Sharing the Citizenship of Women: A Comparative Gendered Analysis of the Concept of "Legal Personhood" in Africa

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Introduction

The choice of this subject rests upon the legal concept of persona or legal personhood. A legal entity is a human person or otherwise a creation of the law (such as a corporate entity) who or which is endowed by nature or by law with the capacity to enter into legal relations. The present work is concerned with women as a human legal entities and in this regard, legal relations into which a human is ordinarily or potentially capable of entering in accordance with applicable laws, such as contracts of employment, commercial contracts, marriage contracts and proprietary transactions. A human legal person also has the capacity to sue and be sued, to vote and be voted for, as provided by law. These are some of the attributes of legal personhood which women in different African societies daily seek to activate or exercise in the hopes of making this personhood a lasting reality.

This struggle for assertion occurs at different levels, and assumes varying dimensions across the chequered patterns of African societies. Women seek lasting relevance as active members of the society, but it is felt that even when the more obvious social constraints on women are overcome and African women find themselves equally capable of exercising the attributes of legal personhood mentioned above, theirs would still be an incomplete citizenship if it cannot be conferred by choice upon their spouse. This is the constitutional position in many African countries.

The intention in this study is to examine this position with a view to identifying therein a detraction from the legal concept of persona or personhood. Hopefully, ongoing constitutional-review exercises in a number of African countries, notably Nigeria, will be influenced by what this study is able to show. Further justification for this work comes from the need to sensitise women to the imperative of being well-informed about the potential effect of decisions and choices related to the marriage contract on their legal and citizenship status. The importance of minimising the surprise element is borne out by the following observation in respect of citizenship laws of the United States of America in the early 1900s: "As the law increasingly linked women's citizenship to that of their husbands, the courts frequently found that U.S. citizen women expatriated themselves by marriage to an alien" (Smith 1998).

It is appropriate to begin this work with a brief definition of key terms such as persona, coverture and marital power. This will be followed by an examination of the concept of citizenship.

Persona, as developed in Roman jurisprudence, has been defined as a human being; a being or entity capable of enjoying legal rights or subject to legal duties; a natural person or a corporation; a person's political and social rights collectively; a person's legal capacity (Rutherford and Bone 1993).

Corporation is defined as a legal person created under a statutory procedure, a distinct legal entity, separate from such persons as may be members of it, and having legal rights and duties and perpetual succession. It may enter into contracts, own property, employ people and be liable for torts and crimes (Rutherford and Bone 1993).

Coverture is defined as follows: "when a man and woman are married together; now whatsoever is done concerning the wife in the time of the continuance of this marriage between them is said to be done 'during the coverture' and the wife is called, a woman covert"(James 1986).

Feme covert is a term of English law denoting a woman under the marital power of her husband, and marital power is the authority or power of a husband over his wife in common law, under which she is a minor (Claassen 1997). A feme sole is an unmarried woman.

The Concept of Citizenship

The subject of citizenship is one that always arouses keen interest. People want to know what the stakes are concerning their membership in a particular country; for example, whether they have entitlements that others do not have. To a large extent, identity resides in a person's knowledge of, sense, experience or enjoyment of citizenship.

Figuratively speaking, it gives a person ground to stand on and space to move in. Therefore, whereas a legal enquiry into the concept of citizenship would focus on identifying the location and actual dimensions of the "piece of ground" allotted to a citizen, sociological analyses may want to know how comfortable, useful and beneficial the space is to its occupant. The present work will involve something of each approach; it will move from a brief examination of the concept of citizenship to focus on the typical constitutional provisions, using Nigeria as a case study. The provisions of other countries with similar constitutions will also be outlined.

In an examination of the nature and content of citizenship in the various political structures throughout history, from slave-owning societies to feudalism to capitalism, one legal author concludes that in spite of the distinctiveness of the forms of expression in different societies and corresponding socio-economic formations, the essence of citizenship has been the same – a means of dominating and exploitating members of the unpropertied class (Gasiokwu 1995). Although this writer does not do so, it is submitted that a gendered interpretation of the "unpropertied class", that is, one which identifies the proportion of women in this class vis-à-vis that of men, would make this conclusion a difficult one to fault.

The term "citizenship" readily conveys the idea of a relationship between the State and persons who constitute its membership, based on legal norms, although scholars have disagreed on the actual content of this legal relationship. Scholarly definitions have presented citizenship as a right that gives rise to a relationship between the State and the individual, while some have defined the concept as a relationship conferring rights and duties on both. Yet others have defined citizenship as "the sum total of rights and duties ensuing for a given person by reason of his legal affiliation to a certain State."[1]

Analysing the foregoing definitions, Gasiokwu observes that a relationship between the State and the individual has to be created before rights and duties can accrue. In his view, a more correct definition of citizenship would be as a definite politico-legal relationship between a person and a sovereign State, based upon which the jurisdiction of the State extends to the individuals, and which is the condition for the citizens availing themselves of their special rights under the laws of the State, and also incurring for themselves corresponding duties:

> *It is … submitted that citizenship should be seen as a legal relationship between citizens and the State. This relationship allows the jurisdiction of the State to extend to the people that constitute the citizens, and forms the basis for the emergence of rights and duties between the State authority and the citizens. The rights and duties do not yet mean citizenship. A relationship must first of all be established. The process of establishing that relationship is a legal process, the rights and duties of citizens emanate from the laws of the State and can only be actualised after a due process of acquiring citizenship* (Gasiokwu 1995).

This definition will be adopted for purposes of the present work. It is also important to mention that there is a lack of unanimity among social scientists and legal scholars on the precise content of citizenship as distinct from nationality. Generally, the predominant view has tended towards defining nationality as a concept of operations in the international sphere, whereas citizenship refers to the relationship between the individual and the State in the municipal sphere. Some have gone so far as to maintain that citizenship is derived from the concept of nationality, which in itself is a broader concept emanating from the position in colonial times, when colonies were subsumed in the colonising state, and colonised peoples were invested with the status of nationals for purposes of consolidating political strongholds. Thus Nigerians under British colonial rule, for example, for purposes of international relations possessed the status of British nationals, as distinct from British citizenship, which was defined more narrowly (Nwabueze 1982).

The United States of America also makes a distinction between nationals and citizens with the effect that all U.S. citizens are also U.S. nationals, but not all nationals are U.S. citizens. The term "national of the United States" is defined as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[2] Moreover, a person born in an "outlying possession" of the U.S or a foreign-born child of such a person is a U.S. national, but not a U.S. citizen.[3]

Yuval-Davis defines citizenship as a multi-tiered construct that applies simultaneously to people's membership in sub-, cross- and supra-national collectivities as well as in states (Yuval-Davis 1997). Citizenship, she maintains, needs to be examined, not just in terms of states, but often in relation to multiple formal and informal citizenships in more than one country, and from a perspective that would include the different positionings of different states, as well as the different positionings of individuals and groupings within states. Therefore, a comparative study of citizenship should consider the issue of women's citizenship, not only in contrast to that of men, but also in relation to women's affiliation to dominant or subordinate groups, their ethnicity, origin, urban or rural residence, as well as the global and transnational positionings of these citizenships (Yuval-Davis 1997).

Yuval-Davis further observes that even though the notion of citizenship cannot capture all the negotiations and dimensions of control that take place in different areas of social life, nor the ways in which the State forms its political project, it can illuminate some of the major issues involved in the complex relationships between individuals, collectivities and the State, and the ways gender relations (as well as other social divisions) affect and are affected by them.

Liberal constructions of citizenship presume equality of status, rights and duties for all members of the political entity and overlook principles of inequality deriving from gender, ethnic, class, race or other categories (Roche, in Yuval-Davis, 1997). In this context, citizens are perceived, not as members of the community, but as "strangers" to one another who share a complex set of assumptions about and expectations of each other, which when not fulfilled, can be enforced by the state (Roche, in Yuval-Davis, 1997).

Communitarian views, on the other hand, maintain (contrary to the "equal individuals" tenor of liberal thinking) that notions of rights and duties, as well as those of equality and privacy, have no meaning outside the context of particular communities. Taking the critique further, the republican construction of citizenship sees citizenship not only as a status, but also as a means of active involvement and participation in the determination, practice and promotion of the common good. Republican scholars argue that by assuming the priority of rights over good, liberal scholars deny the possibility of citizenship as constituting membership in a moral community in which the notion of the common good is antecedent to the choices of individual citizenship.

Exploring the application of this double-faceted notion of republican citizenship (i.e., "status" citizenship and "involved" citizenship), Peled advocates the institutionalisation of a two-tier construction of citizenship: a full membership in the "strong community" for those who qualify or are chosen for inclusion, and "a residual, truncated status." This latter construction would be similar to the liberal notion of citizenship as a bundle of rights, the bearers of which do not share in attending to the common good, but are secure in their possession of what are considered to be essential human and civil rights (Peled, cited in Yuval-Davis, 1997).

Those in the former category are the involved citizens whose "strong community" is, according to Peled, "discovered", not formed by its members. It follows therefore, that membership in this community is open only to those stellar individuals and explorers who discover it, and perhaps to others whom the lucky explorers consider capable of active involvement and participation in the determination, practice and promotion of the common good.

It is not difficult to see who would belong to the "strong" community and who would belong to the "weak" in a gendered application and/or analysis of this proposition, as this two-tiered construction of citizenship already exists and forms the core problematic of this research.

The inherent contradiction in this proposition has been described in the following terms:

> *Politically, it openly condones discrimination and racialisation of citizens on national grounds…. Theoretically, this model dichotomizes the population into two homogenous collectivities – those who are in and those who are out of the national collectivity, without paying attention to other dimensions of social divisions and social positionings, such as gender, intra-national ethnicity, class, sexuality, ability, stage in the lifecycle, etc., which are crucial to constructions of citizenship* (Yuval-Davis 1997).[4]

Moreover, Yuval-Davis reasons, the moral imperative that interprets the "good of the community" as a support for its continuous existence as a separate collectivity can become an extremely conservative ideology that would see any internal or external change in the community as a threat. She does concede, however, that its demerits notwithstanding, the Peled model at least recognises the inherent potentially contradictory nature of citizenship as individual and communal, inclusionary and exclusionary, which liberal constructions of citizenship have consistently overlooked in assuming an automatic overlap between the boundaries of civil society and those of the national community (Marshall 1950, 1975, 1981; Marshall and Bottomore 1992).

The value of adopting a multi-dimensional approach to the study of citizenship cannot be disputed. In this regard, the present study is concerned with the politico-legal constructions of citizenship as membership of a state by the laws of that state, specifically, the legal scope of women's citizenship vis-à-vis that of men. Do they have similar privileges in law? Are there contradictions reflect patriarchal ideology in the law that is supposed to protect all its citizens? This will form the subject of enquiry in the sections following and for this purpose, the provisions of the Nigerian Constitution will be used. However, it is, first necessary to lay a foundation by describing the multi-branched character of Nigerian law.

Background to the Nigerian Legal System

Nigeria's history as a colony of Britain is reflected in probably its most permanent form in the Nigerian legal system. Thus English law in its multiple components forms a substantial part of Nigerian law. The body of law applicable in Nigeria up to the present time is made up of: Nigerian legislation; the received English law; customary law; and judicial precedents (Obilade 1979). The character of these sources of Nigerian law may be defined as follows.

Nigerian legislation consists of Nigerian statutes and subsidiary legislation. The retention of English law as presently applicable was effected by means of various statutory instruments enacted in the various regions (now states) that comprise Nigeria, some before and others after independence.[5] The actual introduction of English law into the territory now known as Nigeria dates back to 1863, following the cession of Lagos to the British Crown in 1861 (Obilade 1979).

The received English law comprises the common law, the doctrines of equity and statutes of general application in force in England on January 1, 1900.

The common law evolved as a body of law from the judgments delivered by judges in England in the application of the "customs of the realm" over time.

Doctrines of equity developed in the old English Courts of Chancery to ameliorate the hardship and injustice that sometimes resulted from the strict application of the common law in England. Equity as a body of law was largely administered by way of intervention via the Lord Chancellor on grounds of conscience in response to the petition of an aggrieved litigant. The Judicature Acts of 1873–1875 fused the administration of the common law and equity in England and provided that whenever there was a conflict between the two on the same matter, equity was to prevail. Rules of equity therefore emerged through judgments of the courts (also known as case law), and therefore do not constitute a written body of law. Over time, however, principles of equity have been incorporated into statutes (Obilade 1979).

Statutes of general application in England on January 1, 1900: The protectorates of Northern Nigeria and Southern Nigeria respectively were created in 1900, and, as British colonial territories, were subject to the statutes that were of general application in England up to that date, but not after it. Subsequently, specific laws were made for the protectorates on specified matters, while others were simply extended to Nigeria by virtue of its position as a colony of Britain.

Customary law: For a customary practice to qualify as customary law, a custom must be accepted as an obligation by the community, and it must be recognised as law by members of that ethnic group or as "a mirror of accepted usage."[6] Where proof or judicial notice of a custom as law has been established, its applicability is still subject to statutory provisions requiring it not to be:

a. repugnant to natural justice, equity and good conscience;
b. incompatible either directly or by implication with any law for the time being in force; and
c. contrary to public policy.

These three provisions are known as the "validity test". The first provision is also described as the repugnancy clause or repugnancy test, and a custom may not fail this test simply because it diverges from the accepted norms of practice in other societies. Similarly, it is not for the courts to modify a custom and apply or recognise the modified form as customary law. Nor is it a simple matter to define what constitutes a violation of the repugnancy clause without the adjudicator employing an external standard. Be that as it may, case law has declared certain customs repugnant to natural justice, equity and good conscience. These include a custom sentencing a deposed chief to death, customs based on slavery, and more recently, customs barring women from succeeding to the estate of a deceased husband or father.[7] In Eshugbayi Eleko v. Government of Nigeria,[8] the court stated that its duty did not extend to transforming "barbarous laws." Once a custom failed the repugnancy test, the duty of the court was to abolish that custom. However, it did observe that it was obliged to recognise and enforce changes in customary law brought about by social and political development, provided they were still recognised, in their milder forms, as binding custom within the community.

Ibhawoh, commenting on the principles governing the application of customary law, observes that the repugnancy test was intended to strike a balance between the need to allow for local cultural expression on one hand, and the need to protect basic individual rights and liberties guaranteed in the applicable English common law on the other hand (Eze 1998; Ibhawoh 1999). However, he criticised the "non-modification" stance of the colonial courts as a bar to the positive development of custom. He asserts that rather than reject in their entirety customs declared barbaric by English standards, provision ought to have been made for the reform or modification of such cultural practices within the colonial legal system. By failing to make such provisions, he reasons, the courts actually limited the space for and slowed down the pace of communal reform of custom that they recognised in theory. He nevertheless acknowledges that the repugnancy test was a useful instrument with which the colonial authorities abrogated some obnoxious customary practices.

A less charitable view maintains that the seeming concession made by the British colonial authority in retaining customary laws that passed the validity test was simply "in order that the British dictatorship may not appear too obvious to the outside world" (Anyebe, cited in Ibhawoh, 1999).

Drawing from Ibhawoh's argument, it is submitted that the passive stance of the colonial courts with respect to customary law reform may actually have served to perpetuate the enforcement of unfavourable customary laws upon women in more than one way. First, like the common law, the customary laws determining inheritance by women resulted in hardship and injustice as traditional societies opened up, unaccompanied by any corresponding progressive development in applicable customary laws. Up till now, the inability of women to inherit real property in certain traditional societies in Nigeria has been legendary (Atsenuwa 1993).

Secondly, the absolute power of the courts to abolish customs adjudged to have failed the validity test no doubt created a wariness in the thinking of indigenous peoples, which translated into a determination to protect those customs which remained untouched, or (more accurately) were not challenged in the colonial courts. This means that a large body of customs that have outlived their usefulness have remained firmly in place in various societies in Nigeria. Many of these customs, including the ancient common law, continue to inflict severe hardships on women, more than a century after the advent of the colonial venture, forty years after the inclusion of a bill of rights in the Nigerian Constitution, and a decade-and-a-half after Nigeria's ratification of the Convention on the Elimination of all Forms of Discrimination Against Women.

However, it must be remembered that the prevailing doctrine of coverture with regard to women in common law could not have encouraged developments in the legal position of Nigerian women that women in Britain did not yet enjoy. A woman's loss of personhood under the doctrine of coverture was aptly captured by a celebrated Nigerian jurist when he observed that:

> *according to common law tradition, as well as our own indigenous culture, a woman ceases legally to be a person upon her marriage. She was then without legal capacity. A husband and wife were regarded as one person and that person was the husband. The personality of the wife is thus submerged into that of her husband* (Oputa sine datum).

The colonial interests must therefore have been served by the maintenance of the status quo of women's passivity in social and political life, pointedly punctuated by the Aba Women's War of 1929 and the Egba Revolts of 1914 and 1947 (Olumese 1988).[9] It is indicative of the dynamics of the society which the colonialists preferred to ignore, that the women who planned and executed the 1929 protests subsequently won seats on the local council (Tamale 1996).

Finally, with regard to customary law, it is important to remember that the repugnancy test, being a judicial instrument, is invoked only by litigation specifically challenging, or otherwise touching on a particular custom. Consequently, scores of dehumanising practices (particularly with regard to widowhood and passage rites) have remained in operation in various parts of the country, not having been challenged in the law courts to date (Okoye 1995).

Judicial Precedent : Also known as case law, judicial precedents as a source of Nigerian law consist of law established in judicial decisions. Such law is sometimes described as judge-made law. The doctrine of judicial precedence makes the pronouncement of law on the facts before the court (not the incidental or surrounding statements or opinions) binding in respect of subsequent decisions by courts of equal or lower jurisdiction, based on parallel facts, unless and until such a decision is reversed by an appellate court having the jurisdiction to do so. Formerly, decisions of English courts were binding on courts in Nigeria, but with independence, this ceased. Consequently, in determining any applicable rule of the common law of England or any applicable English doctrine of equity, the decision of courts in England serve only as a guide to Nigerian courts (Obilade 1979).[10]

Having briefly stated the background of the Nigerian legal system, attention will now be directed towards the constitutional provisions on the subject of citizenship.

Citizenship Provisions of the Nigerian Constitution[11]

The 1999 Nigerian Constitution essentially restates the provisions of the 1979 Constitution on the subject of citizenship. First, the Constitution recognises three categories of citizenship: citizenship by birth, citizenship by registration, and citizenship by naturalisation. (The provisions of the 1999 Constitution on citizenship are provided here as an appendix.) The relevant provisions will be discussed below where relevant.

Citizenship by Birth

Not much will be said on this, except to point out that citizenship passes to a child equally through either parent or grandparent in the circumstances described in the relevant section of the Constitution, in which case it would be more accurate to describe it as citizenship by birth and descent. The present study is more concerned with citizenship by registration, discussed below.

Citizenship by Registration

Section 26(1) of the Constitution states that: “Subject to the provisions of section 28 of this Constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the President is satisfied that:

> (1) (a) he is a person of good character;
> (b) he has shown a clear intention of his desire to be domiciled in Nigeria; and
> (c) he has taken the Oath of Allegiance prescribed in the Seventh Schedule to this Constitution.
> (2) The provisions of this section shall apply to --
> (a) any woman who is or has been married to a citizen of Nigeria; or
> (b) every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.”

Although typically couched in masculine gender, this provision is clearly designed to facilitate the acquisition of Nigerian citizenship by non-Nigerian women married to Nigerian men. Interestingly, but not surprisingly, the provision does not apply vice versa. That this circumscription is wholly intended is borne out not only by the fact of its existence in the immediately preceding Constitution,[12] but even more by the rather curious provision in section 32 (1) which provides for

the granting of “special immigrant status with full residential rights” to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship.

Two premises at least are discernible from this provision. First, it pretends that the provisions of section 26 on the acquisition of citizenship in consequence of marriage apply equally to the non-Nigerian male spouse of a Nigerian woman as they do to the non-Nigerian woman married to a Nigerian man. Secondly, by recognising that a non-Nigerian spouse may not wish to acquire Nigerian citizenship, the possibility is acknowledged that such a person may want to acquire citizenship, be it a man or a woman; nevertheless, it fails to make a corresponding provision for citizenship by registration for non-Nigerian nationals married to Nigerian women. Further, this disparity suggests either that non-Nigerian men are not expected to desire Nigerian citizenship upon marriage to Nigerian women, or else they are not encouraged to want it.

Another core assumption that seems to underlie these provisions is that a longer period is required to prove a man’s loyalty to a country than is needed to prove the loyalty of a woman. The subject of women’s distinct legal status and capacity for loyalty to country still occupies current discourses on American history (Bredbenner 1998, Kerber 1998, Smith 1998).

On the other hand, the foregoing may not, as might be supposed, be the principal reasons for the maintenance of the status quo in the 1999 Constitution. This is because the history of constitution-making in Nigeria reveals a preoccupation by the colonialists, certainly not with issues of gender, but with a workable system of government for ease of governance. This was followed by the struggle for self-determination by nationalist crusaders who were themselves soon overpowered by the military in a contest for the soul of an independent nation.

Accordingly, whereas the earlier constitutions sought to secure a means of maintaining order and the subordination of the inhabitants of the colonial territory, subsequent constitutional experiments were influenced by demands for independence by a growing number of nationalists. Thus Nigeria’s constitutional engineering process moved from the complete subordination of the protectorate by the colonial government under the “Clifford” Constitution of 1922[13] through an insignificant representation of its people in the Legislative Council under the “Richard” Constitution of 1946, followed by the emergence of a “semi-responsible government” with the “Macpherson” Constitution of 1951, internal self-government under the 1954 “Lyttleton” Constitution, to independence with the Independence Act of 1960, which also ushered in the 1960 Constitution (Nwabueze 1982).

As the country moved towards independence, a major source of concern was the recurrent ethnic and regional conflicts that fostered, among the minority ethnic groups, a fear of domination by the majority ethnic groups. The consequent agitation of ethnic minorities led to the constitution of the Minorities Commission in 1958, which recommended the inclusion of a Bill of Rights in the Constitution as a means of guaranteeing the interests of minority groups. Thus in 1958, a bill of rights was introduced into the Constitution, and also included in the 1960 Constitution (Ibhawoh 1999, Nwabueze 1982). The Republican Constitution of 1963, the Presidential Constitution of 1979, and the 1999 Constitution all retained a bill of rights essentially consistent with international human rights provisions. It would therefore be correct to assert, in the light of the foregoing, that the inclusion of a bill of rights in the Nigerian Constitution was prompted, not by the equally important considerations of gender equality and justice, but by minority concerns and demands (Ezeilo 2000). Conversely, it has been observed that the ongoing debate on human rights and development (and by implication, constitutionalism) in Africa, has afforded both state and non-state actors a strategic opportunity to develop emerging and or neglected human rights issues, such as the fundamental subject of gender equality in law alongside the rights of minorities, among others (Okoye 1999).

Commenting on the role and operation of a constitutional guarantee of rights, Nwabueze states that the effect depends not only upon the range of the rights guaranteed, but also upon the scope and sweep of the qualifications made to them. In other words, the rights of one person or a group cannot be guaranteed in absolute terms if the rights of others are to be equally protected. This argument is elucidated as follows:

It is not only in the interest of public order and the protection of the rights of other persons that qualification upon individual rights is necessary; the demands of the security of the state itself, of public morality, public health and the provision of social and economic services are no less worthy of recognition. It follows then that even if one were to guarantee rights in absolute terms, as does the American Bill of Rights, they cannot in fact be enjoyed without qualification. The agency entrusted with their enforcement will inevitably have to draw a line somewhere. But whether the line is to be drawn by the enforcement agency in accordance with the spirit of the pre-existing law or in the constitution itself, the problem is where to draw it so as to leave ample room for the enjoyment of individual rights and at the same time make it possible for the government to discharge its obligations towards the society and the political community itself. This would involve a delicate balancing of objectives [emphasis added] (Nwabueze 1982).

The questions that arise when this reasoning is applied to the discriminatory provision on citizenship by registration are these: is section 26 of the 1999 Constitution intended to be a qualification to the right to freedom from discrimination provided for in section 42 of the same Constitution? If not, what then is its purpose; and if so, whose interest is the non-extension of citizenship by registration to male spouses of Nigerian women intended to protect?

From the foregoing statement, the most likely ground for the qualification that section 26 effects on section 42 would appear to be state security; that is, the likelihood of the penetration of the apparatus of state security by alien men “exploiting” the less demanding provision of citizenship by registration. This argument, if proffered, would be immediately self-defeating as it applies equally vice versa.[14]

On a related issue, it has been suggested that post-colonial regimes wanted to blunt the possibility of die-hard colonialists making a comeback through the assumption of citizenship of the ex-colony by the principle of jus soli, that is citizenship simply by birth within the territory of a State, as distinct from jus sanguinis, or citizenship by descent. Consequently, the citizenship laws of most post-colonial African states do not incorporate the territorial principle of jus soli (Gasiokwu 1995). It is easy to see how this position could also have influenced the constitutional provision that is central to this study. It is nevertheless submitted that this argument has outlived its usefulness, especially in view of the democratic process, which confers on citizens the power to choose their leaders.

It is noteworthy that not much has been done either by way of executive pronouncement or texts on the subject to explain or justify this constitutional position on citizenship by registration in consequence of marriage. Its rationale simply appears to have been taken for granted. This presumptuous stance also appears to be the position in other countries with a similar heritage of English law unless and until challenged by litigation, as was done in the case of Unity Dow v. Attorney-General of the Republic of Botswana (Dow 1995).

Having said that, attention will now shift to consider the provisions of other countries on the subject of conferment of citizenship through marriage.

Overview of the Citizenship Provisions of Selected African Countries

Uganda

The provision for cross-conferment of citizenship between spouses was also lopsided in favour of male citizens in Uganda under the Ugandan Independence Constitution of 1962, as well as its 1967 successor. Article 20 of the 1967 Ugandan Constitution, like the Nigerian Independence Constitution of 1960 actually prohibited discrimination on a number of grounds, except on the grounds of sex. In the words of one commentator, "legal practitioners interpret this to mean that if something is not prohibited, then it is allowed" (Oguli Oumo 2000).

It is instructive that by 1995, when a new Constitution succeeded the 1967 Constitution in Uganda, a great deal of work had been done through the integrated efforts of women's associations in Uganda. The result was that the 1995 Ugandan Constitution extended to Ugandan women the privilege of passing on to a non-national spouse the right to apply to acquire citizenship by registration, in the same way the non-national spouses of Ugandan men had been entitled to do for decades.[15]

Botswana

While the development in the Ugandan "grundnorm" may be described as a constitutional victory, a double judicial victory was recorded on a related subject in the case of Unity Dow v. Attorney-General of The Republic of Botswana (Dow 1995).[16] In that case, the respondent (applicant in the High Court) had petitioned the Court to declare sections 4 and 13 of the Citizenship Act 1984, among others, ultra vires section 3 of the Botswana Constitution, which guarantees every citizen of Botswana fundamental rights and freedoms without discrimination on grounds of sex, among others. Section 4 had the effect of denying Botswana citizenship to the children of the Applicant-Respondent, offspring of her marriage to an American national, while section 13 made provision for a woman married to a Botswana man to apply for citizenship by naturalisation, but made no such provision for the foreign spouse of a Botswana woman. However, as the case was argued almost exclusively in respect of "mother-to-child" transmission of citizenship, the court judgments did not extend beyond this issue. The majority judgment of the Court of Appeal (which upheld the High Court judgment) was grounded, among other things, on the canons of constitutional construction, as well as the provisions of international instruments. In the words of Aguda JCA:

> *The Constitution is the Supreme Law of the Land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand, the Courts must continue to breathe life into it from time to time as the occasion may arise to ensure the healthy growth and development of the State through it…. We must not shy away from a basic fact that whilst a particular construction of a Constitutional provision may be able to meet the demands of the society of a certain age such construction may not meet those of a later age…. In the light of the foregoing, therefore, the Constitution must be held not to permit discrimination on grounds of sex, which will be a breach of international law. Therefore Section 4 of the Citizenship Act must be held to be ultra vires the Constitution and must therefore be and is hereby declared null and void.*

South Africa

While the Botswana Government was briefing the nation on the decision in the Dow case through kgotla meetings,[17] the South African President was signing into law the South African Citizenship Act of 1995, which made equal provisions for citizenship by naturalisation to foreign spouses of South African citizens upon a minimum two-year residency requirement preceding the application for naturalisation and subsequent to the marriage.[18]

Kenya

The 1998 Revised Constitution of Kenya continues the tradition of reserving citizenship privileges for men that are not equally accorded to women, by providing for the conferment of Kenyan citizenship to a non-Kenyan woman who marries a Kenyan citizen, upon her application in that respect.[19] Here, as in Nigeria, the only option open to a non-national married to a Kenyan woman would appear to be naturalisation, albeit with a shorter residency requirement of four years preceding the application for naturalisation.24

Conclusion

An interim conclusion to this paper can be drawn from the observation of Tamale (1996) who asserts that, ironically, the African women's movement has not capitalised enough on the Dow case and other cases to highlight issues of gender oppression at a more generic level. She attributes this to three possible reasons: firstly, the nascent stage of the women's movement in Africa; secondly, the failure to mobilise beyond the respective borders of each country; and thirdly, the fear of reprisals in contexts where challenging gender oppression involves a direct attack on the composition of state power. A fourth reason may be an insufficient appreciation of the persuasive weight of judicial authorities across countries with a similar legal heritage. For instance, Nigerian and Kenyan cases were cited in the Dow case. Indeed, Aguda JCA, who made the earlier cited statement in favour of the Applicant-Respondent, is himself a citizen of Nigeria.

Finally, it is submitted that if corporations (who are artificial creations of the law) maintain a nationality distinct from those of their members,[20] it is in line with sound jurisprudence that the provisions on the nationality of women in international instruments be comprehensively recognised, actively promoted and consistently enforced as good law in the municipal law of African countries.

"State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife." Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 9(1).

"States Parties shall grant women equal rights with men with respect to the nationality of their children." Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 9(2).

Appendix

Constitution of the Federal Republic of Nigeria 1999

Chapter III: Citizenship Sections 25 - 32

Citizenship by Birth

25 (1) The following persons are citizens of Nigeria by birth, namely --
(a) every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria:
Provided that a person shall not become a citizen of Nigeria by virtue of this section if neither of his parents nor any of his grandparents was born in Nigeria;
(b) every person born in Nigeria after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria; and
(c) every person born outside Nigeria either of whose parents is a citizen of Nigeria.

(2) In this section, "the date of independence" means the 1st day of October 1960.

Citizenship by Registration:

26 (1) Subject to the provisions of section 28 of this Constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the President is satisfied that --
(a) he is a person of good character;
(b) he has shown a clear intention of his desire to be domiciled in Nigeria; and
(c) he has taken the Oath of Allegiance prescribed in the Seventh Schedule to this Constitution.

(2) The provisions of this section shall apply to -
(a) any woman who is or has been married to a citizen of Nigeria; or
(b) every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.

Citizenship by Naturalisation

27 (1) Subject to the provisions of section 28 of this Constitution, any person who is qualified in accordance with the provisions of this section may apply to the President for the grant of a certificate of naturalisation.

(2) No person shall be qualified to apply for the grant of a certificate of naturalisation, unless he satisfies the President that --
(a) he is a person of full age and capacity
(b) he is a person of good character;
(c) he has shown a clear intention of his desire to be domiciled in Nigeria;
(d) he is, in the opinion of the Governor of the State where he is or he proposes to be resident, acceptable to the local community in which he is to live permanently, and has been assimilated into the way of life of Nigerians in that part of the Federation;
(e) he is a person who has made or is capable of making useful contribution to the advancement, progress and well-being of Nigeria;
(f) he has taken the Oath of Allegiance prescribed in the Seventh Schedule to this Constitution; and
(g) he has, immediately preceding the date of his application, either --
    (i) resided in Nigeria for a continuous period of fifteen years, or

(ii) resided in Nigeria continuously for a period of twelve months, and during the period of twenty years immediately preceding that period of twelve months has resided in Nigeria for periods amounting in the aggregate to not less than fifteen years.

Dual Citizenship

28 (1) Subject to the other provisions of this section, a person shall forfeit forthwith his Nigerian citizenship if, not being a citizen of Nigeria by birth, he acquires or retains the citizenship or nationality of a country, other than Nigeria, of which he is not a citizen by birth.

(2) Any registration of a person as a citizen of Nigeria or the grant of a certificate of naturalisation to a person who is a citizen of a country other than Nigeria at the time of such registration or grant shall, if he is not a citizen by birth of that other country, be conditional upon effective renunciation of the citizenship or nationality of that other country within a period of not more than twelve months from the date of such registration or grant.

Renunciation of Citizenship

29 (1) Any citizen of Nigeria of full age who wishes to renounce his Nigerian citizenship shall make a declaration in the prescribed manner for the renunciation.

(2) The President shall cause the declaration made under subsection (1) of this section to be registered and upon such registration, the person who made the declaration shall cease to be a citizen of Nigeria.

(3) The President may withhold the registration of any declaration made under subsection (1) of this section if --
(a) the declaration is made during any war in which Nigeria is physically involved; or
(b) in his opinion, it is otherwise contrary to public policy.

(4) For the purposes of subsection (1) of this section -
(a) “full age” means the age of eighteen years and above;
(b) any woman who is married shall be deemed to be of full age.

Deprivation of Citizenship

30 (1) The President may deprive a person, other than a person who is a citizen of Nigeria by birth or by registration, of his citizenship, if he is satisfied that such a person has, within a period of seven years after becoming naturalised, been sentenced to imprisonment for a term of not less than three years.

(2) The president shall deprive a person, other than a person who is a citizen of Nigeria by birth, of his citizenship, if he is satisfied from the records of proceedings of a court of law or other tribunal, or after due inquiry in accordance with regulation made by him, that --
(a) the person has shown himself by act or speech to be disloyal towards the Federal Republic of Nigeria; or
(b) the person has, during any war in which Nigeria was engaged, unlawfully traded with the enemy or been engaged in or associated with any business that was in the opinion of the President carried on in such a manner as to assist the enemy of Nigeria in that war, or unlawfully communicated with such enemy to the detriment of or with intent to cause damage to the interest of Nigeria.

Persons Deemed to be Nigerian Citizens

31 For the purposes of this Chapter, a parent or grandparent of a person shall be deemed to be a citizen of Nigeria if at the time of the birth of that person such parent or grandparent would have possessed that status by birth if he had been alive on the date of independence; and in this section, "the date of independence" has the meaning assigned to it in section 25(2) of this Constitution.

Power to make Regulations

32 (1) The President may make regulations, not inconsistent with this Chapter, prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Chapter, and for granting special immigrant status with full residential rights to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship.

(2) Any regulations made by the President pursuant to the provisions of this section shall be laid before the National Assembly.

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Endnotes

[1] Rusimova (1962), Weis (1956) and Ramus (1969), cited in Gasiokwu (1995).

[2] Section 101 of the U.S. Immigration and Nationality Act (INA), cited in “FAQ on Citizenship” [http://www.webcom.com/richw/dualcit/cases.html].

[3] These outlying possessions of the United States presently include American Samoa and Swains Island in the South Pacific See INA s. 308.

[4] Yuval-Davis, reacting to Peled’s reference to Israel’s treatment of its Palestinian citizens as the ideal case of a state that has successfully implemented the two-tier citizenship model.

[5] These statutes include the Law (Miscellaneous Provisions) Law Cap 65 Lagos Laws 1973; High Court Law of Lagos State Cap. 52 Lagos Laws 1973; Law of England (Application) Law Western Region of Nigeria Laws Cap 60 of 1959; High Court Law Cap 49 Northern Nigeria laws 1963, and High Court Law Cap 61 Eastern Nigeria laws 1963.

[6] These parameters were established in the respective cases of Eshugbayi Eleko v. Government of Nigeria [1931] A.C. 662 at 673; Owoniyi v. Omotosho [1961] 1 All Nigeria Law Report 204 at 309.

[7] These customs constituted part and parcel of the subject -matter in the respective cases of Eshugbayi Eleko v. Govt. of Nigeria supra note 9; Re Effiong Okon Ata (1930) 10 N.L.R. 65; Mojekwu v. Mojekwu (1997) 7 NWLR (Pt.512) 283; Mojekwu & ors v. Ejikeme & ors (2000) 5 NWLR 402.

[8] supra note 10.

[9] Perhaps these instances of women's resistance, which occurred in Southern Nigeria, were instrumental to securing the vote for women in that region in 1959. Women in other parts of the country were admitted to state franchise only in 1976.

[10] Alli v. Okulaja [1970] 2 ANLR 35.

[11] Constitution of the Federal Republic of Nigeria 1999.

[12] Constitution of the Federal Republic of Nigeria 1979, section 24.

[13] Nigeria's colonial Constitutions are identified by the names of the respective Governors-General of the period in time.

[14] An informal survey may well demonstrate that more damage has been done in respect of state security matters through well-orchestrated casual liaisons than has occurred through marriages.

[15] The Constitution of the Republic of Uganda 1995, section 12(2).

[16] The complete record of proceedings at the High Court and Court of Appeal are fully reported in Dow (1995).

[17] See Foreword (by Sarah Llongwe) in Dow (1995).

[18] South African Citizenship Act No. 88 of 1995, section 5(5)(a) and (b).

[19] The Constitution of Kenya Revised Edition (1998) 1992, section 91. Note that section 92 introduces other categories of persons who may be registered as citizens of Kenya. These include commonwealth citizens and citizens of African countries that maintain a reciprocal arrangement with Kenya on citizenship by registration.

[20] See Janson v. Driefontein Consolidated Mines Ltd. [1902] AC 484 HL.