate state implementation of those laws. The domestic laws must be such that the population can relate with and make their own, and that knowledge of the laws reaches the non-state level of ordinary individuals. State leaders should equally invest adequately in law enforcement and adjudication and through these processes, make necessary amendment of the law to facilitate the domestication of the international norms. Without deliberate actions towards domesticating the international human rights norms otherwise the laws would remain abstract to the people and the people will continue to violate the international norms and the state will continue to be characterized as poorly implementing its obligations under the treaty.

3.5.4 Non-state Leaders

Non-state actors can use their authority over the people they govern to accept international human rights norms and thereby help State Parties to domesticate the

international human rights norms. For instance, in the area of disability rights, Chiefs can ban the killing of children with disabilities and religious leaders can encourage families with people with mental disability to seek medical help instead of chaining them in prayer camps. The aim would be to recognize that PWDs have rights and protect those rights. That overarching aim is consistent with the CRPD's principles and the outcome of their actions would bring the state into compliance with its obligations under the CRPD.

3.5.5 Ordinary citizens

If ordinary Africans hold their governments more accountable for the enforcement of their human rights this would help improve state implementation of its human rights obligations. It is usually the case that ordinary Africans are used to their poor human rights conditions and do not pressurize their governments to do more to improve their conditions. Consequently, the governments do not make extra efforts to improve the poor human rights conditions of their citizens. A more demanding citizenry would help African states stop their poor implementation of their international human rights obligations.

3.6 CONCLUSION

It is commonplace to read that African states are poorly implementing international human rights treaties to which they are parties. In this chapter, we have discussed seven important reasons accounting for the poor implementation of international human rights treaties in African states and emphasized how legal pluralism contributes to this phenomenon. The chapter also discussed who is responsible for what causal contribution to African states poor implementation of international human rights treaties and who is responsible for making which contributions to eradicating the problem.

4 CHAPTER FOUR:

CASE STUDIES

(WOMEN'S RIGHTS IN ZIMBABWE AND CHILDREN'S RIGHTS IN GHANA)

4.1 INTRODUCTION

This chapter presents an in-depth case study of the implementation of two international human rights treaties in two African states with legal pluralistic contexts—The CEDAW in Zimbabwe and The CRC in Ghana.

4.2 CASE STUDY OF WOMEN'S RIGHTS IN ZIMBABWE

4.2.1 What this case study is meant to establish

This case study will establish that Zimbabwe's approach to domesticating the international norms on the rights of women does not fit the legal pluralistic context of Zimbabwe and is therefore not yielding desired results. It would further show what approach would yield more positive results.

Additionally the study will show the reader what happens when the approach to implementing an international human rights norm in an African state does not take the state's legal pluralistic context into account.

4.2.2 Background about the state

Prior to the arrival of the Portuguese and later Cecil Rhodes, the area now known as Zimbabwe was a kingdom ruled according to the customary laws of the people. Cecil Rhodes was essentially a businessman trading in gold and diamonds from the South African region. He arrived in Kimberley in 1871 and through negotiations for mining concessions, made his way inland until in 1891, he received British approval to declare the area a British protectorate. On 12 September Rhodesia became a self-governing crown colony. Between 1957 and 1979 there was a sustained and intense pressure from the African population for self-rule but Ian Smith gained control of the country as Prime Minister and imprisoned the African political leaders Joshua Nkomo

and Robert Mugabe from 1964 till 1974. He then sought to have the British declare Zimbabwe as independent based on White minority rule. This, and his other attempts at “indirect minority rule” were successful. Eventually the Lancaster agreement of 1979 paved the way for Britain to grant independence to Zimbabwe on 18 April 1980 with Robert Mugabe’s ZANU-PF party winning the elections in 1980.²¹⁴ Mugabe ruled the nation for 37 years and resigned in November 2017. The new president of Zimbabwe is Emmerson Mnangagwa.²¹⁵

At Independence, a critical issue faced by the new Zimbabwean government (as was the case for other African states) was whether to abolish the pre-existing customary laws and the received (Roman Dutch) law of the colonial authorities in order to create a unified legal system. Zimbabwe opted to retain both the pre-existing and the received laws in addition to the new laws made by the new government, resulting in a plural legal system.²¹⁶

The 1979 Constitution of Zimbabwe was the country’s first Constitution. It was also known as Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom.) This Constitution received several amendments until a new Constitution entered into force in 2013. The 1979 Constitution did not contain sufficient human rights protections making the implementation of international human rights treaties

²¹⁴ BRIAN RAFTOPOULOUS & ALOIS MLAMBO, BECOMING ZIMBABWE: A HISTORY FROM THE PRE-COLONIAL PERIOD TO 2008, (Weaver Press, 2009)

²¹⁵ BBC News Report, ‘Zimbabwe’s Robert Mugabe resigns, ending 37year rule,’ 21 November 2017, available at <http://www.bbc.com/news/world-africa-42071488> (last visited on 24 March 2018.)

²¹⁶ Hellum, *supra* note 4

problematic despite its numerous amendments. However, the 2013 Constitution appears to have rectified this mistake by making extensive human rights provisions in Chapter four of the Constitution.

This case study is will establish the following: first, examine Zimbabwe's customary law and state laws on women's equality with men upon dissolution of a marriage to show the gender difference within the laws; second, show the difference between the state laws on women's equality and the everyday lived experiences of women which are consistent with customary law rather than the state/general law; third, show that enacting state laws that are consistent with international norms but not reflective of domestic customary laws on the subject will not protect women's rights in the legal pluralistic context of Zimbabwe; and fourth, show how African states with legal pluralism can domesticate the international laws without rejecting prevailing customary laws.

4.2.3 Background about the CEDAW

CEDAW was adopted on 18 December 1979 by the UN General Assembly and opened for signature on 1 March 1980.²¹⁷ It entered into force on 3 September 1981, being the 30th day after the date on which the 20th instrument of ratification or accession

²¹⁷ United Nations Treaty Collection
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#1 (last visited on 24 March 2018)

was deposited with the UN Secretary General, in accordance with Article 27(1) of the Convention.²¹⁸ The treaty has 99 signatories and 189 parties.²¹⁹ Zimbabwe acceded to the CEDAW on 13 May 1991 without any reservations, declarations or objections.²²⁰

This study examines how Zimbabwe, as a State Party to CEDAW, complies with CEDAW's requirement for the equal treatment of women and men at divorce²²¹ when its customary law requires differential treatment of women and men while the state laws promote their same treatment. Secondly, the study will inquire into the approach advocated by the CEDAW Committee for the State Party to demonstrate compliance with the treaty: enact domestic legislation, make judicial interventions and adopt administrative practices aimed at ensuring the equal treatment of women and men at divorce.

4.2.4 How the state actually implements the treaty and which approach it uses

Generally, most Zimbabweans marry under customary law (requiring the payment of bride price) before registering it or converting it into a civil law one.²²² Among

²¹⁸ CEDAW, *supra* note 12, Article 27(1) provides that the Convention enters into force on the 30th day after the date on which the 20th instrument of ratification or accession is deposited with the UN Secretary General.

²¹⁹ United Nations Treaty Collection, *supra* note 217

²²⁰ United Nations Treaty Collection, *supra* note 217

²²¹ CEDAW, *supra* note 12, Article 5, 16(1) (c)

²²² Hellum, *supra* note 4, at 130.

Zimbabwe's Shona speaking people, the groom's family is required to pay the bride price (lobolo) to the bride's family in order for the customary law marriage to be valid.

"For the purpose of this study the term bride price or lobolo refers to the different considerations which the groom is expected to present to different members of the wife's extended family during the process of marriage. "Rutsambo" is a cash payment which the groom is expected to make to the bride's father. "Rovoro" or "danga" is some form of payment to the bride's family as compensation for the loss of their daughter's productive and procreative capacity. It is usually paid in cattle. "Mombe youmai" or the "motherhood beast" refers to the cow which the groom is expected to pay to the bride's mother and her maternal ancestors."²²³

Under Shona customary law, the payment of lobolo seals a marriage contract requiring the wife to move to the husband's family home and produce a reasonable number of children to continue the husband's patrilineage. If the wife is unable to produce children, her extended family is required to provide another female relative for the husband to produce the children with. The children produced through this relative belong to the original wife. Where this arrangement does not resolve the problem, the wife's family is required to part with a portion of the lobolo to enable the husband to look for another wife to produce children and fulfill the requirement of patrilineal continuity. If it is the husband who is sterile (usually a traditional healer, called a "n'anga" is consulted to determine who is at fault for the childlessness in the marriage), his family arranges for a male relative to act as a "seed raiser" and produce

²²³ Hellum, *supra* note 4 131.

children for the husband with the original wife. Those children would belong to the original husband. Usually, the wife is permitted to give or withdraw her consent for the “seed raiser.” She may also choose a “seed raiser” subject to her husband’s consent. The production of children is so important among the Shona speaking people that even for those living in nuclear family settings in urban areas such as Harare (the capital city of Zimbabwe), and those who may have become committed Christians, they still find alternative solutions to having children such as extra-marital arrangements, IVF and adoption.

In the case of divorce, the husband is entitled to have his lobolo back, however certain factors are considered in determining how much of the original lobolo the husband will be paid back. One of those factors is the (in)ability of the wife to produce a reasonable number of children during the course of the marriage. Sometimes because the parents of the bride consider that they would be unable to repay the lobolo, they insist on sending other daughters to try to make children for their childless daughter so that their childless daughter remains married to her husband. The woman therefore has to produce children or face all kinds of discomforts and intrusions in her home because lobolo was paid.

At divorce, the wife (and her family) have the disadvantage of returning the lobolo to the husband as described above. The Shona customary law provides for the payment and repayment of lobolo or bride price which has the effect of unevenly situating women and men during marriage and at divorce because it gives rise to different

rights and responsibilities to the men and women; specifically, it puts women at a disadvantageous position during the marriage and divorce. During the marriage the woman is compelled to produce children whether or not she wants to because lobolo has been paid for her. She does not have the right to choose not to have children because that will be in violation of the contract for which lobolo was paid as consideration. Without children, she will not find marital joy because she will be constantly under pressure from her husband, her in-laws, and her own family to fulfill the obligation to produce children that comes with the payment of lobolo. If she is unable to fulfill this requirement and divorces or is divorced by her husband, she will find herself on the wrong side of the customary law once more. The law will require her to reproduce a portion of the lobolo based on her childlessness.

Customary law is part of the existing laws of Zimbabwe since the country opted for a legal pluralistic regime at independence. Thus this existing customary law constitutes discrimination against women contrary to Article 2(f) of CEDAW, and does not give women and men the same rights and responsibilities during the marriage and at divorce, contrary to Article 16(1)(c) of CEDAW. To evenly situate women and men in marriage and during divorce, the international human rights treaty (CEDAW) requires State Parties to register marriages.²²⁴ Zimbabwe has therefore enacted domestic legislation complying with CEDAW's requirement for legislative measures and the domestic legislation requires the registration of marriages.²²⁵ The effect is

²²⁴ CEDAW, *supra* note 12, Article 16(2)

²²⁵ Matrimonial Causes Act of Zimbabwe, Acts 33/1985, 11/1987, 18/1989 (s.38), 2/1990, 6/2000 (s.151.)

that Zimbabwe formally recognize three types of marriages under its state law – The Matrimonial Causes Act. These marriages are: civil marriages, registered customary marriages and unregistered customary marriages.²²⁶ These are the types of marriages that the state actors would enforce. Where the marriage is registered it is given full recognition by the court, but where it is unregistered, the court recognizes only certain features of the marriage, such as the children born within the marriage and not other features such as the marriage itself. Consequently, the court does not give any protections to a childless wife in such an unregistered customary law marriage. This usually happens with unregistered customary law marriages where the payment of lobolo serves as sufficient notification of a valid marriage.

The State's requirement of registration in compliance with CEDAW is a universalism approach to solving the problem of women's equality. It does not take into account the actual lived situations of a large proportion of Zimbabwean women, which is that having been validly married under customary law those women have not additionally converted their marriages into civil law ones or even registered their customary law ones. Yet everyone in their community recognizes them as married, and gives full recognition to their marriage, albeit unregistered, except the judge who implements a law that is disconnected from reality. The state law simply says the judge will only admit one evidence as proof of marriage for everyone, irrespective of one's situation. That evidence is the marriage registration.

²²⁶ Not all unregistered customary law marriages are recognized.

Because many localities still practice customary law the resulting effect is that large groups of women, particularly childless wives, are unprotected by the State law. At divorce, their husbands seek to factor in the childlessness of the wife in increasing the amount of lobolo to be refunded, and since the law does not recognize the union in the first place, it does not offer any protection to the wife in divorce matters. The law would however give full protection to a childless wife from a registered monogamous marriage.²²⁷

Fortunately, where the State law, in compliance with the international law, does not protect the rights of childless wives in unregistered customary law marriages, customary law does, by first allowing the husband to factor in the childless of the wife in the repayment of the lobolo (because the traditional marriage *contract* obligated her to produce children for the husband and that part of the *contract* was not fulfilled) and then giving the wife her share of property accrued during the marriage. Under customary law, this intervention is made whether or not the customary law marriage was subsequently registered. Thus once there is a form of proof that a substantive marriage existed between the man and woman the protection is made available to both parties; and the proof required is not limited to registration as happens under state law. This intervention that customary law offers actually has the effect of equalizing the situation of the divorced women and men to some extent and is definitely better than not giving the women anything at all under state law simply because the procedural requirement of registration was omitted. In a sense, state

²²⁷ Hellum, *supra* note 4, at 403.

actors' implementation of the requirement for registration by CEDAW through the universalism approach actually hinders the implementation of the concept of women's equality in practice among childless women in unregistered customary law marriages in Zimbabwe.

The approach of the non-state actors reflects the cultural pluralism approach to treaty implementation. Perhaps the state law, in admitting of only one proof of marriage, seeks to simplify matters because if differently situated women bring different pieces of evidence to show to the court as evidence that they are validly married it would overwhelm the court system which may struggle to establish precedence or other such legal principles. Under the customary law, a woman from MaShonaland can bring the remainder of a lobolo payment to say that a customary law marriage was validly contracted whereas another woman from another community would use another item to demonstrate that she was validly married. As explained at the introduction of this dissertation, Africa has thousands of cultures and people could hide behind this fact to try to deceive the court. Yet, should women be placed in a disadvantageous situation under state laws just to simplify the work of state actors? The substance of what CEDAW intends is the protection of women's rights. State parties in aiming to achieve this goal should examine the overall effect of the measures they take. If the effect of their approach is to place the wife in a disadvantageous position against the husband, then that approach should be changed.

The author suggests that rather than a one-size fits all approach, or an approach that puts what constitutes a valid marriage up for grasp, at the state level, Zimbabwe's aim of ensuring women's equality would be best achieved through a "pluralistic marriage regime:"²²⁸

*To implement the equality principle in a manner that is sensitive to the situation in hand and caters for the needs of different groups of women it is, as demonstrated by this study, necessary to have a differentiated strategy. In my view, the recognition that there is a plurality of forms of marriage would provide a more flexible instrument for coming to grips with women's mixed identities, both as individuals and as a part of an extended family, than does a uniform marriage regime that links legal protection to registration. Therefore a general prohibition against sex-discrimination combined with a pluralistic marriage regime may, under the circumstances, be preferable ... by law."*²²⁹

This means that state law must first outlaw sex-discrimination and then adapt the law to the various these forms of Zimbabwean marriages. In proscribing sex-discrimination, the state law satisfies the overarching aim of CEDAW, and then in having a domestic legal system that accounts for all forms of Zimbabwean marriages rather than only the registered ones, the state law takes its legal pluralistic context into consideration in creating a law that is fit for the context of Zimbabwe. The law

²²⁸ Hellum, *supra* note 4, at 417.

²²⁹ Hellum, *supra* note 4, at 424.

will therefore not leave a section of women unprotected and will not lack definition because people will not be able to claim just any living arrangement as a marriage.

As noted by eminent African scholars such as Comaroff, customary law is not static; it is dynamic.²³⁰ And so is state law. What constituted customary law 50 years ago may not be the same today. For instance, in many African states with legal pluralism, customary laws on the rites of passage of girls into adulthood have changed in recent years to reflect modern policies such as girl-child education. In the same way, state laws also change frequently for various reasons²³¹ and they can be changed to reflect an approach to implementation of CEDAW that achieves the substantive aim of the treaty – women’s equality.

4.2.5 Conclusion to CEDAW case study

Zimbabwe’s state actors’ approach to the implementation of CEDAW is consistent with the treaty party’s requirement to follow the universalism approach. However, the effect of implementing this approach is that women are actually placed in a disadvantageous situation against men, which is inconsistent with the requirement of CEDAW. On the other hand, the effect of the customary laws is that they re-set the balance in order not to disadvantage the women. The customary laws achieve this by

²³⁰ Tomlins & Comaroff, *supra* note 142

²³¹ For instance, change of government can result in change of state laws.

adopting a differentiated approach in determining what constitutes a valid marriage. Anne Hellum suggests that the approach that would best help Zimbabwe comply with its obligations under the CEDAW is the cultural pluralism approach.

4.3 CASE STUDY OF CHILDREN'S RIGHTS IN GHANA

4.3.1 What this case study is meant to establish

This case study is meant to establish that the cultural pluralism approach can improve the protection of children's rights in Ghana but with an additional step.

Ghana has moved from the previous universalism approach to domesticating the CRC and adopted a new policy towards domesticating the CRC, which fits the particular context of Ghana and also achieves the aim of the CRC.

The case study demonstrates that a one-size-fits-all approach to the implementation of international human rights norms will not achieve the expected results; and that in African states with legal pluralism a context specific approach would better achieve the international human rights treaty's goals.

4.3.2 Background about the state

Ghana was originally called The Gold Coast.²³² The Portuguese were the first Europeans to arrive at the Gold Coast, doing so in 1471. The Danish and subsequently The British, who eventually colonized Ghana in 1867, followed them.²³³ Along some coastal towns in Ghana, particularly “El mina” (meaning “the Mine” in Portuguese) one can still hear Portuguese words worked into the local dialects. This pre-colonial period was characterized by trade in gold and slaves with the local chiefs and traditional leaders, “wars of conquest and related abuses, forced labour and political oppression.”²³⁴

“Prior to the arrival of the colonial masters, the various communities that now constitute Ghana were governed by Customary Laws. These Laws varied from community to community but performed the same role of ordering the lives of the people. These Laws included very fine principles of human rights, including the sanctity of life; the right to live in community; the right to property, individual and communal; and the right to fair trial. ... On the other hand, some

²³² John Mensah Sarbah, *Fanti Customary Laws* (London: William Clowes & Sons Limited, 1903)

²³³ Other scholars reference the Bond of 1844 between some Fante and other local Chiefs and the British authorities as marking the official commencement of colonization in Ghana. According to the Constitution Review Commission of Ghana, page 628: “Immediately after the formal declaration of the end of the slave trade, the British entered into the Bond of 1844 with a number of Fante and other local Chiefs. The Bond legalised the imposition of the British legal system on the Gold Coast, acknowledging the power and jurisdiction that the British had exercised *de facto* in the territories adjacent to the British forts and settlements.” Sarbah, *supra* note 232 at v also wrote that even in 1665 (pre-colonial era) there existed in the Gold Coast “an organized society having kings, rulers, institutions, and a system of customary laws.”

²³⁴ Constitution Review Commission Report, *supra* note 233, Chapter 13 “Human Rights”.

aspects of pre-colonial governance, such as slavery, executions that followed the death of some chiefs, betrothal marriages, dictatorial chiefs and patriarchy, have been cited by modern day human rights activists as violations of human rights during the pre-colonial era.”²³⁵

During the colonial era, the British subjected the customary laws to the repugnancy test as a way of refining “barbarous” laws of the locals to those that were reasonable in the minds of the British. The remodeled versions of customary law mostly operated at the state level, whereas as at the non-state level, people continued to practice the original versions of their customary laws (discussed in Chapter 2).

The Gold Coast gained independence from Britain on 6th March 1957 and changed its name to Ghana. In post-independence Ghana, one finds that the nation’s state level culture is shaped along the British tradition. For instance, when one considers the three arms of government, in the court system, judges and lawyers dress, sit, refer to themselves and conduct their cases according to the English court. Government Ministries, Department and Agencies are named and structured according in the British way and many of them still carry the names the British established them by. Ghana’s Parliament reflects many British concepts including the official costume of the leadership of Parliament.

²³⁵ Constitution Review Commission Report, *supra* note 233 at 627

At Independence, Ghana chose legal pluralism by keeping the British laws (which had become the state laws), and customary laws (those practiced at non-state level) as part of the laws of Ghana.²³⁶ Today, British laws that were in force in Ghana at the time of independence, the customary laws that were “refined” by British judges, the customary laws that have been subsequently “refined” by Ghanaian judges and the non-state level “pristine” customary laws are all valid law in Ghana.²³⁷ Certain matters of chieftaincy, inheritance, marriage and succession are reserved for determination under customary law in Ghana.

Ghana has had five Constitutions: the 1957 (Independence Constitution),²³⁸ The 1960 Republican Constitution, The 1969 second Republican Constitution, the 1979 third Republican Constitution and the 1992 fourth Republican Constitution. A fundamental catalyst for the creation of each Constitution has been the quest for human rights protection. The 1957 Constitution was born out of a fight for political rights during the independence struggle. However it retained the British Queen as the head of state of Ghana and to have full political rights the 1960 Constitution emerged. The result produced by this Constitution was human rights violations, mainly because Ghana was turned into a one-party state under this Constitution and executive power rested in the hands of only the President.²³⁹ Any dissenting opinion was considered a threat to the nation and one could be incarcerated indefinitely under the Preventive

²³⁶ Constitution Review Commission Report, *supra* note 233

²³⁷ Constitution, *supra* note 80, Article 11.

²³⁸ 1957 Ghana (Constitution) Order in Council adopted by the British Parliament

²³⁹ The case of *Re Akoto and Nine Others* where the Supreme Court refused to enforce the human rights of the applicants, the killing of political enemies.

Detention Act. The 1969 Constitution therefore came into force to undo these human rights violations by making the President became only a ceremonial head and power shifted from the President to the Prime-Minister who was now the head of government, but the 1979 Constitution provided that the popularly elected president should be the head of state, Head of State and Commander in Chief of the Armed Forces of Ghana. Both the 1969 and 1979 Constitutions enshrined civil and political rights of Ghanaians but the protections were mostly civil and political rights.²⁴⁰ It was chapter 5 of the 1992 Constitution that fully dealt with the human rights aspirations of Ghanaians. These ground-breaking protections had the result of paving the way for the implementation of international human rights treaties in Ghana such as women's rights, children's rights and disability rights.

This case study is meant to establish the following: First, that Ghana used to implement the CRC according to the CRC treaty body's approach just like other states do; Second, that Ghana found that this approach was inappropriate for its legal pluralistic context and rather achieved negative results; and third, that Ghana adopted a new policy fit for the context of Ghana and has found that approach as more suitable in helping it achieve the goals of the CRC.

4.3.3 Background about the CRC

²⁴⁰ Constitutions of the Republic of Ghana, 1969; and Constitution of the Republic of Ghana, 1979.

The Convention on the Rights of the Child (CRC) was adopted and opened for signature, ratification and accession on 20 November 1989, and it entered into force on 2 September 1990.²⁴¹ Ghana ratified the CRC on 5th February 1990, being the first country in the world to ratify this Convention,²⁴² and has subsequently taken impressive steps towards implementing it.²⁴³ Overall, the Committee on the Rights of the Child has been happy with Ghana's implementation of the Convention.²⁴⁴

²⁴¹ CRC, *supra* note 14.

²⁴² Link to the Status of ratification interactive dashboard at the website of the Office of the High Commissioner on Human Rights (OHCHR) <http://indicators.ohchr.org/> (last visited on 26 March 2018) see also <http://unchildrights.blogspot.com/2011/01/chronological-order-ratifications-crc.html> (last visited on 26 March 2018)

²⁴³ Since ratifying the CRC, Ghana has completely overhauled its legal and policy framework to facilitate the implementation of the treaty. The country's legal framework for enforcing the Convention include the following: Domestically, the Constitution of Ghana, 1992; The Children's Act of Ghana, *supra*, note 162; The Juvenile Justice Act of Ghana, 2003, Act 653; The Human Trafficking Act, 2005, Act 694; The Domestic Violence Act, 2007, Act 732; The Criminal and Other Offences Act, 1960, Act 29; Intestate Succession Act, 1985, PNDCL 111; Education Act, 2008, (Act 778) passed in January 2009; The Mental Health Act, 2012 (Act 846); Persons With Disabilities Act, 2006 (Act 715), (PWD Act). Internationally, Ghana ratified the Optional Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict in 2014; the Protocol to Prevent, Suppress and Punish Trafficking Persons Especially Women and Children supplementing the United Nations Convention Against Transnational Organized Crime in 2012; African Charter on the Rights and Welfare of the Child in 2005; The International Labour Organization (ILO) Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in June 2000; ILO Convention No. 138 concerning Minimum Age for Admission to Employment, in 2011; The Convention on the Protection of All Migrant Workers and Members of Their Families in July 2003; Convention on the Rights of Persons with Disabilities, in 2012; The Rome Statue of the International Criminal Court in 1999. The following are some of the Institutional and Policy Measures undertaken to facilitate the implementation of the Convention: Creation of the Ministry of Gender, Children and Social Protection (MoGCSP) (2013); Creation of the Department of Children (DOC) within the MoGCSP (2013); Child and Family Welfare Policy (CFWP) (2015); National Neo-natal Health Care Strategy (2014-2018); National HIV/AIDS, STI Policy (2013); National Employment Policy (2012 - 2016); National Human Resource Development Policy (2011); Education Strategic Plan (ESP) (2010-2020); National Plan of Action (NPA) for the Elimination of the Worst Forms of Child Labour in Ghana (2009 – 2015); National Policy and Plan of Action on Domestic Violence (2009-2019); Under-5 Child Health Policy (2007 - 2015).

²⁴⁴ Link to the Reports of the Committee on the rights of the child on Ghana at the website of the Office of the High Commissioner on Human Rights (OHCHR) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (26 March 2018) After Ghana's second periodic report, the Committee asked it to combine its 3rd to 5th periodic reports into one report and present it in 2015 so that it had enough time to implement the Convention. This was remarkable because the Committee has to frequently nudge States to present their regular reports.

Under the CRC, Ghana as a State Party has the obligation to respect the rights of children in Ghana and protect them from abuse. The approach advocated by the Committee on the Rights of the Child (the Committee) like all other UN Treaty bodies, for achieving these obligations is Universalist in aspiration.²⁴⁵ This is shown in the trend of the Committee's recommendations to States Parties from 2006 to 2016²⁴⁶; urging them to undertake similar measures to demonstrate compliance with the treaty irrespective of the peculiarities of that State Party. The Committee, instead of making efforts to give to each state context-specific measures that would help bring it from its specific situation into full compliance with the treaty, literally says "this is what everyone must do, whether it will work in your situation or not ... so go back home and do same."

4.3.4 How the state actually implements the treaty and which approach it uses

²⁴⁵ Universalism is the usual approach of the UN treaty bodies. Andrew Byrnes justifies the use of this approach by the CEDAW committee thus: Andrew Byrnes, *The Committee on the Elimination of Discrimination Against Women*, in *WOMEN'S HUMAN RIGHTS CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW*, ANNE HELLUM AND HENRIETTE SINDING AASEN eds., Cambridge University Press, 2013, 48: "The Committee's role requires that it assess the extent of implementation of the Convention in nearly all the countries of the world. It thus had had to seek to apply a universal standard of equality and non-discrimination to societies that are enormously diverse – from tiny Island nations to the world's largest countries located in all regions, representing different levels of development and legal systems; manifesting a variety of religious, traditional and cultural systems; and with political systems ranging from advanced liberal democracies through socialist states to countries in turmoil or seeking to find a transition from internal conflict and social disruption (including genocidal killings and civil wars) to a stable, just and ordered society. This diversity and the fact that the Committee is carrying out an international supervisory function that involves making judgements (albeit non-legal ones) on the extent to which sovereign states have given effect to their international obligations, poses significant challenges of competence, legitimacy, diplomacy and effectiveness."

²⁴⁶ Recommendations of the Committee on the Rights of Persons with Disability available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en

The CRC obligates State Parties to ensure the education of children and education of children is guaranteed under the 1992 Constitution of Ghana but this right is implemented in different ways across the country. Whilst most children in urban communities sit in classrooms and study most of the day, many children in rural use the time to help their parents on the farm or on fishing trips and on market days, some of these children offer their services to carry loads for market women to earn some extra income for their families.

To enforce the right to education of the child, state actors have enacted legislation such as the Children's Act, making it an offense not to educate one's child.²⁴⁷ The children's ministry has also been undertaking public education on the need to educate children, cautioning parents that it is against the law for their children to be outside of school during school hours and undertaking these forms of labour. Interventions such as the school-feeding programme were introduced to encourage children to go to school and stay in school, but their successes were short-lived. Ghana was therefore doing what the Committee on the rights of the Child prescribed by using state actors, state institutions and state level legislative, administrative and judicial measures to achieve child protection and prevent child abuse. What the state actors were doing reflected the universalism approach, yet the population of non-school going children continued to soar.

²⁴⁷ Education Act of Ghana, *supra* note 243; and Children's Act of Ghana, *supra* note 162.

The chiefs and other non-state actors have avoided intervening in children's education because it was considered a government's milieu and implementation of their customary laws could be mistaken for abuse of the rights of the child. Under customary law children have to learn a trade as they grew up and this was usually the trade of their parents or something else preferred. The purpose was to develop them into useful and responsible citizens of their communities. When a child is found loitering about all day without being properly engaged, anyone in the community may report this to the chiefs or traditional leaders who would summon the parents for an explanation and possibly punish them for neglecting their duty towards the child. Therefore, first, the child is meant to be educated under the customary laws, although the form of education under customary law varies from that of state law. Secondly the education of the child is of interest to the entire community, not just to the parents or teachers. According to customary law, if the child succeeds the community owns that success and if the child does not, the community suffers from that loss that is why members of the community will report a child who is not engaged in some useful training to their leadership. If a violation of the customary laws is observed, chief or traditional leaders may punish the parents or the child or both of them.

State level legislation on the rights of the child have restricted what many traditional leaders can do to help with the education of children. The informal (non-state) structures therefore relied on state structures, laws and institutions to achieve the country's formal educational goals.

Ghana's Ministry for children realized this was not helping to achieve satisfactory results in child rights protection and prevention of child abuse. A baseline study of the Policy revealed that the most available means for protecting the rights of children – including the right to education, are the traditional (local cultural) systems at the non-state level but these were not adequately regulated. Consequently, to achieve the overarching aim of the treaty – child rights' protection and prevention of child abuse – Ghana adopted a cultural pluralism approach (a different approach from the universalism approach of the Committee.) This new approach was captured in a 2015 Policy titled the Child and Family Welfare Policy.²⁴⁸ The new Policy was considered "Fit" for (the context of) Ghana. Meaning, it embraces the relevant international norms but implements them based on values, beliefs and practices specific to Ghana to domesticate the CRC. The Policy encourages the use of non-state actors, institutions and structures such as chiefs, the extended family system and informal adoption as against the Police, foster care and institutionalization of children to protect children.²⁴⁹ The Policy encourages the use of non-state actors because they are a ready source of information. It is not hard to get good information through these non-state actors because after their training, they are issued community report cards and

²⁴⁸ The Child and Family Welfare Policy of Ghana, February 2015, available at the official website of the Ministry of Gender, Children and Social Protection, Ghana <http://mogcsp.gov.gh/policies/> (last visited on 26 March 2018) aimed at consolidating efforts of various governmental departments and non-governmental organizations working in the field of child welfare in Ghana and "establish[ing] a well-structured and coordinated Child and Family Welfare system that promotes the wellbeing of Children, prevents abuse and protects children from harm."

²⁴⁹ Regulations for the Child and Family Welfare Policy of Ghana, 2015, 23 at 1.3: the policy makes it mandatory for a child protection case, reported to the police, to be referred to the social welfare and community development department. The Policy further bars the police from deciding to remove a child from the family environment and place him or her in an institution unless for immediate safety. This restriction on the capacity of a state institution to intervene is quite telling of the approach that the children's ministry is adopting.

books by the state actors who train them, to facilitate reporting and monitoring. Social welfare officers regularly visit them (the non-state actors) and collect any reports that are due from them for purposes of reporting back to the state. This interface between the formal and informal sector for information collection – the reporting process – provides a source of good information. The Policy further encourages the use of the informal (non-state level) system because it is readily available and inexpensive. First, child abuse costs Ghana millions of dollars each year. However the amount of resources needed to rope in the informal sector to prevent child abuse is very little, therefore constituting savings to government. Second, by using the informal sector, the formal sector (the state) passes on the cost of child rights' protection to the community. Certain costs, such as cost of food and security, are passed on from the state to the community and absorbed by the community through the community setting, and extended family setting. This practice is founded on the traditional understanding that the child belongs to the community (not just his or her parents) and if the child belongs to the community in the long run the community gets a better citizen. This also provides new roles for traditional communal groups such as the *Asafo* groups – the traditional community security forces – which have been dormant in recent times due to the absence of conflicts and communal wars.²⁵⁰ Such groups can now assume new roles of child protection within the community.

²⁵⁰ Atuguba, *supra* note 80, footnote 25: *The Asafo companies of the Asante were groups of young men who were the focal points for political mobilization, community economic and social activities, and security provisioning in the pre-colonial era.*

Two examples confirm the cultural pluralism approach of Ghana's Child and Family Welfare Policy. First, the Policy specifically ropes in Traditional leaders, Chiefs and queen mothers to help implement the international treaty. It makes them "... responsible for facilitating dialogue and engagement through organized community forums and debates on child and family welfare issues to help increase the common understanding of issues and discuss different solutions and resources available." This is significant because first, the traditional leaders, chiefs, queen mothers, community leaders and elders, religious leaders (as mentioned in the Policy) are non-state actors being asked by state actors to help implement an international human right norm.

Second, by "increase the common understanding of issues," the non-state actors - traditional leaders, chiefs and queen mothers - are being asked to help translate international human rights norms to their people based on their intersubjective understandings of such issues, and this is key if the general population is to domesticate the international law. As shown in the previous chapters, Ghana has a legal pluralistic context and traditional leaders, chiefs and queen mothers, and religious leaders are some of the groups of people who implement laws other than the state laws, and people under their authority conform their behavior to those non-state laws. Therefore getting the help of such non-state actors to correct wrong perceptions, change wrong understandings of child-related issues and adopt and enforce state laws on these matters among their people will help facilitate the domestication of the CRC.

However, three issues are likely to arise: First, how do these non-state actors who are neither engaged at the international level nor involved in the drafting of the state laws and policy become acquainted with the law in the first place in order to translate it; second, what if the norms of the people and the state norms diverge; and third, are the people not likely to consider the non-state actor's new perspectives on those issues a rejection of their customs and practices and therefore oppose them?

In response to the first issue, the Ministry responsible for Children has developed a Community Training Manual, an Activity book and Tools with which it has been training various types of community leaders including chiefs and religious leaders.²⁵¹ This informs the community leaders of acceptable and non-acceptable practices under the treaty. Of particular importance is the approach used in such trainings: the non-state actors are guided by the trainers (usually state actors such as the District welfare Officer) to agree on what child abuse and violations are, how they manifest in that particular community, and how they can be dealt with in that particular community based on the peculiar resources available there.²⁵² Thus the training impacts knowledge of the international law and using traditional leaders, chiefs and queen mothers to “discuss different solutions and resources available” to their community at these trainings means that the solutions and resources generated are context specific and not one-size fits all, because the solutions and resources available

²⁵¹ So far about 800 communities have received training.

²⁵² Manual for the Policy – this is a working document developed by UNICEF Ghana and the Ministry of Gender, Children and Social Protection. It is continuously being updated based on feedback received from the various trainings so the version on file with me may soon be outdated.

to an Asante chief (in the Ashanti region) for instance may not be available to a Bole chief (in the northern region) but, the different cultural resources would be harnessed towards a common goal of child protection. In response to the second issue of possible divergence of norms, reality is that the chiefs are forced or compelled to accept these international norms because of modernization - Child Protection has been accepted as a national issue and every chief or queen mother would like to be part of protecting children; because the aim is to get to Accra - to do what the people in the capital city, Accra, do (which is similar to the CRC way); because those chiefs want to get to the National House of Chiefs (and it looks good on their profile if they have been attending these trainings - so that they can get to the regional house of chiefs and further to the National House of Chiefs); and because they want to get donor funding for their projects. So the trainings and "agreement with the CRC norms" makes the chiefs look good. On the third issue of non-state actors who enforce laws other than state laws being accused of betraying their custom when they start enforcing state laws, the practice by Ghanaian chiefs for instance has been two fold: first they announce the new rules consistent with the International laws to their people and subsequently invite a state actor such as the District Social Welfare Officer and a member of an Non-Governmental Organization (NGO) working in the area to confirm the importance of the new rule. Secondly, during annual festivals Chiefs usually set aside a day to deliberate with their people on welfare matters. These days the discussions include how children are performing in school (sometimes they invite the headteacher of the local school to inform parents of their children's performance), what could be accounting for poor performance of children from the community in

national examinations and how to improve their performance. From such discussions, the people tend to generate options that imply changes to their customs. For instance, the raping of a girl is culturally considered a crime against the community, something that offends the gods. In some communities, the traditional leaders may banish the offender from the community, or require the performance of some rituals to cleanse the offender and the community. Usually, the girl (victim) ends up with a bad name in the community, is teased in school – giving rise to various psychological issues for her without any support and she eventually drops out of school and is soon an unmarried teenage mother. The Policy aims to have the traditional leaders use their authority and laws to do things differently in such situations. The traditional leaders encourage the community at its annual durbar to deal with such offenders under state law, and undertake rituals and community announcements to protect the victim's image and reassure her position in the community. If she is pregnant she should be encouraged to go to school and complete her education without been teased. But the question is how do state actors get the non-state actors to do all this? First, Chiefs have the traditional responsibility to protect children. Second, when the training is organized through state institutions such as National House of Chiefs the Chiefs are obligated to attend. Third, the chiefs need the trainings and positive implementation for their own Curriculum Vitae (CV) or profile – to be chosen to be in the Regional House of Chiefs and National House of Chiefs. Finally, the chiefs accept the training to improve chances of donor funding for their community. For these reasons, sometimes the chiefs pretend to be implementing the international norms they have learnt but do not actually do it. So

that when you go back into their communities you could still find child abuse incidents such as young children engaged in hazardous labour on cocoa farms rather than being in school.

The second confirmation of the cultural pluralism approach is that under the Policy the chief and other traditional leaders use their resources to achieve the overarching value of child protection in their community. One of the characteristics of the cultural pluralism approach is that the different sub-groups must use their different resources to achieve the other arching goal of the state and that is what happens in the cultural pluralism approach to the CRC implementation in Ghana because the Chiefs, the Asafo people, and the Police among others, are all tapping into their different resources (the chiefs for example tap into their indigenous knowledge system) to achieve the overarching goal of children's rights protection in Ghana.

The third confirmation of the cultural pluralism approach is that the Policy states that the Ministry had realized that focusing only on the individual child's interest in isolation from the family's interest as a whole (as canvassed by the CRC Committee) has not been helpful in the past and so in this new policy, the Ministry will consider the interest of the child within the context of the family and community. The family and communal interest is an African value enshrined in the African Charter on Human and Peoples' Rights²⁵³ and it supersedes the individual's right.²⁵⁴ The Ghanaian Policy

²⁵³ ACHPR, *supra* note 97

²⁵⁴ ACHPR, *supra* note 97

embraces this communitarian value and uses it in implementing the international law.

After nearly two years of implementation, the Ministry for Children’s Policy, Planning, Monitoring and Evaluation team has found the new Policy to be more effective in child protection from harm and prevention of child abuse than the previous purely universalism approach.²⁵⁵ Therefore harnessing the help of the non-state actors has proven to be the missing link to the effective domestication of the international human right (CRC) in Ghana.²⁵⁶

4.3.5 What accounted for the Successful Implementation of the CRC In Ghana

From the case study of the implementation of the CRC in Ghana, we identify three steps through which Ghana was able to successfully domesticate the CRC. First, adopt the overarching international principle protecting children from abuse and tap into sub-group resources (indigenous knowledge and methods) to achieve the overarching international principle. Second, develop a legal and policy framework for achieving this international principle that is fit for the legal pluralistic context of

²⁵⁵ National Team Monitoring – Greater Accra Region, October 2016 (Interim report) 5 “... behaviour change issues have been observed in terms of positive parenting, deepened understanding of child protection by parents and community members, community members discussing community laws on child protection and putting in structures within the communities to address child protection issues.

²⁵⁶ Interim report, *supra* note 255 also identifies gaps in the training process which, when addressed, would further improve the domestication of the international norms. For instance, training with activities and tools that specific communities can relate with more easily.

Ghana. And third, create an interface where responses from non-state actors about the implementation of the treaty are transmitted to state actors and vice versa. When these criteria (or conditions) are true, then international human rights norms will be successfully domesticated.

4.3.6 Conclusion to CRC case study

In the above case study I have presented the situation of children's rights in Ghana. I have sought to demonstrate how Ghanaian state actors failed to achieve their goals on child rights protection when they used the universalism approach to implement the CRC as advocated by the Committee on the rights of the child and how the cultural relativism approach is unlikely to generate an improvement in children's rights protection in Ghana. I then showed how Ghana achieved success in the protection of the rights of the child when it switched from the universalism approach to the cultural pluralism approach with some modification to that approach.

4.4 STATEMENT OF THEORY

These case studies illustrate the following thesis: For an African state with a legal pluralistic context to successfully domesticate international human rights norms she

must take the following steps: First, adopt the overarching international human rights norm and tap into sub-group level indigenous knowledge and other resources to achieve the overarching international human rights norm. Second, enact domestic legislation that reflects all the varied domestic manifestation of the issue; and third, create an interface between non-state actors and state actors that allows for frequent updating of both state and non-state laws and policy to reflect the international human right norm.

This three-step approach has ensured success in the implementation of the CRC in Ghana, albeit some drawbacks such as the slow rate of the spread of the norms and lip service paid by some non-state actors to the norms instead of demonstrating sustained commitment to their implementation.

4.4.1 Explanation of Theory

When a state party enters into an international human rights treaty, it is assumed that she aims to implement the international law. Consequently the necessary first step in this theory is for the African State Party to adopt an international human rights principle in the treaty and aim to achieve that principle. This principle could be 'children's rights protection.' The second half of this first step is for state actors in the African State Party to tap into sub-group level indigenous knowledge and methods to find out which ones are most appropriate to help achieve the overarching guiding

principle. As explained earlier, the overarching human rights principle would serve as the guiding principle for the state as it makes efforts towards implementing the treaty. It would help the state to avoid doing things that would be inconsistent with the treaty, because working towards achieving the principle invariably means working towards the treaty. Since the African State Party has a legal pluralistic context, her state actors should tap into the authentic, original, and indigenous resources at the sub-group level to achieve the overarching principle. The people would be able to identify more easily with methods they already know at that level and this would facilitate their compliance with the treaty's principle. For instance, as previously shown, an original resource for child protection in Ghana would be the use of Asafo companies. The people already know these groups so they would be effective in enforcing rules that ultimately enforce the international human rights principle.

The second step is creating the legal and policy framework that would help achieve this principle. In Ghana, the Constitution and children's Act of Ghana proscribe the abuse of children and reflect both rights of children and duties of children. The concept of duties of children is an essential non-state level principle in Ghana, so non-state actors are more accommodating of a law that provides for both the rights and duties of children. Ghana has also adopted 'the child and family welfare policy.' This policy was made to "fit" the legal pluralistic context of Ghana while at the same time achieving the overarching international human rights goal.

The third step in this theory is the creation of an interface where responses from the non-state actors about the implementation of the treaty are transmitted to state actors and vice versa. This interface creates the opportunity for the modification of local customary laws to make them more responsive to the state's obligations under the international treaty on the one hand, and also creates the opportunity for the modification of state laws and policy to make them more suitable to the local cultural contexts on the other hand. When this interface was applied in the CRC implementation in Ghana it shifted Ghana from making non-state actors passive objects of the international norms to making them active subjects in the domestication of the international human right treaty. The state gave recognition to non-state actors' interest in the welfare of their local children and rather than impose rules on those non-state actors laws, used the non-state actors as a resource to protect the rights of local children and to find out what would work best in the particular circumstance to better protect the children.

The third step is my critical addition to the cultural pluralism approach. In this third step creates a unique interface for non-state actors to interact with state actors. By interaction I meant that they would meet with each other at forums such as workshops, visits by the state actors' to the Chiefs' palace in the communities, or visit by the Chiefs' to state actors' offices in the urban areas. Non-state actors that could attend such meetings would include Chiefs, council of elders and community leaders. State actors who could attend such meetings would include Directors of Policy Implementation at the Ministries, social workers and community educators. It would

also be helpful if the state actors initiate such meetings and do so on regular basis because they have a broader sense of what the international body requires of the state and know how much time is available to meet the goals. At the meetings, attendees should be encouraged to speak freely without intimidation. To this end, it would be helpful not to invite the Police or other stakeholders whose presence at such meetings would intimidate one group or the other. The atmosphere should encourage free flow of information and ideas from state actors to non-state actors and vice-versa. Non-state actors are usually cautious when they discover that state actors are not forthright with them but could only be pretending to be interested in their views. On the other hand some non-state actors considering themselves gatekeepers of their communities without whom the aim of the state will not be achieved may use the opportunity to sabotage the process. It is very necessary for both sides to be genuinely interested in achieving the overarching goals. During such meetings information exchange is key. Information about what works and what does not work in the implementation of the treaty must be passed on and received in a language that both sides fully understand. Suggestions for modifying both customary law and state law to facilitate the translation and reception of the international norms to ensure that both legal systems work towards attaining the overarching goal of the state complying with the international human right norm should be exchanged at such meetings. The stakeholders - State actors and the non-state actors – should carve out responsibilities for the non-state actors that harness their unique capacities among their people and positions them as interested stakeholders in the implementation of

the international human rights norms rather than passive recipients of the international human right norm.

When non-state actors consider themselves as “owners” of the process they go the extra mile to ensure the successful implementation of the treaty in their communities. Secondly, the advantage of having different types of non-state actors as stakeholders is that they could work together, holding each other responsible for violations and reminding each other of decisions taken at previous meetings. Such steps ensure the overall progress in the treaty implementation.

At the same time, some non-state actors may feign interest in the whole process because of the stipends they may receive at the various meetings they attend. To curb this practice it would be helpful for the state actors to take frequent field trips outside of the formal offices of the Chiefs and traditional leaders to ascertain for themselves the true happenings on the ground in terms of the implementation of the treaty. The trips and stipend payment carry cost implications and the state must demonstrate commitment to pay them in order to incentivize the stakeholders.

4.4.2 Why this is a theory

Legal pluralism is a phenomenon that this grossly under-theorized, yet its effect on how well African states implement international human rights treaties is significant.

An approach to implementing international human rights in Africa, which does not factor in legal pluralism, is at best dead on arrival. It is a major reason for which African states poorly implement international human rights treaties. Anne Hellum has therefore shown that the cultural pluralism approach is more likely to help improve the implementation of international human rights in Africa because this approach makes use of legal pluralism. However although the cultural pluralism approach recognizes the role of legal pluralism, it leaves other incidents of legal pluralism unaccounted for. This thesis builds on the work of Anne Hellum by accounting for other aspects of legal pluralism to sustain the cultural pluralism approach. Instead of limiting the influence of sub-group level actors to the provision of indigenous knowledge and methods to achieve the overarching human rights principle, this theory brings the sub-group actors into contact with the state actors such that sub-group customary laws could potentially influence international law. Thus instead of a one-way flow of information from the state level to the non-state level, because the state actors would only reach into the non-state level to draw out a method for achieving the international norm, this theory creates another way for the non-state level actors to also reach into the state laws and influence them.

4.4.3 Why this is a new theory

Bringing international human rights norms to the ground—the non-state level—has proven to be so challenging that scholars usually limit their work to the state level.²⁵⁷ They usually recommend that state actors take steps to change certain things at the state level and ultimately the intended aim of the international human rights treaty would be achieved at the non-state level. My theory is new because I provide specific principles for not only how the international human rights norms could reach the non-state level, but also how to keep the two streams of law—international and indigenous law—in continuous touch.

Although the critical third step of the theory may be accused of adding nothing new, it is actually adding something new to the body of law because it is bringing indigenous authentic African resources in the form of traditional leaders (who are the gatekeepers to their sub-groups) to connect with international norms. This is unique. Again my theory is new because it opens up international law to the influence of sub-group level actors, which is unprecedented. This is because the feedback from the traditional leaders could influence the state to make reservations to certain provisions in the next treaty she enters into, because she would have received first hand knowledge that such provisions would be unimplementable in her domestic settings.

²⁵⁷ Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke Law Journal* 621, 642 (2004), Goodman and Jinks advocate acculturation; Harold H. Koh, *Transnational legal process*, 75 *Nebraska Law Review* 181 (1996): Koh advocates the Transnational legal process.

4.4.4 Robustness of the theory

The main argument, which can be presented against my theory, is that it is intuitive. My response to such argument is that the theory is deeper and more complicated than initially meets the eye. For a long time the fact of legal pluralism in African states has been glossed over or not properly accounted for, and African states were presented with approaches to implementing international human rights law that assumes that their societies are homogenous. The cultural pluralism approach has stepped in to account for legal pluralism in treaty implementation. However, the approach as it stands currently is one-sided, which makes it unsustainable. My theory is more robust in that I suggest an interactive interface for the exchange of information and continuous updating of both state and non-state law. In the long run this theory would make the cultural pluralism more sustainable.

Another likely criticism of this theory would be that it is an adjunct to the pluralism approach. My response is that there is a critical difference between the cultural pluralism approach and my theory. My theory builds on the pluralism approach by not limiting the responsibilities to the state actors, but assigning responsibilities also to non-state actors. Again cultural pluralism approach as it is does not make room for customary law to “touch” or “change” state law, but my theory allows for the interaction between these two systems of law and, very importantly, it allows for the two systems of law to continually update themselves.

4.4.5 Advantages and disadvantages of the theory

The first major advantage of this theory is that it offers a simplified means for achieving improved implementation of international human rights in African states with legal pluralism.

The second major advantage of this approach is that it uses traditional leaders as active participants in the implementation of the international human rights law. Using non-state actors opens the door to many more positive ripple effects. For instance, it makes the process cost effective because since the traditional leaders play active roles in planning how to domesticate the treaty, using their help to implement the treaty should not give rise to additional costs to the state. Again, as active participants, the non-state actors own the process of the domestication of the international human rights norms. They are therefore protective of it at the ground level. This “ownership” of the process is very essential for the successful domestication of the international human rights norms. When the leaders of the communities—the gatekeepers— feel that the process of change is theirs and not the superimposition of an outside authority, the process of domestication is more likely to be well grounded.

The third major advantage of this theory is that it is sustainable. First, by providing for the frequent updating of state law and customary law to reflect feedback from

either side and to achieve the overarching aim of the international human rights treaty, the theory makes room for growth and will make the process of domestication sustainable. The theory does not give a one-time solution because you cannot change social conduct abruptly. This is the reason why many theories of domestication fail. This new theory rather acknowledges that both customary law and state law evolve, and rather uses the evolving character of both laws to its advantage to ensure a more sustainable process of domestication.

Second, this process is more sustainable because of the actors who actually implement it at the ground level. The traditional leaders command a level of trust from the people at the ground level that is different from how the people feel towards politicians and state actors. The people have entrusted themselves to the care of their traditional leaders and who actually live with them in their communities. They have the understanding that those leaders would not implement things that will destroy the very community of which those leaders are a part. On the other hand, they do not have the same level of trust for a politician or a state actor who lives outside their community but comes to their community to introduce a new norm to them and then leaves at the end of the day, and would not be affected if the effect of his advise is the destruction of the community. Using the community's traditional leaders will therefore be the catalyst that leads to a sustained acceptance and implementation of the international human rights principle at the ground level.

A fourth major advantage of this theory is that it frees state actors to concentrate on monitoring and evaluating the implementation of the treaty holistically to ensure that overall, the state meets its goal of domesticating the international human rights principle. As earlier shown in this dissertation, Africa is a heterogeneous continent with multiple domestic legal systems. The effect is that, even within one African state with legal pluralism, the different mechanisms will be needed in order to achieve compliance with the human rights treaty at the community level. So in order to ensure that all the different mechanisms lead to one result of implementing the overarching principle, it would be best that the actual implementation is left to the community leaders whilst the state actors constantly monitor and evaluate those mechanisms to ensure that they achieve the intended result of implementing the international human rights principle

Finally, the fifth major advantage of this theory is that it measures the level of a state's progress in implementing its international human rights obligations according to the specifics of the state and not through a one-size fits all approach. When the state makes its legal and policy framework that is "fit" for its context, for domesticating the human rights principle, this ensures that at the international level, the related treaty bodies and other bodies, use that framework as the yardstick for determining whether the state is making any progress or is at a standstill; instead of evaluating the state by a generalized standard, which has the disadvantage of not showing the actual progress the state may or could have made but did not. This makes room for a context-specific assessment of state implementation of the international human rights treaty.

The main disadvantage of the theory is that, where the systems of law at the sub-group level are many, it may be complicated for the state to monitor and evaluate the various different methods that each sub-group chooses to use to achieve the overarching human rights principle. This disadvantage is however over-shadowed by the fact that the theory makes room for frequent interactions between state actors and non-state actors, which if well implemented, can forestall such happenings.

4.5 CONCLUSION

Zimbabwe's implementation of CEDAW and Ghana's implementation of the CRC provide very important lessons for the implementation of international human rights treaties in African states with legal pluralistic contexts. After undertaking these two case studies we arrive at the conclusion that the universalism and cultural relativism approaches do not help improve implementation of international human rights treaties in African states with legal pluralistic contexts. The cultural pluralism approach however can help improve the implementation of those treaties, with some modification. In the next chapter I will examine the implementation of the CRPD in Ghana to determine if Ghana is fully complying with its obligations under that international human rights treaty, if not, I will assess the applicability of the cultural pluralism theory developed above to the case of the implementation of the CRPD in

Ghana to determine if it would help improve Ghana's implementation of the CRPD, in the following chapter, chapter six.

5 CHAPTER FIVE:

APPLICATION OF THEORY TO THE IMPLEMENTATION OF THE CRPD IN GHANA

5.1 INTRODUCTION:

Ghana has a huge population of PWDs²⁵⁸ and the state has been making various legislative and administrative interventions to improve the respect of the rights of this population. In this chapter we will examine the actual situation of PWDs in Ghana, the effect of the state level interventions in the lives of PWDs and the effect of customary laws on disability on the lives of PWDs in Ghana. Next we will apply the cultural pluralism theory developed in Chapter four to the situation of disability rights in Ghana to determine if it would help improve the situation of PWDs in Ghana and further test the theory to determine if it has traction in other sectors of human rights.

²⁵⁸ Population and Housing census of Ghana, summary report of final results, 12 (Ghana Statistical Service, 2012)

5.2 CASE STUDY OF DISABILITY RIGHTS IN GHANA

5.2.1 What this case study is meant to establish

This case study is meant to assess the current situation of PWDs in Ghana in terms of national and international law. The case study is also going to answer certain crucial questions of responsibility: who is responsible for what causal contributions to the problems of PWDs in Ghana; who is responsible for making (which) contributions to alleviating or better eradicating these problems; and who is responsible for making the various systems of law co-existing in Ghana's legal system work together to improve the rights of PWDs in Ghana?

Through this case study, the reader will be presented with a spectrum of actors who are capable of making different contributions to improving the rights of PWDs in an African state with legal pluralistic context. The intended outcome is to question the treaty body's reliance on the universalism approach to the implementation of the CRPD in State Parties.

5.2.2 Background about the state

Ghana's political and constitutional history has been copiously discussed in the previous chapter. In this case study I will first undertake an examination of the relevant contextual facts and trends. This will involve an examination of the situation of disability rights in Ghana and the attitudes/"ideologies" of the general population, relevant politicians and civil servants towards disability. Second, I will examine the available funds and facilities for disability rights protection in Ghana, and the work of chiefs, individuals and Non-Governmental Organizations in disability rights protection in Ghana. Third, I will offer an explanation of why things are as they are: what are the existing laws (customary laws, judicial pronouncements, statutes, and constitutional provisions), practices, culture, attitudes, influence of multiple domestic systems of law on disability protections, foreign influences, and how they together cause the situation as described to persist. Finally, we will assess the current situation in terms of national and international law as well as from the standpoints of social justice and morality.

5.2.3 Background about the CRPD

The CRPD and its Optional Protocol were adopted on 13 December 2006 at the United Nations Headquarters in New York "during the 61st session of the United Nations

General Assembly by resolution [A/RES/61/106](#).”²⁵⁹ The treaty was opened for signature by states and regional integration organizations on 30 March 2007.²⁶⁰ On that same day “there were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. This is the highest number of signatories in history to a UN Convention on its opening day.”²⁶¹ The Convention entered into force on 3 May 2008 being 30 days after receiving its 20th ratification as required by Article 45(1) of the CRPD.²⁶² As at December 15 2017, almost 10 years after the CRPD entered into force, the Convention had received 175 ratifications.²⁶³ Forty-two African states have ratified the CRPD whilst 3 African states have signed but not ratified the CRPD.²⁶⁴ Many of these African states have enacted domestic legislation protecting the rights of PWDs.²⁶⁵ Ghana signed the CRPD on March 30 2007 and ratified the treaty on 31 July 2012. The Parliament of Ghana passed the Persons with Disability Act, 2006, Act 715 in June 2006 and it received the

²⁵⁹ United Nations Treaty Collection, *supra* note 217

²⁶⁰ CRPD, *supra* note 16, Article 42

²⁶¹ United Nations Division for Social Policy and Development Disability <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited on 23 March 2018)

²⁶² United Nations Treaty Collection, *supra* note 217

²⁶³ United Nations Division for Social Policy and Development Disability, *supra* note 261

²⁶⁴ United Nations Treaty Collection, *supra* note 217: The African states that have signed but not ratified the CRPD are Cameroon, Chad and Libya. Egypt is the only African country that made a declaration or reservation upon signing or ratifying the treaty. Egypt declared that the meaning of Article 12(2) of the CRPD on the recognition of PWDs on an equal basis with others before the law did not include capacity to perform under Egyptian law.

²⁶⁵ Algeria <http://www.handicap-international.us/algeria> (last visited on 28 March 2018): The webpage contains steps Algeria has taken towards disability rights protection in that country.

Presidential Assent in August 2006²⁶⁶ while the CRPD was adopted in December 2006.²⁶⁷

The CRPD guarantees the rights of Women²⁶⁸ and children²⁶⁹ with disabilities. The right to life,²⁷⁰ liberty and security of person²⁷¹ freedom from torture or cruel inhuman or degrading treatment or punishment,²⁷² freedom from exploitation violence and abuse²⁷³ right to live independently and be included in the community,²⁷⁴ right to freedom of expression and opinion, and access to information,²⁷⁵ right to privacy,²⁷⁶ right to marry and found a family,²⁷⁷ right to education,²⁷⁸ right to health,²⁷⁹ right to work,²⁸⁰ right to adequate standard of living

²⁶⁶ Ghana Federation of Disability Organizations, *News Commentary on the tenth Anniversary of the Disability Act 715, Its Impact on the Lives of Persons With Disabilities* by Yaw Ofori Debrah, National President of the Ghana Federation of Disability Organisations (26 March 2018) <https://www.facebook.com/gfdghana/posts/333987956943420> (last visited on 26 March 2018)

²⁶⁷ For an in-depth analysis about whether the provisions of the PWD Act of Ghana is consistent with those of the CRPD see Lewis Abedi Asante and Alexander Sasu, *The Persons with Disability Act, 2006 (Act 715) of The Republic of Ghana: The Law, Omissions and Recommendations Law*, Journal of Law, Policy and Globalization Vol. 36, 2015; and Law and Development Associates, *Aligning the Mental Health Bill of Ghana to the Convention on the rights of Persons With Disability Act*, Project Report, May 2012. These publications show that the provisions of the PWD Act of Ghana, are not entirely consistent with those of the CRPD. Important specific provisions are omitted such as the rights of women with disabilities. These do not however detract from the basic fact that the domestic legislation is intended to formally protect the rights of PWDs are required by the CRPD.

²⁶⁸ CRPD, *supra* note 16, Article 6

²⁶⁹ CRPD, *supra* note 16, Article 7

²⁷⁰ CRPD, *supra* note 16, Article 10

²⁷¹ CRPD, *supra* note 16, Article 14

²⁷² CRPD, *supra* note 16, Article 15

²⁷³ CRPD, *supra* note 16, Article 16

²⁷⁴ CRPD, *supra* note 16, Article 19

²⁷⁵ CRPD, *supra* note 16, Article 21

²⁷⁶ CRPD, *supra* note 16, Article 22

²⁷⁷ CRPD, *supra* note 16, Article 23

²⁷⁸ CRPD, *supra* note 16, Article 24

²⁷⁹ CRPD, *supra* note 16, Article 25

²⁸⁰ CRPD, *supra* note 16 Article 27

and social protection,²⁸¹right to participate in political and public life,²⁸²right to participate in cultural life, recreation, leisure and sports.²⁸³ Ghana’s Constitution and Disability Act enshrine most of the rights guaranteed under the CRPD²⁸⁴ however many local customary laws and practices violate disability rights. The approach advocated by the relevant treaty body to State Parties for achieving the obligation is universalism.

5.2.4 How the state actually implements the treaty and which approach it uses

First, Article 7 of the CRPD requires Ghana to ‘take all necessary measures to ensure the full enjoyment by Children with Disabilities (CWDs) of all human rights and fundamental freedoms on an equal basis with other children,’ and Article 10 of the CRPD guarantees the right to life of all PWDs. Article 37(2)(b) of Ghana’s Constitution provides that “[T]he State shall enact appropriate laws to assure the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled... .” However the right to life of Ghanaian CWDs is frequently violated based on different cultural beliefs about disability.

²⁸¹ CRPD, *supra* note 16 Article 28

²⁸² CRPD, *supra* note 16 Article 29

²⁸³ CRPD, *supra* note 16 Article 30

²⁸⁴ Constitution, *supra* note 80, Articles 29, 37(2)(b) and 38 (3)(b); Disability Act of Ghana, *supra* note 243.

Among the Asantes of central Ghana, the cultural belief is that babies born with disabilities are evil signs for the community from the gods, threatening the very survival of the community. Parents must have offended the gods to receive a CWD. Babies with intellectual disabilities are believed to come from rivers and are labelled 'Nsuoba' literally; 'child of the river.' Such babies were returned to the river to go back to where they came from or 'to their own kind.'²⁸⁵ Babies with physical disabilities such as six fingers, were killed at birth (Munyi (2012) or labelled 'nea wadidem' literally; 'the one who has a physical "deformity".' This label signifies 'an imperfect or incomplete person.'²⁸⁶

Among the northerners of northern Ghana, babies born with disabilities were killed because they were considered a threat to their parents' prosperity. The intersubjective understanding of the problem of disability in children among the people living in northern communities is that such babies are actually evil spirits sent to impoverish their parents, as parents would have to spend all their wealth nursing their CWDs to health. Babies born with disabilities (or complex medical conditions) are labeled 'spirit children', 'Kinkirigo' (language in Kassena Nankana district) and their birth signifies the emergence of an evil force in the family necessitating their death or abandonment.²⁸⁷

²⁸⁵ Chomba Wa Munyi 'Past and Present Perceptions towards disability: a historical Perspective' (2012) <http://dsq-sds.org/article/view/3197/3068> (accessed 26 March 2018)

²⁸⁶ PWD Act, *supra* note 243, section 37 criminalizes the calling of persons with disabilities with derogatory names.

²⁸⁷ Jacqueline Slikker, *Attitudes towards Persons with disability in Ghana*, (2009) 15.

In January 2013, an investigative journalist uncovered the active pursuit of the killing of “spirit children” through soothsayers in communities in northern Ghana.²⁸⁸ These practices of soothsayers and other non-state actors have persisted because they are founded on negative non-state norms about disabilities. These negative non-state rules about CWDs violate the right to life of the CWD, which is protected under the state law (the Constitution) and under international law (CRPD).

Second, Article 19 of the CRPD guarantees PWDs the right to be included in the community, whilst Article 30 of the CRPD guarantees PWDs the right to participate in cultural life, recreation, leisure and sport.²⁸⁹ Article 29(1) of Ghana’s Constitution provides that “Disabled Persons have the right to live with their families or with foster parents and to participate in social, creative or recreational activities.”²⁹⁰ This right is re-echoed in Section 1 of Ghana’s Persons with Disability Act, with an extension to include the right to participate in political and economic activities.²⁹¹

Operating at the non-state level, stigmatization is the single most difficult barrier to PWDs participating in communal, cultural, recreational, economic, social and political life. For PWDs, stigmatization usually starts from childhood and continues into adulthood. The cultural perception that the birth of a child with disability is the

²⁸⁸ Anas, documentary on spirit children, *supra* note 160

²⁸⁹ CRPD, *supra* note 16, Articles 19 and 30. Some African scholars have argued that the Western concept of communal life as protected under the CRPD is different from the African concept.

²⁹⁰ Constitution, *supra* note 80, Article 29(1)

²⁹¹ PWD Act of Ghana, *supra* note 243.

parent's punishment for offending a god²⁹² leads some parents of 'normal' children to stop their children from playing with CWDs, lest the 'punishment of the god' is transferred to their 'normal' children. On the other hand, parents of CWDs hide them from the community instead of seeking help for them. Baffoe (2013) narrates the response of a parent of a child with Intellectual disability who was a participant in his survey:

*"when my child was born with this illness (Down's syndrome), everybody told me that my family may have done something wrong for the gods to send me this child. I never brought him outside the house. The only time I bring him out of the room to the open compound is when everyone in the neighborhood has gone to the farm..."*²⁹³

Not allowing CWDs to play freely with other children without disabilities in the communities, and hiding children with disabilities from other people within the community for fear of stigmatization violate the rights of the CWDs to participate in the community life.

Adults with disabilities are denied the opportunity to become chiefs or appear before them due to the stigma attached to their disabilities.²⁹⁴ This violates their right to

²⁹² Mawutor Avoke *Models of disability in the labelling and attitudinal discourse in Ghana* (2002) 17 Disability and society 769, 773; Joseph S. Agbenyega *The power of labelling discourse in the construction of disability in Ghana*, A paper presented at the Australian Association for Research in Education Conference, New Castle, Association of Active Educational Researchers (AARE), Volume 16, (2003/12), available at <https://pdfs.semanticscholar.org/dbf7/cbaed55503793265f51e6a5c642ca383ec7b.pdf> (last visited on 28 March 2018)

²⁹³ Michael Baffoe 'Stigma, discrimination & marginalization: Gateways to oppression persons with disabilities in Ghana, West Africa (2013) 3(1) *Journal of Education and Social Research* 187 195.

²⁹⁴ Recently several important national positions are being occupied by PWDs in Ghana. In 2013 a visually-impaired lawyer Henry Seidu Daanaa was appointed minister of Chieftaincy and Traditional Affairs in Ghana, it was a taboo for visually-impaired persons to be admitted into the presence of chiefs let alone address them, and a chief could be de-stooled for admitting a person with visual impairment into his court. Consequently the appointment of the minister was greeted with great uproar and

participate in the Political life of their communities. There is a Ghanaian customary law rule that before someone marries, a background check is conducted of the prospective partner to determine if there are any issues of mental illnesses or other disabilities in that partner's family. Where there are, the marriage is discouraged; least the disability (bad bloodline) is introduced into the 'healthy' family. A PWD's chance of marriage is therefore severely hampered by customary law rules violating his right to family and social life.²⁹⁵ The CRPD guarantees PWDs the right to be included in their communities²⁹⁶ and to participate in public life.²⁹⁷ However many non-state norms in Ghana 'dehumanize PWDs, affect their self esteem and limit their opportunities for social interaction.'²⁹⁸ For instance, a regular pastime of adult Ghanaian men, particularly those in rural areas (where PWDs are concentrated) is drinking together and calling out of drinking names to other men in their communities.

Among the Ewe-Anlo of South-Eastern Ghana, the calling out of drinking names of an Ewe-Anlo man awakens his personhood in ways that defy categorization using the

protests from some chiefs but government maintained that appointment. In 2015, Gabriel Pwamang, a lawyer with a physical disability, was sworn in as a Supreme Court Judge. In early 2016, Ivor Greenstreet a wheel chair-bound person was elected presidential candidate of a major political party in Ghana (Convention People's Party) ahead of Ghana's November 2016 national elections.

²⁹⁵ Population and Housing Census, *supra* note 258, '40% PWDs were married compared to 43% in the total population, while 42.5% of non-PWDs had never married the proportion for [non-] PWDs was 27.3 percent'

²⁹⁶ CRPD, *supra* note 16, Article 19

²⁹⁷ CRPD, *supra* note 16, Article 29

²⁹⁸ Osman Mensah et al *Strengthening the disability movement in Ghana through organizational capacity and advocacy: Contextual analysis of the disability situation in Ghana*, JMK Research Consulting, (2008) v <http://www.gfdgh.org/Context%20analysis.pdf> (last visited on 28 March 2018).

five senses.²⁹⁹ The denial of a drinking name to a PWD on the basis of his disability³⁰⁰ is a blow on his personhood, making him feel 'less than.' Being denied the pleasure of that recognition from his community when colleagues are accorded it, affects one's self esteem and is an example of not being allowed to participate fully in the activities of the community because of one's disability in violation of the right to be included in one's community guaranteed under Article 19 of CRPD.

Even when an adult with disability is healed of a disability, he or she is always associated with the former disability. Members of the community continually make reference to the former disability to justify his or her exclusion from various communal activities. For instance, Ghana enacted the Mental Health Act in 2012, aimed at "promot[ing] a culturally appropriate ... mental health care that will involve both the public and the private sectors."³⁰¹ Two years after the enactment of this legislation the Chief Psychiatrist of the Accra Psychiatric Hospital, Dr. Akwasi Osei, complained that when mentally ill patients are treated and sent home, their families and communities do not want to accept them back and allow them to reintegrate into their societies because of the customary norm that 'once a person has been mentally

²⁹⁹ Kathryn L. Geurts & Elvis Gershon Adikah, *Enduring and Endearing Feelings and the Transformation of Material Culture in West Africa* in E EDWARDS *et al* eds., *SENSIBLE OBJECTS: COLONIALISM MUSEUMS AND MATERIAL CULTURE* (Berg, 2006): For instance, among Ewe-Anlos of South-eastern Ghana, certain feelings do not fall into the broad categories of the five senses such as what they call "seselelame" literally; "feel-feel-at-flesh-inside.

³⁰⁰ Avoke, *supra* note 292, Among Ewes the cultural belief is that a person with mental disability is a fool. Such persons are therefore labelled 'Asovi' meaning 'a fool or an idiot,.

³⁰¹ Mental Health Act, *supra* note 243, section 2(d)

ill before, he or she still retained some mental illness no matter how well-recovered he or she may be.’³⁰²

Third, Article 9 of the CRPD requires state parties to ensure to PWDs access to, *inter alia*, buildings, roads, transportation and other indoor and outdoor facilities on equal basis with others, to enable them live independently and participate fully in all aspects of life.³⁰³ Ghana’s Constitution provides for equal access to public places for PWDs³⁰⁴ and Ghana’s Disability Act directly obligates the owner or occupier of a public place to provide appropriate facilities for PWDs to have access to them.³⁰⁵ However public places in Ghana are frequently constructed without disability access. In 2007, the Millennium Development Authority (Ghana) began constructing the George Walker Bush Highway in Ghana. The Ghana Federation of the Disabled (GFD) was not consulted during the design of the Highway although it is the umbrella body of PWDs in Ghana and the highway is a major one, linking some of the major vehicular and pedestrian traffic routes in the capital city of Ghana: Accra. Later, and in response to requests of the GFD, assurances were given that adequate provision had been made in the design of the Highway to facilitate its use by PWDs. The designer of the highway informed the GFD that overpasses and pelican crosses were available for use by pedestrians. During the actual construction of the Highway, the GFD observed that

³⁰² Interview of Dr. Akwasi Osei, 10 October 2014 <http://www.myjoyonline.com/lifestyle/2014/October-10th/resource-constraints-may-force-shutdown-of-mental-facilities.php> (last visited on 24 March 2018): The popular saying is ‘obi abodam ko a, na enye kakra a, ode be hunahuna mmofra’ meaning: ‘no matter how well someone’s mental illness is treated, there still remains some for him to use frightening children.’

³⁰³ CRPD, *supra* note 16 Article 9(1)(a).

³⁰⁴ Constitution, *supra* note 80, Article 29(6).

³⁰⁵ PWD Act of Ghana, *supra* note 243

adequate provisions were not being made to accommodate their disabilities and this matter was brought to the attention of the appropriate officials albeit fruitlessly. The GFD applied for an interim injunction to restrain the government from commissioning the road without first addressing their concerns but the motion was unsuccessful. After commissioning, patronage confirmed the fears of the GFD. It showed that whereas able-bodied persons could traverse the highway safely by using either the overpasses or the pelican crossings, PWDs who are the more vulnerable of the two groups were limited to the Pelican crossings as the only medium for traversing the major highway. The overpasses were constructed in such a way that they were inaccessible to PWDs. At the foot of the overpasses, the initial step was so high that a person with mobility impairment could not easily climb it and the railings that could have supported their climb were absent at the ground level. Subsequent steps were also unevenly spaced and too steep for such PWDs to use. Where railings are located on the overpasses, these were not strong enough to support the weight of an adult and were so widely spaced that young children with mobility impairments were in danger of falling through. At the Pelican Crossings, the curbs did not facilitate crossing by PWDs in wheel chairs. (These observations were confirmed in a Safety Audit Report conducted by the Ghana Highway Authority on the Highway, which also classified some of the defects as requiring immediate action.) Secondly, the pelican crossings are so far apart from each other that the PWDs have the additional burden of walking long distances just to be able to cross the highway from one side to the other. This bad situation was worsened by the fact that most of the stops for commercial vehicles (the usual means of transportation of PWDs) on the highway are

far away from the pelican crossings. Thus, when a PWD alights from a commercial vehicle but needs to traverse the road to reach her destination, she must walk a further distance to reach a pelican crossing, cross the road before continuing her journey. For these reasons the GFD issued a writ of summons at the High Court, Accra (Human Rights Division) seeking, *inter alia*, an order compelling the defendants to provide facilities to make the overpasses accessible to PWDs traversing the Highway in compliance with Article 17 of the 1992 Constitution (non-discrimination clause) and Act 715.³⁰⁶

What is particularly interesting about the case is the absence of disability access to the Human Rights courtroom. Thus the representative of the GFD who is mobility-impaired frequently struggled up the stairs to the third floor where the Court is located.³⁰⁷ In a sense, the absence of disability access to public buildings additionally affects access to justice of PWDs in violation of Article 13 of the CRPD³⁰⁸, Article 29(5) and (6) of Ghana's Constitution³⁰⁹ and Section 5 of Ghana's Disability Act³¹⁰. Absence

³⁰⁶ The GFD issued a writ from the Human Rights Court; *Ghana Federation of the Disabled v. Attorney-General of Ghana, Ghana Highway Authority and Millennium Development Authority*; Suit No. HRC 12/12 (Case on going.)

³⁰⁷ At some point in the proceedings the Judge directed that the representative of the GFD maybe excused from appearing before the Court due to the absence of disability access to the courtroom.

³⁰⁸ CRPD, *supra* note 16, Article 13(1): "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages." CRPD Article 13(2): "In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

³⁰⁹ Constitution, *supra* note 80, Article 29(5): "In any judicial proceedings in which a disabled person is a party, the legal procedure applied shall take his physical and mental condition into account." Article 29(6): "As far as practicable, every place to which the public have access shall have appropriate facilities for disabled persons."

³¹⁰ PWD Act, *supra* note 243, Section 5: "Where a person with disability is a party in judicial proceedings, the adjudicating body shall take into account the condition of the person with disability"

of disability access also creates a barrier for PWDs in the enjoyment of their right to education, which is guaranteed under Article 24 of the CRPD³¹¹, Article 30 of Ghana's Constitution³¹² and Sections 16 and 17 of Ghana's Disability Act.³¹³ Baffoe (2013) narrates the observations of a visually impaired student of the University of Ghana (Ghana's premier public university.)

"All the roads on this campus have open gutters beside them. There are no pavements by the roadside so it is very difficult for those of us that are blind to walk safely around the campus. Another difficulty I have is the stairs to climb to some of the lecture halls that are on the second and third floors. There is no lift (elevator) in the building so sometimes I get friends to carry me upstairs but this is difficult. When I don't get any people to carry me upstairs to the lecture hall, I don't go to class. It is as if the university is only for able-bodied persons."³¹⁴

Teachers in elementary public inclusive education remain prejudiced against CWDs due to negative non-state customary laws about disability. The CRPD provides that PWDs should be guaranteed the right to inclusive education at all levels, regardless of age, without discrimination and on the basis of equal opportunity.³¹⁵ Until recently,

and provide appropriate facilitate that enable the person with disability to participate effectively in the proceedings."

³¹¹ CRPD, *supra* note 16 Article 24 is on Education. It guarantees the rights of PWDs to education and development, and mandates State parties to include PWDs in the policy of Free Compulsory Basic Education and continuous education up to the tertiary level inclusively.

³¹² Constitution, *supra* note 80, Article 30: "A person who by reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs.

³¹³ PWD Act, *supra* note 243, Sections 16 & 17 obligates a person who has custody of a CWD to enroll that child in school or requires the Minister of Education to enact the appropriate legislation to ensure the provision of appropriate facilities and equipment necessary for the successful education of CWDs.

³¹⁴ Baffoe, *supra* note 294, at 194.

³¹⁵ CRPD, *supra* note 16, Article 24.

CWDs in Ghana were not inclusively educated. The change begun in 1962 when Ghana's education laws mandated inclusive education of children with moderate disabilities in regular schools.³¹⁶ Currently, the Constitution, the PWD Act and the Policy of Inclusive Education collectively guarantee the right to inclusive education of CWDs ³¹⁷ based on certain guiding principles.³¹⁸ Yet an overwhelming number of the regular teachers are unwilling to teach CWDs inclusively; considering themselves 'mentally unprepared' to teach CWDs. ³¹⁹ In the face of clear provisions in the CRPD and Ghana's legislation that CWDs have right to education,³²⁰ attitudes of teachers influenced by cultural beliefs about disability suggest the contrary. Consequently, CWDs complete the education cycle ill-equipped to participate in society, which already does not expect their participation. Students who undergo specialized education graduate with "non-functional" diplomas because society is unwilling to employ them due to their disabilities.³²¹

These three examples demonstrate the actual lived experience of PWDs in Ghana. They show that although the CRPD, the Constitution of Ghana and the Disability Act of Ghana guarantee their rights, those rights are undermined in Ghana, and PWDs are

³¹⁶ Education Act of Ghana, *supra* note 243.

³¹⁷ Constitution, *supra* note 80, Articles 25 & 29; PWD Act, *supra* note 243, sections 16, 17, 18, 20 & 21; and Government of Ghana, Education Strategic Plan, 2010 – 2012, Vol. 1, Policies, Strategies, Delivery, Finance; Ministry of Education, February 2012; items 2.2.5 and 2.3.4.

³¹⁸ Education Plan, *supra* note 317, at 17

³¹⁹ C Obeng 'Teacher's view on the teaching of children with disabilities in Ghanaian classrooms' (2007) No. 1 *International Journal of Special Education* 96 101: In a 2006 survey conducted by the author, 80% of the respondent teachers said they would be unwilling to teach CWDs even if they were given the requisite training and the children were placed in a separate classroom, away from the regular students.

³²⁰ CRPD, *supra* note 16, Article 24; and PWD Act, *supra* note 243, section 16.

³²¹ Baffoe, *supra* note 293, at 194.

not given equal rights as other people within the state who do not have disabilities. PWDs are denied their right to education, to participate in cultural activities or to marry and found a family because a person with disability is considered to have a bad bloodline.

From the actual lived experiences of PWDs in Ghana, the disability rights guaranteed by the CRPD, the Constitution of Ghana and the Disability Act of Ghana, are undermined by non-state norms in Ghana. These non-state norms are founded on deep-rooted stigma based on which people do not give PWDs equal rights as other people without disabilities.

State actors have employed methods such as legislation criminalizing violations of disability rights and formal statements to discourage violations of the rights of PWDs and encourage the inclusion of PWDs in social life. Inclusive education is being encouraged in mainstream public schools and state actors frequently educate the general public that PWDs are capable of being useful to their communities. In particular, the methods are aimed at bringing non-state norms in conformity with the international norms on disability. These methods employed by the state actors reflect the universalism approach that the CRPD committee encourages State Parties to use in meeting their obligations under the treaty, yet they have not changed violations of the rights of PWDs in Ghana.

Non-state actors use customary laws to justify violations of the rights of PWDs. Customary law prohibits certain contacts with PWDs by individuals and by the community and there are dire consequences attached to the non-observance of these laws as demonstrated above. For instance, the customary law is that when a child is born with disabilities he or she must be killed. When the community fails to observe this law, the effect is that the community itself may be annihilated.

Again, as discussed earlier, customary law is valid law in Ghana. But Ghana's Constitution provides that such laws that do not reflect the letter and spirit of the Constitution are invalid. Thus, in a sense, customary law that violates the right to life of PWDs, which is guaranteed under the Constitution of Ghana is invalid law and would be struck down if challenged in Court. Interestingly, non-state actors who implement such customary laws are blissfully oblivious to court decisions and deep-seated stigma against disability operating at the non-state level does not change through community education,³²² enactment of state legislation criminalizing violations of the rights of PWDs³²³ or even the expression of one's intention.³²⁴ For instance, Ghanaians have been receiving education for a long time now about the need not to stigmatize PWDs. Ghana has enacted many laws criminalizing violations of the rights of PWDs and even politicians and other national leaders have spoken about the

³²² Law and Development Associates, *Aligning the Mental Health Bill of Ghana to the Convention on the rights of Persons With Disability Act*, Project Report, (May 2012) 12.

³²³ Christine Buamah, 'State Conformity to International Human Rights Norms: The Acculturation Approach,' LLM paper, 2014. In this paper I explain how criminalizing of certain conducts of non-state actors are unable to deter them from their acts because those methods do not reflect their intersubjective knowledge of the issues.

³²⁴ Law and Development Associates, Ghana, *supra* note 322, at 9 "expression of intention is not enough to go round this deep-seated social problem."

need to respect the rights of PWDs. Yet the disconnect between the state laws and efforts and the customary laws against disability remains because the methods been used have not been targeted to respond to Ghana's legal pluralistic context.

As a result a Ghanaian intellectual will still refuse to allow marriage between his daughter and a man who was previously mentally-ill but has now recovered and is economically independent. That intellectual maybe living and working in the urban area but will likely cite possible objections from his extended family in the rural area against the suitor's history of mental illness as the excuse for violating the PWDs right to marry. The intellectual will likely present himself as powerless to change the customary rules of his extended family in the rural area about disability and since marriage in the Ghanaian sense is the coming together of families, would yield to the overarching rules of the wider family.

Unless targeted actions are taken to connect these systems of law, the state may continue to make laws protecting the rights of PWDs as required by the CRPD, judges may make decisions invalidating customary laws that violate the rights of and state agencies may undertake all the education they want (all these in compliance with the universalism approach advocated by the CRPD committee), but non-state actors will continue violating the rights of PWDs because those state laws will not change non-state actions.

5.3 APPROACHES USED IN THE CRPD IMPLEMENTATION IN GHANA

The CRPD requires Ghana to protect the rights of PWDs in Ghana by taking administrative, legislative and judicial measures. To comply with this, Ghana has enacted domestic legislation protecting the rights of PWDs and there is an administrative policy requiring that 2% of the District Assembly Common Fund be set aside for PWDs to use start or establish small-scale businesses.³²⁵ These steps meet the requirement for all State Parties to the CRPD, yet they do not achieve the expected result of improved respect for the rights of PWDs.

A cultural relative approach would not work either to improve disability rights in Ghana. Presently, chiefs and other non-state actors claim that they are justified in violating the rights of PWDs because their actions are consistent with their cultural beliefs and their customary laws; and customary law is guaranteed under the Constitution of Ghana. However, the Constitution of Ghana invalidates customary law which is inconsistent with the Constitution. Therefore since the Constitution protects the rights of PWDs, customary law that violates the rights of PWDs is not guaranteed by the Constitution.

³²⁵ Republic of Ghana, District Assembly Common Fund: The Common Fund Newsletter, Issue 2, (December 2014). Available at <http://www.commonfund.gov.gh/Final%20DACF.pdf> (last visited on 24 March 2018.)

5.4 THEORY FOR HUMAN RIGHTS IMPLEMENTATION IN AFRICAN STATES WITH LEGAL PLURALISM

My theory for the successful implementation of international human rights norms in African states with legal pluralistic contexts is that the African state must first adopt the international human rights norm, then enact domestic legislation that reflects all the varied domestic manifestation of the issue and finally create an interface between non-state actors and state actors that allows for the frequent update of state and non-state laws or policy to reflect the international human right norm.

5.5 APPLICATION OF THE THEORY TO THE IMPLEMENTATION OF THE CRPD IN GHANA

I will now apply my theory to the CRPD in Ghana's legal pluralistic context to see if it would improve Ghana's domestication of international disability norms.

First, Ghana will need to adopt the overarching principle of protecting the rights of PWDs. This first step has already been accomplished because Article 29 of the 1992 Constitution of Ghana guarantees the rights of PWDs and is consistent with the principles embodied in the CRPD. The Mental Health Law of Ghana, 2012, Act 846 contains provisions on the rights of persons with mental disabilities and these provisions are also consistent with the overarching principles embodied in the CRPD.

The second step requires the development of a context specific policy or legal instrument to guide the implementation of the overarching principle. This instrument, like Ghana's child and family welfare policy, must be fit for the specific context of Ghana. To meet this second step, Ghana will need to develop a disability policy that relates with the cultural beliefs of the people and at the same time protects the rights of PWDs. The policy must make use of cultural structures that people can identify with such as chiefs. For instance, it is culturally unacceptable for chiefs to permit blind persons into their court. If a chief accepts a blind person or a person with mental disabilities into his or her court, it would send a specific message straight to the targeted constituency (non-state actors) the blind persons or persons with mental disability are no longer outcasts.

The third step requires the creation of an interface where responses from non-state actors about the implementation of the law or policy are transmitted to the states actors and vice-versa; thereby creating opportunity for the modification of local customary laws and practices to make them more responsive to the state's obligations under the CRPD and the modification of State laws and policy to make them more suitable to the local cultural contexts.

To meet this goal, existing bodies working in the field of disability rights such as the Ghana Federation of the Disabled (GFD) should expand their membership to include non-state actors whose actions have the potential of violating the rights of PWDs such

as soothsayers; and state actors who need to be more directly informed about what works best for the disability community such as a representative of the department of roads and highways and a Member of Parliament (MP). Thus for instance in the construction of roads, the state would receive direct feedback from the GFD on whether there is sufficient provision made for the use of the road by PWDs and soothsayers would receive direct evidence PWDs can achieve just as much with their lives as persons without disabilities. The soothsayers on such bodies would in turn be able to tell other soothsayers where they have been wrong in judging PWDs and their messages would be more targeted and maximize outcomes in terms of behavioral change among their colleagues. At the same time the soothsayers would be able give helpful feedback to the GFD on advocacy techniques that would be most efficient and inform the MP of what law would work and those that would not.

5.6 WILL THE THEORY HELP TO IMPROVE THE IMPLEMENTATION OF THE CRPD IN GHANA

The theory would help improve the domestication of the CPRD in Ghana because it assembles the necessary actors whose actions can improve the rights of PWDs in Ghana and assigns interactive roles for them. Whereas universalism has the effect of sidelining non-state actors, and cultural relativism has the effect of sidelining state-actors, cultural pluralism misses the interactive aspect of the roles that state and non-state actors are supposed to play. I believe that once these actors interact, it would break down barriers of stigma and superstition as well as unrealistic laws, and the

acceptance and enforcement of the rights of PWDs would only be a matter of course because it would bring “home” the concept of the rights of PWDs down to the basic level of the ordinary Ghanaian who can.

5.7 DOES THIS CULTURAL PLURALISM THEORY HAVE ENOUGH TRACTION IN OTHER AREAS OF INTERNATIONAL HUMAN RIGHTS PROTECTION SUCH AS WOMEN’S RIGHTS?

To answer this question I will apply my theory to the implementation of CEDAW in Zimbabwe to find out whether what I know would improve the implementation of the CRPD and CRC in Ghana would also improve the implementation of the CEDAW in Zimbabwe.

When Zimbabwe attained independence from Britain in 1980 it immediately signed and ratified many international human rights laws in fulfillment of her “responsibility to protect” citizens under international law.³²⁶ Immediately after independence, the Zimbabwean government established a Ministry of Community development and Women’s Affairs as the national machinery for the advancement of women in all spheres of life.³²⁷ Zimbabwe acceded to the CEDAW in May 1991.³²⁸ “As from 1994, a

³²⁶ Torque Mude, *The History of International Human Rights Law in Zimbabwe*, Journal of Social Welfare and Human Rights, Vol. 2 No. 1, 53-86, 57 (March 2014.)

³²⁷ The exact ministry in charge of women’s issues in Zimbabwe has changed over time.

³²⁸ Initial state report of Zimbabwe to CEDAW Committee, Core Document, the Convention and Zimbabwe, page 8.

focal point was established in other Ministries...for ensuring that policies of their respective Ministries are gender sensitive.”³²⁹ In the case of Ghana, the country attained independence in March 1957 and eagerly joined the international community signing and ratifying many international laws. Ghana was the first country to ratify the CRC in February 1990. The 1992 Constitution of Ghana devoted an entire chapter to Fundamental human rights and freedoms including children’s rights.³³⁰ Subsequently the Children’s Act of Ghana, 1998, Act 560 came into force. These accounts show that both State Parties make commitments to the international human rights laws and follow up with domestic commitments to protect those rights; showing that in both African states there is a willingness of state actors to implement international human rights. The cultural pluralism theory the worked in Ghana’s CRC and CRPD requires the adoption of the international human rights norm, followed by domestic legal or policy framework towards the enforcement of that international norm. Zimbabwe has performed these first two requirements. The additional third requirement of the new cultural pluralism theory is the creation of an interface where responses from non-state actors about the implementation of the state law or policy are transmitted to the state actors and vice-versa; thereby creating opportunity for the modification of local customary laws and practices to make them more responsive to the state’s obligations under the international law and the modification of State laws and policy to make them more suitable to the local cultural contexts. This is something that Zimbabwe can easily achieve. Zimbabwe, like Ghana, is a legal

³²⁹ Initial state report, *supra* note 328, at 9.

³³⁰ Constitution, *supra* note 80

pluralistic state where non-state actors make and enforce non-state laws including customary laws. Both Zimbabwe and Ghana are patriarchal societies³³¹ and the men enforce these customary laws over women and children in similar fashion, particularly in their rural communities. State actors can create the interface with such non-state actors so that international norms of the rights of women can be introduced into the customary laws of Zimbabwe through these non-actors and at the same time customary law knowledge on how best to protect the rights of women within their context is also passed to state actors to be used in formulating more fitting state laws and policy. This additional step will help improve the protection of women's rights in Zimbabwe because at the sub-group level, the leaders will know the international norms on women's rights and due to the constant interaction with the state actors, they will be encouraged to implement those norms. At the state level, state laws and policy will receive inputs that will ensure that they are so distant from the actual lived experiences of people. So that, for instance, state laws that require registration before recognizing a valid customary law marriage as a marriage, would change. I therefore find that that the retrofitted version of the cultural pluralism theory has traction in women's rights protection in Zimbabwe as it does in disability rights and children's rights protection in Ghana.

³³¹ Initial state report, *supra* 328; Felicia Safoa Odame, *Ghanaian traditional women leaders and sustainable development: The case of Nadowli district of Ghana*, European Scientific Journal, May 2014 edition, Vol. 10, No. 14, ISSN:1857-7881.

Secondly, according to Zimbabwe's initial state report to the CEDAW Committee, a large percentage of Zimbabwean women live in the rural communities.³³² In Ghana about 70% of the population dwells in the rural areas.³³³ Since about 36.5% of the population of Ghana consists of children aged 15 years and below³³⁴, we can say that at least half of the children in Ghana live in rural areas. In rural areas in both Zimbabwe and Ghana, customary law is the main law that governs the lives of people although both countries have state laws. Therefore the distance between the situation of children in Ghana and women in Zimbabwe is not too far—in both cases their lives are ordered according to customary law. It is therefore critical that a successful theory for improving children's rights in Ghana and women's rights in Zimbabwe shows how the international human rights norms can be introduced into customary law. Since my theory of cultural pluralism succeeded in showing how international norms on children's rights were introduced into customary law in Ghana and resulted in improvement in children's rights in Ghana; it is likely to also succeed in introducing international norms on women's rights into the customary law in Zimbabwe to help improve women's rights in Zimbabwe.

Thirdly, as was discovered in the case study of the CEDAW in Zimbabwe, the customary law on the rights of women upon the dissolution of their marriages gave

³³² Initial state report, *supra* 328, 8: "The 1992 census figures indicate that a very large percentage of women are based in the rural areas and are in one way or the other connected with or involved in agriculture."

³³³ Ghana-UNICEF Inequality Briefing, *Inequality in Ghana: A Fundamental National Challenge*, Briefing Paper, (April 2014) 3.

³³⁴ Ghana Population, available at http://countrymeters.info/en/Ghana#age_structure (last visited on 28 March 2018).

actual protection of the rights of such women, which is consistent with the overarching aim of CEDAW. This is because customary laws recognized women whose marriages were unregistered as married and therefore entitled to all the incidents of marriage whereas the state laws did not recognize such women as married and therefore not entitled to a share of the marital property upon the dissolution of the marriage. Similarly customary laws on the rights of children in Ghana had the effect of giving more protection to the rights of children in Ghana as required by the CRC unlike the effect of state laws. This is because customary laws have the effect of requiring the entire resources of the community to be used to protect the children whereas the state laws limit the resources to be used for the children's rights protection to that of the family. For instance in most rural communities, any other member of the community can feed a hungry child. Such customary laws ensure that a more robust system for child welfare protection. Consequently since the actual customary laws on Women's rights in Zimbabwe and Children's rights in Ghana are not too far away from the international human rights laws—CEDAW and CRC—the cultural pluralism theory that worked for the CRC in Ghana can also help improve the CEDAW in Zimbabwe.

Based on the above, my theory of cultural pluralism has enough traction in other sectors of international human rights such as women's rights in Zimbabwe.

5.8 CONCLUSION

The situation of PWDs in Ghana is far-removed from what is expected from a state-party to the CRPD. The above analysis shows that to improve the rights of PWDs in Ghana, specific solutions targeted at non-state actors will be needed and my theory offers such a solution.

My theory for the successful implementation of international human rights in African states with legal pluralism involves the creation of an interface for state and non-state actors to interact. In practical terms, it makes use of indigenous resources at the non-state level to help domesticate the international human rights norms. This is the additional step to the cultural pluralism approach that would bring the international norms on disability rights to the level of the ordinary Ghanaian and make it easy for him to accept that PWDs have rights in the society and so he must conduct himself in such ways as not to violate those rights. The interface is also the step that would help state actors formulate more robust legal and policy framework for disability rights protection in Ghana.

In this chapter I have additionally demonstrated that my theory is not limited to disability rights but has traction in other sectors of international human rights such as women's rights in African states with legal pluralism.

Therefore in conclusion, this chapter has established that my theory will help improve the implementation of international human rights in African states with legal pluralism.

6 CHAPTER SIX:

CONCLUSION

6.1 INTRODUCTION

In this concluding chapter to my dissertation, I am going to summarize the dissertation and show the original contribution that my work makes to legal knowledge.

6.2 SUMMARY OF DISSERTATION

6.2.1 Summary of Thesis

African State Parties to international human rights treaties are frequently accused of poorly implementing the treaties. My thesis is that the reason for this state of affairs

is that prevailing approaches to implementing international human rights treaties (universalism and cultural relativism) do not factor in legal pluralism into those approaches. The cultural pluralism approach however factors in legal pluralism but in order to achieve a more sustainable implementation of human rights treaty, I add a third step to the cultural pluralism approach—the creation of an interface, which will ensure that the customary law and state law, are updated frequently as the state works towards implementing the international human rights norms.

6.2.2 Summary of Research Method

This dissertation was borne of mainly library research. It answered the following research question: First, what are the prevailing approaches to implementation of international human rights in Africa? Second, what is legal pluralism, and why is it important to factor it into any approach to implementing international human rights law in Africa? Third, how has this factoring-in been done and what were the outcomes? And fourth, can the outcomes of the third research question be applied to the CRPD in Ghana?

The dissertation employed case studies in the examination of the human rights treaty implementation. In all three case studies were undertaken: case study of the implementation of the CEDAW in Zimbabwe; case study of the implementation of the CRC in Ghana and case study of the implementation of the CRPD in Ghana. After the CEDAW and CRC case studies, I developed my theory for implementation of human

rights treaties in African states with legal pluralism and assessed its applicability to the CRPD in Ghana.

6.2.3 Outcome of Research

The outcome of my research is that my theory will help improve the implementation of international human rights in African states with legal pluralism. My theory of what would help improve the implementation of human rights in African states with legal pluralism is that the African state must first adopt the international human rights norm and use indigenous methods available at the sub-group level to achieve the international norm; then the state must enact domestic legislation that reflects all the varied domestic manifestation of the issue; and finally the state must create an interface between non-state actors and state actors that allows for the frequent update of state and non-state laws or policy to reflect the international human right norm.

6.3 CONTRIBUTION TO LEGAL KNOWLEDGE

My work demonstrates the complex effect of legal pluralism on the implementation of international human rights in African states and presents a theory for achieving

improvement in the implementation of international human rights in African states when legal pluralism is present.

6.4 CONCLUSION

International human rights are intended to be implemented. So far, three main approaches have been suggested to State Parties to be used in implementing international human rights treaties. These approaches are the universalism approach, the cultural relativism approach and the cultural pluralism approach. In this dissertation I have shown that the situation of legal pluralism in African states changes the dynamics of state implementation of international human rights norms and therefore an approach that does not account for legal pluralism will not succeed in improving the implementation of international human rights.

Consequently, through a case study of women's rights in Zimbabwe, I found that although the cultural pluralism approach accounts for legal pluralism it is missing an additional step which would bring the international human rights norm to the level of the ordinary person and help improve the implementation of the human rights treaty. I further found that Ghana's application of the cultural pluralism approach to the implementation of children's rights accounts for the additional step that helps introduce the international norms on the rights of the child to the non-state level. Based on this knowledge I developed a theory of what would help improve

implementation of human rights in African states with legal pluralism and tested my theory with the case of disability rights in Ghana to determine whether it would help improve disability rights in Ghana and it did.

6.5 BIBLIOGRAPHY

A. BOOKS

1. ALLOT, A., THE LIMITS OF THE LAW (Butterworths, 1980) 197.
2. CRANSTON, M. W., WHAT ARE HUMAN RIGHTS 36 (Bodley Head, 1973).
3. HART, H. L. A., THE CONCEPT OF LAW 91 (Oxford University Press, 1961.)
4. HELM, A., WOMEN'S HUMAN RIGHTS AND LEGAL PLURALISM IN AFRICA: MIXED NORMS AND IDENTITIES IN INFERTILITY MANAGEMENT IN ZIMBABWE 30 (Tano Aschehoug, 1999).
5. KELSEN, H., GENERAL THEORY OF LAW AND STATE (Trans. A. Wedberg, 1949)
6. LOUIS, H., et al., HUMAN RIGHTS 397 (2nd ed. Foundation Press, 2009.)
7. MENSKI, W., COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEM OF ASIA AND AFRICA, (2nd ed., Cambridge)
8. RAFTOPOULOUS, B., & MLAMBO, A., BECOMING ZIMBABWE: A HISTORY FROM THE PRE-COLONIAL PERIOD TO 2008, (Weaver Press, 2009)
9. RICHARDSON H. J., III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW 22, 23 (2008)

10. ROUVEROY VAN NIEUWAAL, E. A. B. VAN, AND Z. W., eds., SOVEREIGNTY, LEGITIMACY, AND POWER IN WEST AFRICAN SOCIETIES: PERSPECTIVES FROM LEGAL ANTHROPOLOGY, (Lit Verlag, 1998):
11. SARBAH, J. M., FANTI CUSTOMARY LAWS (London: William Clowes & Sons Limited, 1903)
12. SIMMONS, B., MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS, (Cambridge University Press, 2009)
13. TAMANAHA, B. Z., A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (Oxford University Press, 2001)

B. ARTICLES, PAPERS AND REPORTS

14. African Commission on Human and Peoples' Rights, Indigenous Peoples in Africa: *The Forgotten Peoples?* The African Commission's work on indigenous peoples in Africa (2006)
15. Agbenyega, J. S., *The power of labelling discourse in the construction of disability in Ghana*, A paper presented at the Australian Association for Research in Education Conference, New Castle, Association of Active Educational Researchers (AARE), Volume 16, (2003/12).
16. Anas Aremeyaw Anas, Report on the killing of spirit children in Ghana, <http://www.aljazeera.com/programmes/peopleandpower/2013/01/201319121124284358.html>

17. Ajayi A. J. F., *The Continuity of African Institutions under Colonialism* in T.O. Ranger, ed., EMERGING THEMES OF AFRICAN HISTORY 189, 195 (East Africa Pub House, 1968).
18. Archampong, E. A., *Marital Rape, a women's equality issue in Ghana*, 2 (2010)
19. Asante, L. A., and Sasu, A., *The Persons with Disability Act, 2006 (Act 715) of The Republic of Ghana: The Law, Omissions and Recommendations Law*, Journal of Law, Policy and Globalization Vol. 36, 2015.
20. Atuguba, R. A., *Ghana @ 50 Colonised and Happy*, in GHANA LAW SINCE INDEPENDENCE, HISTORY, DEVELOPMENT AND PROSPECTS CONSTITUTION, (Henrietta J.A.N. Mensa-Bonsu et al., ed., Black Mask for Faculty of Law University of Ghana, Legon, 2007).
21. Atuguba, R. A., Kofi Annan International Peacekeeping Training Centre (KAIPTC) Executive Master of Arts Degree in Conflict, Peace and Security (EMCPS 2) 2017 – 2018 Academic year. Lecture 1
22. Atuguba, R. A., "Seven Phases in the Evolution of Customary Law in Africa: Signposts from Ghana," Lancaster University of Ghana, 2nd Colloquium on Law for Development: "Almost 100% of marriages in Ghana are (first) celebrated or wholly or partially performed according to the rules of customary law.
23. Avoke, M., *Models of disability in the labelling and attitudinal discourse in Ghana* (2002) 17 Disability and society 769, 773.
24. Austin, J., *The Province of Jurisprudence Determined* (1781)

25. Baffoe, M., *Stigma, discrimination & marginalization: Gateways to oppression persons with disabilities in Ghana, West Africa* 3(1) *Journal of Education and Social Research*, (2013).
26. Betham, J., *An Introduction to the Principles of Morals and Legislation*, (18th Ed., London, W. Pickering 1823)
27. Bilyeu, A. S., *Trokosi, The practice of Sexual slavery in Ghana: Religious and Cultural Freedom vs Human Rights*, *IND. INT'L & COMP. L. REV.* Vol. 9:2, 457 (1999)
28. Buamah, Christine 'State Conformity to International Human Rights Norms: The Acculturation Approach, LLM paper.
29. Cerna, C. M., *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different socio-cultural contexts*, 16 *Hum. Rts. Q.* 740, 741 (1994.)
30. The Constitution Review Commission of Ghana, *Report of the Constitution Review Commission of Ghana, From a political to a developmental Constitution*, December 2011.
31. Dañino, R., World Bank.
<http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817148/CustomaryLawGhana120505.pdf>
32. Donnelly, J., *Cultural Relativism and Universal Human Rights*, *Human Rights Quarterly*, Vol. 6 No. 4, 400-419 (The Johns Hopkins University Press, Nov., 1984.)
33. Eskay, M., et al., *Disability within the African culture*, *US – China Education Review* 473 - 484 (2012)

34. Ezeanya-Esiobu, C., TED Talk 2007
https://www.ted.com/talks/chika_ezeanya_esiobu_how_africa_can_use_its_traditional_knowledge_to_make_progress
35. Fallers, L., *The Predicament of Modern African Chief: An instance from Uganda*, American Anthropologist, Vol. 57, 290; 295 (1955)
36. Gedzi, V., "Principles and Practices of Dispute Resolution in Ghana: Ewe and Akan Procedures on Females Inheritance and Property Rights" PhD thesis, International Institute of Social Studies of Erasmus University, Rotterdam, The Hague, Netherlands, (2009) 109-111, available online: [repub.eur.nl/res/pub/32640/90-423-0372-7 DOK%5B1%5D.pdf](http://repub.eur.nl/res/pub/32640/90-423-0372-7_DOK%5B1%5D.pdf)
37. Ghana-UNICEF Inequality Briefing, *Inequality in Ghana: A Fundamental National Challenge*, Briefing Paper – April 2014, p3
38. Ghana Federation of Disability Organizations, *News Commentary on the tenth Anniversary of the Disability Act 715, Its Impact on the Lives of Persons With Disabilities* by Yaw Ofori Debrah, National President of the Ghana Federation of Disability Organisations
<https://www.facebook.com/gfdghana/posts/333987956943420>
39. Goodman R. and Jinks, D., *How to Influence States: Socialization and International Human Rights Law*, 54 Duke Law Journal 621, 642 (2004)
40. Griffiths, A., *Pursuing Legal Pluralism: The Power of Paradigms in a Global World*, The Journal of Legal Pluralism and Unofficial Law, 43: 64, 173 – 202 (2013).
41. Griffiths, J., *What is legal pluralism?* Journal of Legal Pluralism 24, 1 (1986).

42. Guerts K. L., and Adikah E. G., *Enduring and Endearing Feelings and the Transformation of Material Culture in West Africa* in E Edwards *et al*; (eds) SENSIBLE OBJECTS: COLONIALISM MUSEUMS AND MATERIAL CULTURE (2006)
43. Hammond, A. F., "Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana, PhD thesis, The University of British Columbia, Vancouver, (2016), available online: <http://docplayer.net/48486835-Towards-an-inclusive-vision-of-law-reform-and-legal-pluralism-in-ghana-ama-fowa-hammond-a-thesis-submitted-in-partial-fulfilment-of-the-requirements.html>
44. Ibhawoh, B., *Restraining Universalism: Africanist Perspectives on Cultural Relativism in the Human Rights Discourse* in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA, (Paul Tiyambe Zeleza and Philip J. McConnaughay eds., University of Pennsylvania Press, 2004) 22.
45. Initial state report of Zimbabwe to CEDAW Committee, Core Document, the Convention and Zimbabwe.
46. International Labour Organization and the African Commission on Human and People's Rights, *The Rights of Indigenous Peoples, Kenya*, Country Report of the Research Project (2009).
47. International Lesbian, Gay, Bisexual, Trans and Intersex Association: Kirichenko K. *United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics, 2016* (Geneva: ILGA, November 2017)
48. Koh, H. H. Transnational legal process, 75 Nebraska Law Review 181 (1996)

49. Kutsoati, E., and Morck, R., *Family Ties, Inheritance Rights, and Successful Poverty Alleviation: Evidence from Ghana*, NBER Working Paper No. 18080, 23-24 (2012). Available at www.nber.org/papers/w18080
50. Kyei, T. E., *Marriage and Divorce Among the Asante: A study undertaken in the course of the Ashanti Social Survey*, Cambridge African Monographs 14 (1945), "Death of a spouse," 76.
51. Larbi, W. O., *Ghana's Land Admin Project: Accomplishments, Impact and the way ahead*, Annual World Bank Conference on Land and Poverty, 2011, available at <http://siteresources.worldbank.org/INTIE/Resources/475495-1302790806106/GOV5Pres2Larbi.pdf>
52. Law and Development Associates, *Aligning the Mental Health Bill of Ghana to the Convention on the rights of Persons With Disability Act*, Project Report, May 2012.
53. Logan. C., *Traditional Leaders in Modern Africa: Can Democracy and the Chief co-exist? Afrobarometer working Paper No. 93*, February 2008.
54. Matua, W. M., *The Ideology of Human Rights*, Virginia Journal of International Law 36 (1996.)
55. Matua W. M., *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 204 (2001).
56. Mensah, O., et al *Strengthening the disability movement in Ghana through organizational capacity and advocacy: Contextual analysis of the disability situation in Ghana* (2008) v <http://www.gfdgh.org/Context%20analysis.pdf>
57. Merry, S. E., *Legal Pluralism*, Law and Society Review, Vol. 22 No. 5 869-896, 870(1988)

58. Mude, T., *The History of International Human Rights Law in Zimbabwe*, Journal of Social Welfare and Human Rights, March 2014, Vol. 2 No. 1, 53-86, 57.
59. Munyi, C. W., 'Past and Present Perceptions towards disability: a historical Perspective' (2012) <http://dsq-sds.org/article/view/3197/3068>
60. Ndulo, M., African customary law, customs, and women's rights (2011) Indiana Journal of Global Legal Studies, Vol. 18:Iss. 1, Art. 5.
61. Obeng, C. *Teacher's view on the teaching of children with disabilities in Ghanaian classrooms* No. 1 International Journal of Special Education 96, 101 (2007).
62. Odame, F. S., *Ghanaian traditional women leaders and sustainable development: The case of Nadowli district of Ghana*, European Scientific Journal,
63. Okeke, C. N., *The Use of International Law in the domestic Courts of Ghana and Nigeria*, 32 Ariz. J. Int'l. & Comp. L. 371, 381 (2015).
64. Okupa, E., International bibliography of African customary law ius non scriptum, Hamburg (Lit verlag).
65. Pantoja, A. et al., *Towards the Development of Theory: Cultural Pluralism Redefined*, The Journal of Sociology & Social Welfare: Vol. 4 Issue 1, Article 11, 130-131 (1976).
66. Population and Housing census of Ghana, summary report of final results, 12 (Ghana Statistical Service, 2012)
67. Ray, D. I., *Divided Sovereignty: Traditional Authority and the State in Ghana*, Journal of legal pluralism 1996, 12.
68. Ray, D. I. and Rouveroy van Nieuwaal, E. A. B. van., *The New Relevance of Traditional Authorities in Africa: The Conference; Major Themes; Reflections on*

- Chieftaincy in Africa; Future Directions*, Journal of Legal Pluralism and Unofficial Law, The Ghana Conference, Vol. 37-38 (1996)
69. Republic of Ghana, District Assembly Common Fund: The Common Fund Newsletter, Issue 2, (December 2014). Available at <http://www.commonfund.gov.gh/Final%20DACF.pdf> (last visited on 24 March 2018.)
70. Rouveroy van Nieuwaal, E. A. B. van., *States and Chiefs: Are Chiefs Mere Puppets?* Journal of Legal Pluralism and Unofficial Law, Issue No. 37-38 (1996)
71. Sorrell, K., *Cultural Pluralism and International Rights*, 10 Tulsa J. Comp. & Int'l 369, 371 (2002)
72. Skalnik, P., *Authority Versus Power: Democracy in Africa Must Include original African Institutions*, Journal of Legal Pluralism, (1996)
73. Slikker J. 'Attitudes towards Persons with disability in Ghana' (2009) 15.
74. Tamanaha, B., *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney Law Review Vol. 30, 375, 377 (2007)
75. Tamanaha, B. Z., *The Folly of the "Social Scientific" concept of Legal Pluralism*, Journal of Law and Society, Vol. 20 No. 2 (1993).
76. Teson, F. R., '*International Human Rights and Cultural Relativism*' 25 Va. J. Int'l L. 869 (1985)
77. The Law, Omissions and Recommendations Law, Journal of Law, Policy and Globalization Vol. 36, 2015;

78. Tomlins, C. and Comaroff, John *“Law as...” Theory and Practice in Legal History*, available at <http://www.law.uci.edu/lawreview/Vol1No3Articles/TomlinsandComaroff.pdf>
79. UNICEF, *Early Marriage: A Harmful Traditional Practice (A statistical exploration)*, (UNICEF, 2005), available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf
80. UNICEF, *Promoting the Rights of Children with Disabilities*, Innocenti Digest No. 13, 2007.
81. Vanderlinden, J., *Return to Legal Pluralism: Twenty years later*, *The Journal of Legal Pluralism*, Vol. 21, Iss. 28, (1989).
82. Vanderlinden, J., *Le pluralism juridique: essai de synthese* in JOHN GILISSEN (ed.), *LE PLURALISME JURIDIQUE*, (Universite de Bruxelles).

C. STATUTE AND CASE LAW

83. 1957 Ghana (Constitution) Order in Council adopted by the British Parliament
84. Constitution of the Republic of Ghana, 1969
85. Constitution of the Republic of Ghana, 1979
86. Constitution of the Republic of Ghana, 1992
87. Children’s Act of Ghana, 1998, Act 560
88. Courts Act of Ghana, 1993, Act 459
89. Courts Ordinance, Cap 4 (1951 Rev)
90. Criminal Code of Ghana, 1960, Act 29
91. Customary Marriage and Divorce (Registration) Law, PNDC Law 112.

92. Education Act of Ghana, 2008, Act 778
93. Government of Ghana, Education Strategic Plan, 2010 – 2012, Vol. 1, Policies, Strategies, Delivery, Finance. Ministry of Education, February 2012.
94. Intestate Succession Law of Ghana, 1985, PNDC Law 111
95. Land Title Registration Act, P.N.D.C.L. 152
96. Marriages Act of Ghana, 1884-1985, CAP 125;
97. Matrimonial Causes Act of Ghana, 1971 (Act 367)
98. Matrimonial Causes Act of Zimbabwe, Acts 33/1985, 11/1987, 18/1989 (s.38), 2/1990, 6/2000 (s.151.)
99. Mental Health Act of Ghana, Act 846, 2012 (Mental Act)
100. The Chiefs' Act of Kenya, Chapter 128 of the Laws of Kenya.
101. The Chiefs Act of Zambia, Chapter 287 of the Laws of Zambia
102. The Child and Family Welfare Policy of Ghana, February 2015, available at the official website of the Ministry of Gender, Children and Social Protection, Ghana <http://mogcsp.gov.gh/policies/>
103. Manual for the Child and Family Welfare Policy
104. Regulations for the Child and Family Welfare Policy of Ghana, 2015, 23 at 1.3
105. Re Canfor: Canfor v Kpodo [1968] GLR 177
106. Owusu v Agyepong [1971] 1 GLR 56
107. Whittaker v Choiteram [1971] 2 GLR 267
108. Youhana v Abboud [1974] 2 GLR 201 CA
109. In re Larbi (deceased) Larbi v Larbi [1977] 2 GLR 5
110. King v Elliot [1972] 1 GLR 54 CA

111. Yirenkyi v Sakyi [1991] 1 GLR 217
112. Dr. Owusu Afriyie Akoto v Adwoa Abrefi [2011] 1 SCGLR 533
113. Oyewumi v. Ogunesan, Judgment delivered on Friday the 4th of May 1990 in the Supreme Court of Nigeria,
114. Lewis v. Bankole [1908] 1 NLR 81, 100-01 (Nigeria.)
115. Faroe Atlantic Co. Ltd v Attorney General [2005-2006] SCGLR 271
116. Martin Amidu v Attorney-General, Isofoton & Forson [2013-2014] 1 SCGLR 167
117. New Patriotic party v Inspector General of Police (1993-94) 2 GLR 459
118. The case of Re Akoto and Nine Others

D. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND OTHER SOURCES OF INFORMATION

119. African Charter on Human and Peoples' Rights (AFCHR)
120. OHCHR Website: State Party reports of all state parties to all the UN Human Rights treaties:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en
121. OHCHR Website: Status of ratification interactive dashboard at the website of the Office of the High Commissioner on Human Rights (OHCHR)
<http://indicators.ohchr.org/>

122. OHCHR Website: Link to the Reports of the Committee on the rights of the child on Ghana at the website of the Office of the High Commissioner on Human Rights http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5
123. OHCHR Website: Link to the Core international human rights instruments, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>
124. United Nations Conference on Trade and Development, UN List of Least Developed Countries, available at <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>
125. United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#1
126. UN Women, United Nations Entity for Gender Equality and the Empowerment of Women, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>
127. United Nations Division for Social Policy and Development Disability <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>
128. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>
129. Convention on the Rights of the Child (CRC), Text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

137. Myjoyonline, Child marriage in Ghana,
<http://www.myjoyonline.com/news/2017/March-7th/traditional-rulers-institute-fines-to-stem-child-marriage.php>
138. Myjoyonline, Mental health in Ghana, Interview of Dr. Akwasi Osei, 10 October 2014
<http://www.myjoyonline.com/lifestyle/2014/October-10th/resource-constraints-may-force-shutdown-of-mental-facilities.php> (last visited on 24 March 2018)
139. The National Mirror, President Goodluck Jonathan of Nigeria and the Mallams
<http://nationalmirroronline.net/new/boko-haram-jonathan-invites-senegalese-mallams-for-prayers/>
140. The Guardian Newspaper,
<https://www.theguardian.com/world/2014/oct/24/ebola-cremation-ruling-secret-burials-liberia>
141. The Guardian Newspaper
<https://www.theguardian.com/world/2015/apr/20/south-africa-xenophobic-violence-migrants-workforce>
142. Time, <http://time.com/3478238/ebola-liberia-burials-cremation-burned/>
143. Malawi, <http://mwnation.com/22-malawi-chiefs-demoted/>
144. Ghana, http://countrysimeters.info/en/Ghana#age_structure
145. Algeria <http://www.handicap-international.us/algeria>
146. Quran 4:3 & Quran 4:11

147. Catholics in Africa

<http://www.usatoday.com/story/news/world/2013/03/12/catholic-church-africa/1963171/>

148. Baylor University, <http://www.baylor.edu/mlc/index.php?id=11594>

149. Baylor University, Modern Languages & Culture, Division of Asian and African Languages, <http://www.baylor.edu/mlc/index.php?id=11594>