

**FEMINIST APPROACH TO *UKUZILA* CUSTOM UNDER THE NEW
SOUTH AFRICAN CONSTITUTIONAL DISPENSATION**

By

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**A thesis submitted in partial fulfilment of the requirements for the LLM
degree in the Faculty of Law, University of the Western Cape**



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DECLARATION

I declare that this work: **Feminist approach to *ukuzila* custom under the new South African Constitutional dispensation** is my own. It has not been submitted for any degree or examination in any other university, and all sources used or quoted have been indicated and acknowledged by complete references.

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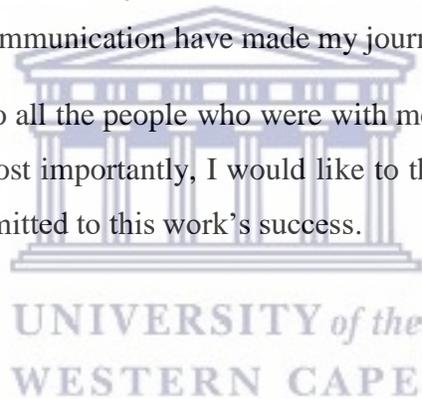
I would like to appreciate and thank the Almighty God and my Ancestral Angels for always carrying me through and giving me the highest strength.

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ABSTRACT

This study sought to investigate how the *ukuzila* practice violates women's constitutional rights, and how can *ukuzila* custom be aligned with the constitutional values of gender equality. A qualitative research approach was employed to collect in-depth data through a desktop method. Various legal materials such as legislation, case laws, legal journals, internet sources and books have been utilised and referenced to answer the postulated research questions.

Using the liberal feminism theory, the findings of the study reveal that *ukuzila* violates *inter alia* the right to equality, right to human dignity, freedom of movement, freedom of religion, belief, and opinion. The study shows that most rituals and procedures of *ukuzila* violate these rights, such as widows wearing a black garment for a year; women coerced to conform to the practice without being given a chance to express their opinions and beliefs, as well as restriction from movement for a year. During the period of *ukuzila*, widows are usually perceived as 'dark cloud' carriers, leading to the public discriminating against them. The study reveals that this stigmatisation leads to a violation of women's rights, as mentioned above.

Human dignity, the achievement of (gender) equality and the advancement of humans' rights and freedoms are some of the values on which the new South African Constitution is founded upon. In determining whether *ukuzila* can be aligned with the constitutional values of gender equality, the *Harksen's case* test was used to show that the practice is discriminatory. The test also illustrated that *ukuzila* constitutes discrimination and unfairly differentiates between widows and widowers. Moreover, the right to gender equality's limitation could not be justified by the South African Constitution's internal limitation clauses of s30, 31(2) and s36 respectively.

Since liberal feminism depicts *ukuzila* as a cultural practice that violates, discriminates, and oppresses women, it is viewed as an instrument to undermine the effort of promoting, protecting, and advancing women's rights. Consequently, liberal feminism mandates that *ukuzila* must be prohibited and eliminated using all the available legal instruments which include *inter alia*, CEDAW, Maputo Protocol, Constitution of the Republic of South Africa and PEPUDA.

KEY TERMS AND PHRASES

Culture

Gender

Human rights

Liberal feminism

Right to culture

Right to equality

Right to freedom of movement

Right to human dignity

Ukuzila

Widow

Women

Women's rights



ACRONYMS

ANCWL - African National Congress Women's League

BCEA - Basic Conditions of Employment Act

BPA- Beijing Platform for Action

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

CGE- Commission on Gender Equality

DEDAW- Declaration on the Elimination of Discrimination against Women

DEVAW- Declaration on the Elimination of Violence Against Women

DVA - Domestic Violence Act

FSAW- Federation of South African Women

ICCPR- International Covenant on Civil and Political Rights

ICESCR - International Covenant on Civil, Economic, Social and Cultural Rights

Maputo Protocol- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

PEPUDA- Promotion of Equality and Prevention of Unfair Discrimination Act

PFVA - Prevention of Family Violence Act

RCMA- Recognition of Customary Marriages Act

SADC Protocol- The Southern African Development Community Protocol on Gender and Development

SAHRC- South African Human Rights Commission

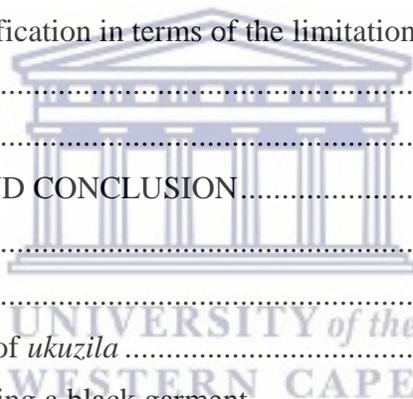
UDHR- Universal Declaration of Human Rights

WNC- Women's National Coalition

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CHAPTER ONE

INTRODUCTION

1.1 Background and problem statement

The *ukuzila* (spousal mourning) custom is a cultural practice observed predominantly by traditional African communities in respect of the departed spouse. According to McLaren, the primary meaning of the Xhosa transitive verb *ukuzila* is to abstain.¹ For a widow, the practice begins immediately after the husband's passing is confirmed. The significance of *ukuzila* is threefold: first, to honour the deceased; secondly, to show respect to the ancestors; and thirdly, to preserve the custom.² *Ukuzila* is a symbol that a widow is grieving properly and that she respects her deceased husband.³

Ukuzila can be divided into three phases. First, a widow is expected to sit on a mattress and is restricted from making movements in and outside the yard until after the burial.⁴ During this period, only married women sit with the widow who must be covered with a blanket.⁵ The second phase is marked by a widow wearing a black garment as a sign of mourning.⁶ The wearing of *inzilo*- a black garment is a process that takes the form of the external expression of mourning.⁷ The purpose of wearing black mourning clothes is for widows to be distinguishable, preventing men from approaching them for sexual relationships.⁸ The last phase of *ukuzila* is generally known as purification or cleansing. The widow is expected to bathe in cold water mixed with various traditional herbs.⁹

The challenge with the *ukuzila* custom is that women seem to suffer the most when their husbands die because various restrictions and prohibitions are imposed on them. Widows are obligated to

¹ McLaren J *A New Concise Xhosa - English Dictionary* (1963) 3.

² See Cebekhulu LM *Understanding the Experiences of Young Widows in Rural Kwazulu-Natal* (Unpublished MA, University of KwaZulu-Natal, 2015) 27-28.

³ Rosenblatt PC & Nkosi BC 'South African Zulu Widows in a Time of Poverty and Social Change' (2007) 31 *Death Studies* 67-85.

⁴ Cebekhulu LM (2015) 25.

⁵ Cebekhulu LM (2015) 25.

⁶ Ngubane S 'Traditional Practices of Burial Systems with Special Reference to The Zulu People of South Africa' (2000) 3 *Indilinga: African Journal of Indigenous Knowledge Systems* 171-7.

⁷ Ngqangweni H *Gender and Constructions of Spousal Mourning Among the AmaXhosa in The Eastern Cape* (Unpublished PhD Thesis, Rhodes University, 2013) 2.

⁸ Mtshemla S *Meanings Ascribed to Ukuzila by A Group of Men and Women from Mpukane in The Eastern Cape* (Unpublished Honours Thesis: University of Fort Hare, 2005) 1-11.

⁹ Magudu B 'AmaHlubi women's experience & perceptions of "ukuzila"' (2004) 18 *Agenda* 140-48.

conform to this practice because their families and communities often cast them out if they refuse. For instance, in a recent encounter in the Hlathikhulu community in KwaZulu-Natal, a widow was asked to leave her village for refusing to wear black to mourn her husband's death.¹⁰ The newspaper reported that:

Fikile Mlaba observed International Women's Day last week feeling like a "fugitive" in her own village after she was branded as being a harbinger of bad luck and for standing up to a traditional authority in northern KwaZulu-Natal. Neighbours complained to the amaHlubi traditional council about the 71-year-old mother, who refused to wear the mourning attire commonly known as *inzilo* after her husband's death in the rural village of Hlathikhulu last year (2020). They said this invoke[s] the wrath of the ancestors and lead[s] to crops being destroyed by floods and bad weather.¹¹

The challenge of the claims made by Hlathikhulu villagers is an excuse to violate and oppress widows by forcing them to observe a practice they do not believe in. Nonetheless, the root of this oppression is the *ukuzila* custom. From a human rights and constitutional rights perspective, the *ukuzila* practice seems discriminatory, affecting only women in traditional communities. In addition, Daber points out that the custom is discriminatory and derogatory, degrading and life-threatening.¹²

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹³ defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁴

¹⁰ Mdletshe M 'Black day: widow stands up for her rights as village turns against her' *Sunday Times: Daily* 15 March 2021 available at <https://www.timeslive.co.za/sunday-times-daily/news/2021-03-15>. (accessed on 16 March 2021).

¹¹ Mdletshe M 'Black day: widow stands up for her rights as village turns against her' *Sunday Times: Daily* 15 March 2021 available at <https://www.timeslive.co.za/sunday-times-daily/news/2021-03-15>. (accessed on 16 March 2021).

¹² Daber BN *The Gendered Construction of Mourning and Cleansing Rites of Widowhood Amongst the Zulu Speaking People of Ndwedwe Community* (Unpublished MA Dissertation, Durban University of Natal, 2003).

¹³ CEDAW, 1979.

¹⁴ Article 1 of CEDAW, 1979.

The above definition perfectly describes the shortcomings of the *ukuzila* custom as discriminatory. Based on gender, *ukuzila* impairs full enjoyment of widows' rights under customary marriages; this is discussed in subsequent chapters.

While the *ukuzila* custom can be understood as an act of respect,¹⁵ it comes with many human rights violations and the infringement of some rights that are enshrined in the Constitution of South Africa. Despite these violations, *ukuzila* forms part of indigenous cultural practice and is protected under the constitutional right to culture.¹⁶ As mentioned previously, only women seem to suffer in the name of conforming to the *ukuzila* custom that discriminates against them and infringes on their basic fundamental human rights. This custom perpetuates the oppression of women in traditional communities, infringing on their constitutional rights, which negatively impacts their well-being emotionally, psychologically and otherwise.¹⁷

Against this background, through liberal feminism, this study sought to determine how *ukuzila* custom violates women's rights under the new South African constitutional dispensation; and if *ukuzila* custom can be transformed and aligned with constitutional values of gender equality.

1.2 Research questions

This study seeks to answer two main questions:

- (a) How does the *ukuzila* custom infringe on women's constitutional rights?
- (b) How can *ukuzila* custom be aligned with the constitutional values of gender equality?

1.3 Significance of the study

The outcome of this study contributes to the existing body of knowledge about the *ukuzila* custom and its implications on the infringement of women's rights under the new constitutional dispensation. It further expands the scope of understanding of whether the practice can be aligned with women's constitutional rights.

This study also contributes significantly to the ongoing debate about balancing other customs under customary law (right to culture) and other rights in the Bill of Rights.

¹⁵ See Rosenblatt PC & Nkosi BC (2007) 31 *Death Studies* 67-85.

¹⁶ See ss 30 and 30 (1) (a)-(b) of the Constitution of the Republic of South Africa, 1996.

¹⁷ Sossou MA 'Widowhood practices in West Africa: the silent victims' (2002) 11 *International Journal of Social Welfare* 201-209.

The outcome of this study can also be used as a contributory piece in policy formulation processes, particularly on gender transformation policies focusing on women under customary law. Finally, this study could be a frame of reference for future research on empowering women in rural areas about their human rights and liberation. While *ukuzila* is not only limited to customary marriage settings as found in South Africa, this thesis however, will be fairly limited to the South African context.

1.4 Methodology

This desktop study carefully analyses and evaluates primary and secondary sources of the existing literature. Various legal material such as legislation, case laws, legal journals, internet sources and books were utilised and referenced to answer the proposed research questions. In addition, to gain a deep understanding of the research questions, a qualitative research approach was used. The choice of this methodology was informed by the fact that qualitative research investigates aspects of human existence such as culture, expression, beliefs, morals, life stress, and imagination.¹⁸ This research method allows for accurate, in-depth insight into how *ukuzila* custom, as practised in traditional communities, violates women under customary marriages. Qualitative researchers may use observation, note-taking, interviews, focus groups, documents, and artefacts to obtain information during data collection.¹⁹ Similarly, in this study, documents, note-taking, and observations were used to gather information.

The current study is also confined within the liberal feminism framework, which aims to understand the nature of gender inequality brought by the *ukuzila* custom and how legal reform can protect and advance widow's rights.

1.5 Literature review

Ndlovu²⁰ conducted a field study that explored how cultural practices contribute to discrimination against women. The study focused on the challenges and consequences that the Zulu speaking widows experience during their mourning period and various gender bias and power inequalities inherent in the Zulu-speaking people's mourning cultural practice. Ndlovu's study aimed to expose

¹⁸ Wertz F, Charmaz K, McMullen L *et al.* *Five Ways of Doing Qualitative Analysis: Phenomenological Psychology, Grounded Theory, Discourse Analysis, Narrative Research, and Intuitive Inquiry* 1 ed (2011) 16-18.

¹⁹ Babbie ER *The Basics of Social Research* 6 ed (2014) 303-04.

²⁰ Ndlovu CD *The Mourning Cultural Practices Amongst The Zulu-Speaking Widows of The Kwanyuswa Community: A Feminist Perspective* (Unpublished Master of Art, University of KwaZulu-Natal, 2013) 4-55.

the gender inequalities embedded in the mourning cultural practice and determine how people of this community perceive the mourning cultural practices. The findings revealed that the rural people of KwaNyuswa, do not consider social transformation or gender equality as processes that should change their traditional beliefs. Instead, they firmly adhere to patriarchal practices believing that they inform their identity and sense of belonging.²¹ Both widows and widowers held this view.²²

Similarly, Rosenblatt and Nkosi's study explored the experience of Zulu widows in economic and contemporary South Africa.²³ Their study revealed that Zulu widows often live in extreme poverty, without adequate food or housing.²⁴ As a result, some widows lack of economic resources compared to the deceased husband.²⁵ In addition, Bhana also conducted a study that examined how Hindu widows express their mourning in their context, thereby defining their experiences of widowhood.²⁶ The findings revealed that within a patriarchal society, Hindu widows appear inadequately prepared for their widowhood.²⁷ As a result, they experience financial, emotional and psychological difficulties adjusting to widowhood.²⁸ In other words, though no one may be prepared for the death of their spouse, the burden becomes too heavy for widows than widowers. Especially if the man was the sole breadwinner in the household.

Furthermore, research on *ukuzila* custom in South Africa highlighted that health-related issues were associated with this practice. Somhlaba and Wait highlighted stress and depression as related issues that might follow the loss.²⁹ Similar findings by Manyedi and Koen indicated that widowhood brought stress due to isolation and other prescribed customs.³⁰ Some rituals demand that widows wash or bathe early in the morning and late at night by the river or outside the yard with cold water. Washing by the river at night could lead to health issues such as pneumonia due

²¹ Ndlovu CD (2013) 47.

²² Ndlovu CD (2013) 47.

²³ Rosenblatt PC & Nkosi BC (2007) 31 *Death Studies* 67-85.

²⁴ Rosenblatt PC & Nkosi BC (2007) 31 *Death Studies* 67-85.

²⁵ Rosenblatt PC & Nkosi BC (2007) 31 *Death Studies* 67-85.

²⁶ Bhana J *A Social Constructionist Understanding of Mourning: Indian Widows' Experiences* (Unpublished MA: University of South Africa, 2007) 1-333.

²⁷ Bhana J (2007) 1-333.

²⁸ Bhana J (2007) 1-333.

²⁹ Somhlaba NZ & Wait JW 'Stress, Coping Styles, and Spousal Bereavement: Exploring Patterns of Grieving Among Black Widowed Spouses in Rural South Africa' (2009) 14 *Journal of Loss and Trauma* 196-210.

³⁰ Manyedi ME, Koen MP & Greeff M 'Experiences of widowhood and beliefs about the mourning process of the Batswana people' (2003) 8 *Health South Africa, Gesondheid* 69-87.

to exposure to cold water.³¹ Moreover, bathing in a public river or space can pose a danger to the safety of a widow as she might get raped while bathing at night or before dawn.

In addition, Schoepf highlights the danger of contracting sexually transmitted diseases and HIV/AIDS; for example, through practices such as *ukungena*, whereby the brother of the deceased husband takes over ‘conjugal’ rights to the widow as well as through widow inheritance.³² *Ukungena* (levirate) although not so widely practiced anymore, it still has potential challenges against widows. Family members decide on behalf of the widow on whom she should marry next, thus, taking away her freedom and rights.

Likewise, Dlukulu explored how widows in South African transitional societies, whose husbands have died of terminal illnesses, experience bereavement and how they cognitively process and cope with the loss.³³ Dlukulu found that the participants’ anticipatory bereavement did not ease or shorten their sense or period of grief after their husband’s death.³⁴ Some participants seemed more adaptive, with greater openness and flexibility in social cognition and greater problem-focused coping. In contrast, others showed more negative emotions in social interaction, greater loneliness, and relatively closed and inflexible social cognition.³⁵ Both of the above studies focused on widows coping with death and bereavement processes.

On the other hand, Cebekhulu’s study sought to interrogate the basic structures and ideologies responsible for the oppression of young widows in the Emangweni area in KwaZulu-Natal.³⁶ The study adopted the African feminist perspective because it values young women’s experiences and provides a basis for understanding widowhood.³⁷ Although Cebekhulu employed African Feminist theory in the study, the violation of women’s rights by *ukuzila* was not questioned. The current study is different from Cebekhulu’s study in two ways. First, this study uses liberal feminism as an approach to understanding the *ukuzila* cultural practice. Secondly, it focuses on specific women’s rights violated by the *ukuzila* custom.

³¹ Magudu B (2004) 18 *Agenda* 140-48.

³² Schoepf BG ‘AIDS, gender and sexuality during Africa’s economic crisis’ in Mikell G (ed) *African feminism: The politics of survival in sub-Saharan Africa* (1997) 310-332.

³³ Dlukulu PM *Black Urban Widows: Their Experiences of and Coping with Bereavement In A Transitional Society* (Unpublished Doctoral Thesis, University of Pretoria, 2010) 31.

³⁴ Dlukulu PM (2010) 238-48.

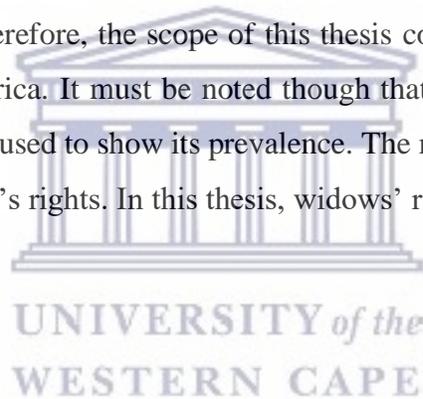
³⁵ Dlukulu PM (2010) 238-48.

³⁶ Cebekhulu LM (2015) 3.

³⁷ Cebekhulu LM (2015) 3.

The studies mentioned above have not explicitly focused on how the *ukuzila* custom infringes women's constitutional rights. Thus, there is a gap in the literature on women's rights and *ukuzila*. Secondly, the *ukuzila* custom has never been tested using the *Harksen case* test to determine its alignment with constitutional values of gender equality. Therefore, this study contributes to the literature by bridging these gaps. First, it explores the implications of *ukuzila* practice on women's rights, focusing on the specific constitutional rights that are infringed by the custom of *ukuzila*. Secondly, it expands on the relationship between customary law and universal human rights law. Lastly, it explores the relationship between the custom of *ukuzila* and the rights of gender equality.

Unlike most of the studies in the reviewed literature, this study is not limited to a specific village or traditional community, as the literature indicates that *ukuzila* is a widely practised custom. For example, *ukuzila* is practised amongst AmaXhosa, AmaPedi, AmaZulu, and Indian communities (discussed in chapter three). Therefore, the scope of this thesis covers the trends and patterns of *ukuzila* custom across South Africa. It must be noted though that the focus is not on trends and patterns of *ukuzila*, but these are used to show its prevalence. The main focus is on *ukuzila* custom itself and how it violates women's rights. In this thesis, widows' rights and or women's rights are used interchangeably.



1.6 Chapter outline

Chapter 1: Introduction

This introductory chapter provides a background to the study, the problem, significance of the study, methodology, literature review and an outline of the chapters.

Chapter two: Theoretical framework

This chapter provides an in-depth discussion of liberal feminism, radical feminism, Marxist feminism, socialist feminism, and South African feminism. The chapter concludes with the main reasons for adopting liberal feminism as a theoretical framework that underpins the study.

Chapter three: Implications of *ukuzila* custom on women's constitutional rights

Chapter three presents a discussion of the *ukuzila* custom and its infringement on women's constitutional rights. This chapter comprehensively describes *ukuzila*, its significance and the prevalent practice of *ukuzila* across South African traditional communities. Constitutional rights discussed include *inter alia* the right to equality, right to human dignity, right to freedom of movement and security of a person.

Chapter four: Alignment of *ukuzila* custom with constitutional values

This chapter discusses the relationship between women's and cultural rights using international, regional and national human rights instruments and the *Harksen's case* test.

This discussion establishes whether the *ukuzila* practice can override women's rights to equality and be aligned with the right to equality under the Constitution of South Africa.

Chapter five: Summary of findings and concluding remarks

Chapter five presents a summary of findings of the *ukuzila* cultural practice, which are: the varying purposes of *ukuzila*; marking of widows using a black garment; modern women in public spheres; potential gender-based violence against widows; health-related issues; exclusion of women from cultural development, followed by concluding remarks.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

This chapter outlines the theoretical feminist theories to ascertain the best approach to provide a lens through which the custom of *ukuzila* can be evaluated and aligned with the constitutional values of empowering women and promoting gender equality. There are various definitions of the term *feminism* by different scholars. For example, Beasley defines feminism as the advocacy of women's rights based on a belief in the equality of the sexes and refers to everyone being aware of and seeking to end women's subordination in any way and for any reason.¹ According to Magezis, feminism is underpinned by the notion that society does not treat women fairly, and so it is the role of feminism to unearth why this is the case and how women are oppressed.² Furthermore, Rizter describes feminism as an umbrella term encompassing many ideologies and political perspectives, focusing on women's issues as a priority.³ On the other hand, Scholtz suggests that all schools of feminist thought begin with a common assumption that women are oppressed.⁴ However, there are differences in how this oppression is understood by different schools of thought and the strategies proposed to overcome it.⁵ The term feminism also describes a political, cultural or economic movement that establishes equal rights and legal protection for women.⁶ It involves political and sociological theories and philosophies concerned with issues of gender difference, advocating for gender equality, and women's rights and interests.⁷ Similarly, this study aligns itself with all the definitions provided by scholars above, as they all resonate with what this study is about. Although the different feminist theories share some essential principles, they are diverse. This diversity led Jaggar for example, to group the feminist political philosophy into four camps: Radical feminism, Socialist feminism, Marxist feminism, and Liberal feminism.⁸

¹ Beasley C *What is Feminism? An Introduction to Feminist Theory* (1999) 27.

² Magezis J *Teach Yourself Women's Studies* (1996) 13.

³ Rizter G *Contemporary Sociological Theory and its Classical Roots* (2003) 44.

⁴ Scholtz SJ *Feminism: A Beginner's Guide* (2010) 10.

⁵ Scholtz SJ *Feminism: A Beginner's Guide* (2010) 10.

⁶ Gender and Water in Central Asia 'History and theory of feminism' available at <http://www.gender.cawater-info.net/> (accessed 01 October 2020).

⁷ Gender and Water in Central Asia 'History and theory of feminism' available at <http://www.gender.cawater-info.net/> (accessed 01 October 2020).

⁸ Jaggar AM *Feminist Politics and Human Nature, Philosophy and Society* (1983) 25-123.

This chapter is divided into subsections which include Liberal feminism, Radical feminism, Marxist feminism, Socialist feminism, South African feminism and the conclusion.

2.2 Liberal feminist theory

Liberal feminism locates the origins of women's oppression in women's lack of equal civil rights. Other sources can be traced from the lack of equal opportunities, traditions and learned psychology associated with the sex-role socialisation process.⁹ Liberal feminism purports that women's liberation can be achieved with the removal of sexist discrimination. Hence, women have the opportunity to pursue their potential for individual development fully like men.¹⁰ In other words, the eradication of sexist and gendered cultural practices or roles, in general, could ultimately free women from oppression. Thus, women must be free from any role that makes them inferior.

The historical context of liberal feminism was influenced mainly by many scholars' thoughts and writings, such as Mary Wollstonecraft, a pioneer of the liberation movement for women.¹¹ In her book, *A Vindication of Rights of Women*,¹² Wollstonecraft discusses the concept of rights for women. Among others, she advocated for the status of women to be valued, protesting women's exclusion from education,¹³ voting rights,¹⁴ the ability to own and manage properties,¹⁵ and limits on the kind of work they could do.¹⁶ Wollstonecraft believes that women's poor education teaches them to be superficial and ignorant, making life miserable for their future husbands and children.¹⁷ This argument is powerful because it suggests that if women are ignorant, they become a burden to their male partners and cannot be independent, implying that their aspirations is securing a husband and having children. Nonetheless, the objective must be to provide equal educational opportunities for both men and women to contribute meaningfully to the society in which they

⁹ Freeman ML 'Beyond Women's Issues: Feminism and Social Work' (1990) 5 *Affilia* 72–89.

¹⁰ Freeman ML (1990) 5 *Affilia* 72–89.

¹¹ See Stanley MJ *Mary Wollstonecraft: Forerunner of Positive Liberty and Communitarianism* (Unpublished MA Thesis, University of British Columbia 2011) John Locke (1632-1704), Jean-Jacques Rousseau (1712-178), Edmund Burke (1729-1797), and Richard Price (1723-1791). Locke and Rousseau were also educational reformers; however, neither of them extended a call for education specifically to women and the lower classes, and Rousseau openly advocated limiting the education of women.

¹² Wollstonecraft M (1759-1797) *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects* 1792.

¹³ Wollstonecraft M *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects* (first published in 1792; reis 2018) 200.

¹⁴ Wollstonecraft M (reis 2018) 167.

¹⁵ Wollstonecraft M (reis 2018) 55.

¹⁶ Wollstonecraft M (reis 2018) 58.

¹⁷ Wollstonecraft M (reis 2018) 58-59.

live. Women should be treated just as well as men because they have intelligence. Additionally, the phrase ‘should be treated’ suggested by the scholar must not be passively accepted. Women must denounce the sense of incapability and ceasing of celebrating and brushing off sentiments claiming they are weaker than men.

As a liberal feminist, Wollstonecraft serves as a significant source of this current study as she establishes what women and widows, particularly in rural areas, go through in their lives. The lack of education has significantly contributed to the misery of most women and widows in rural areas, especially when it comes into understanding their human rights and worth as human beings. This subjects them to oppression as their men or husbands take advantage of their dependability and illiteracy. Moreover, in agreement with Wollstonecraft, women must be afforded good education to increase their chance of accessing and understanding their rights. However, it must be noted that this is not to suggest that women must be afforded rights or have access to human rights only if they are educated, but it is to say that it places them in a better position to understand what rights they have and what avenues are available to them to ensure the enforcement of such rights. While this is a plausible solution, the cultural practice of *ukuzila* must be scrutinised. Although women can be given an excellent education to understand and access their rights, it will not diminish the magnitude of violation that *ukuzila* has on their lives. Therefore, educating women while transforming and eliminating harmful cultural practices will be the best solution.

In support of the above assertion on women and intelligence, Korsmeyer strongly submits three propositions; first, arguing that *reason* is essential for developing a moral, virtuous character. Secondly, women lack *reason* not because they are biologically incapable but because they are denied the educational opportunities that encourage the development of rational intellect. Lastly, the common distinction between masculine and feminine virtues must be eradicated because *reason*, the basis of all virtue, makes no gender distinctions.¹⁸ The struggle for a less prejudiced society founded on the manifest equality of human beings must remain a modern goal.¹⁹ In other words, dealing with the lack of *reason* among women is still relevant in liberating women and ensuring equal cognitive standing with men. Therefore, providing women with the same education as men will facilitate equality and thus narrow the gap of gender inequality. It is also important to

¹⁸ Korsmeyer C ‘Reason and Morals in the Early Feminist Movement: Mary Wollstonecraft’ in Gould CC & Wartofsky MW eds *Women and Philosophy* (1976) 98.

¹⁹ Monroe JA ‘A Feminist Vindication of Mary Wollstonecraft’ (1987) 8 *IJL Studies* 143-52.

note that in this thesis the echoing of providing women with basic education is for the purpose of accessing justice and understating of all the rights enshrine in all human rights instruments. For example, most human rights instruments are available in English, even if they are available in other languages, the interpretation and understanding would require a basic level of literacy. As mentioned above, this will solve only one part of the problem and not uproot the other factor contributing to gender inequality and violation of other women's rights which deals with the cultural practice and examines the extent to which it hinders women from liberation.

Furthermore, Wollstonecraft's idea of liberating women is not without criticism. Her work was criticised by Vlasopolos, who spotted cracks and ideological contradictions in a *Vindication*. Vlasopolos accuses Wollstonecraft of addressing men using proverbial feminine weapons of flattery and dark hints involving issues that men feel are least secure.²⁰ Vlasopolos makes men feel in control of the proposed "revolution in female manners",²¹ stating that:

[a]part from flattering men's intellects, Wollstonecraft makes it clear that her revolution will not challenge men in physical combat. She acknowledges the notion cherished by many - of women's physical inferiority to men and goes so far as to assert that "[to] some degree," such weakness makes women dependent on men. She then turns to the men to whose intellectual and physical superiority she has bowed and asks them to become the liberators of women: "would men but generously snap our chains"; "I entreat them to assist to emancipate their companion, to make her a help meet for them" "women must be allowed"; "make them free"; and finally "be just then... and allow her the privileges of ignorance, to whom ye deny the rights of reason." ²²

The above criticism illustrates that Wollstonecraft tried to 'sugarcoat' her points in challenging male dominance.

Wollstonecraft has been accused of using a soft tone and in that regard giving men the upper hand even in the liberation movement for women. Wollstonecraft's tone suggests that men may choose to allow such liberation or emancipation of women to occur or not, which reassures men that their powers are not threatened but seek the space for women to develop control over themselves.

²⁰ Vlasopolos A 'Mary Wollstonecraft's Mask of Reason in A Vindication of the Rights of Woman' (1980) 60 *Dalhousie Review* 462-64.

²¹ Vlasopolos A (1980) 60 *Dalhousie Review* 462-64.

²² Vlasopolos A (1980) 60 *Dalhousie Review* 462-64.

Despite these critics, which this study wishes not to entertain, whether or not Wollstonecraft distances herself from her assertion is irrelevant in the arguments that she is raising about, inter alia, good education, civil rights and equal work pay. Failure of Wollstonecraft to “transcend the preconceptions of the traditional female roles of wife, mother, and daughter” seems irrelevant in this case because once women have access to good education, it will give them the intellectual capacity, power and liberty to decide on whether or not to conform to those traditional roles.

The second advocate for women’s liberation is Mill, whose well-known work, *The Subjection of Women*, is about women’s rights in the history of feminism.²³ Mill sets forth what has often been viewed as a progressive theory advocating equality for women in society.²⁴ Mill argues that social and legal conditions restricting women’s liberty serve as one of the “chief hindrances to human improvement.”²⁵ He stresses that this kind of social injustice is one of the main barriers to human progress and the moral improvement of humankind.²⁶ Mill adds that everyone is negatively affected by such conditions the same way; consequently, the subjection of women negatively affects society.²⁷ In other words, the oppression of women should be a matter of concern to everyone as their unending subjugation hinders human progress, growth, and development. Thus, promoting human progress and the greatest happiness for all through new and diverse intellectual forces result from improved and equal education and opportunities for women.²⁸ Although Mill only scratches the tip of the iceberg, these are great benefits since affording women equal legal status will not necessarily eliminate their oppression, instead it is the elimination of harmful cultural practices through legal means that will contribute to the liberation and advancement of women. The gender roles within family structures are one of the contributory factors to women’s oppression.

Mill seems to evade this, stating outright that men within family structures can and must take up roles previously assigned to women.²⁹ He challenges the conventional assumptions regarding women and men’s different responsibilities in a household and does not accept that when women

²³ Mill JS *On Liberty and The Subjection of Women* (1879 ed) (1859) 206-214.

²⁴ Mill JS *On Liberty and The Subjection of Women* (1879 ed) (1859) 226-227.

²⁵ Mill JS *On Liberty and The Subjection of Women* (1879 ed) (1859) 233.

²⁶ Szapuová M ‘Mill’s liberal feminism: Its legacy and current criticism’ (2006) 5 *Prolegomena* 182.

²⁷ Szapuová M (2006) 5 *Prolegomena* 182.

²⁸ Mill JS *The Subjection of Women, in On Liberty and Other Writings* ed Stefan Collini (1989) 199.

²⁹ Szapuová M ‘Mill’s liberal Feminism: its legacy and Current Criticism’ (2006) 5 *Prolegomena* 182.

marry, they should be responsible for taking care of the home and children while men provide the family income.³⁰ Except for childbearing, any other role must be considered neutral and not natural, as Mill claims. What Mill is suggesting is synonymous with formal equality where ‘sameness treatment’ is the primary goal. However, this should not be the focus; the aim is to target gender roles that sustain women’s oppression and maintain men’s superiority. Equality can still be achieved even in the absence of ‘sameness treatment’. In other words through substantive equality.

Additionally, Mill argues that women are brought up through “fear of men or religious rules” and to be obedient of either one or both.³¹ In other words, most ideal women is that who is submissive. Mill however, states that all men have no knowledge or desire to understand the true vocation of women, but the existing character of women is that of manmade or artificial which seeks to uphold the dominant-submissive status quo.³² He then suggests that women have innate experiences with their fully functional faculties, thus, they must “discover for themselves what is it for happiness to do or leave undone.”³³ Therefore, the main argument here is that women must aspire to be women in their own description and definition. They must refuse to adopt any definition or description set out by the society for them and about them. This will allow them to have a bold clearly defined presence and role within their families, societies, and most importantly as individuals. In other words, attaining status by defining themselves without having to bow under the shadow of men must be a priority.

In light of the above debate, its convergent ideas have emerged about the liberation movement for women. It became clear that “its focuses on women’s rights, such as access to education, the right to vote, and economic independence, citizenship, and other issues of equality.”³⁴ This feminist perspective emphasises social and legal reform through policies designed to create equal opportunities for women.

³⁰ Szapuová M (2006) 5 *Prolegomena* 182.

³¹ Mill JS *On Liberty and The Subjection of Women (1879 ed)* (1859) 233.

³² Mill JS *On Liberty and The Subjection of Women (1879 ed)* (1859) 254.

³³ Mill JS *On Liberty and The Subjection of Women (1879 ed)* (1859) 254.

³⁴ Saulnier C *Feminist theories and social work: Approaches and application* (1996) 9.

It also stresses establishing individual civil rights so that no one is denied access to the existing social-economic system because of sex, race, or class.³⁵ Several human rights instruments that have been created give women access to such rights.

There is more evidence of the legal reform and transformation of women's status through policies, laws and legislation to ensure protection and advancement of women's rights as liberal feminism dictate. For example, the United Nations Charter³⁶ reaffirms that both men and women have equal rights.³⁷ The Universal Declaration of Human Rights (UDHR)³⁸ is a declaration that serves as a global guideline for freedom and equality, ensuring that everyone's rights are protected.³⁹ Countries agreed on the freedoms and rights guaranteed to all people to live their lives freely, equally and in dignity.⁴⁰

The International Bill of Human Rights consists of the UDHR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁴¹ and the International Covenant on Civil and Political Rights (ICCPR).⁴² The Covenants recognise that, in accordance with the Universal Declaration, "the ideal of free human beings enjoying civil and political freedom and freedom from fear and what can only be realised if conditions are created that allow everyone to exercise their civil and political rights, as well as their economic, social, and cultural rights."⁴³

³⁵ Freeman ML 'Beyond Women's Issues: Feminism and Social Work' (1990) 5 *Affilia* 72–89.

³⁶ See the preamble of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html> (accessed 5 October 2020).

³⁷ "... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". United Nations 'Universal Declaration of Human Rights' available at <https://www.un.org/en/universal-declaration-human-rights/> (accessed 05 October 2020).

³⁸ Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, is not a treaty to which states can become parties, but it is a statement by the international community of the minimum standards of state practice and is also regarded as an articulation of states' human rights obligations as parties to the Charter of the United Nations.

³⁹ UDHR, 1948.

⁴⁰ Preamble of UDHR, 1948 "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...".

⁴¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 05 October 2020). (ICESCR) also requires state parties to ensure the equal rights of men and women and the enjoyment of all economic, social and cultural rights outlined in the Covenant.

⁴² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed 05 October 2020). ICCPR presents the equal rights of men and women on the enjoyment of all civil and political rights outlined in the Covenant. Additionally, Article 26 of ICCPR promotes equality before the law and lists all grounds against any form of discrimination.

⁴³ See UDHR, 1948, CESCR, 1966 & ICCPR, 1966.

Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is known as the “women’s bill of rights.”⁴⁴ It is one of the United Nations’ basic international human rights treaties, requiring the member states to commit to legal commitments to respect, protect, and fulfil human rights. What makes CEDAW unique is that it solely focuses on gender equality. The intricacies of women’s human right to equality and non-discrimination are written out in-depth in CEDAW and the broad range of actions that must be taken to attain this equality.⁴⁵ For example, Article 1 provides a comprehensive definition of what discrimination against women should mean.⁴⁶ Article 2(a)-(g) of CEDAW further provides the duties of states to adopt legislative and other measures to end discrimination and oppression of women.⁴⁷ It also provides that equality is a must and should be enshrined in the national constitutions of states.⁴⁸ Article 5 presents that States must ensure the eradication of prejudicial cultural practices and customary laws.⁴⁹

Additionally, under the Declaration on the Elimination of Violence Against Women (DEVAW)⁵⁰, Article 3 states that women are entitled to the equal enjoyment and protection of all human rights.⁵¹ Some of these Articles are discussed in detail in the next chapter.

The international community further impacted on laws and policies of regional and local communities.⁵² Regional human rights instruments also include the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol).⁵³ Unlike many other women’s human rights instruments, it details various and substantive human rights for

⁴⁴ CEDAW, 1979.

⁴⁵ See Article of CEDAW, 1979.

⁴⁶ See Article 1 of CEDAW, 1979.

⁴⁷ See Article 2(a)-(g) of CEDAW, 1979.

⁴⁸ See Article 2(a) CEDAW, 1979.

⁴⁹ See Article 5(a)-(b) of CEDAW, 1979.

⁵⁰ UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, available at: <https://www.refworld.org/docid/3b00f25d2c.html> (accessed 5 August 2021)

⁵¹ These rights include, *inter alia* :

- the right to equality;
- the right to liberty and security of person;
- the right to equal protection under the law;
- the right to be free from all forms of discrimination;
- the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

⁵² See the United Nations "Sustainable Development Goal 5: Gender equality" from the original 30 November 2021 available at <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> (accessed 04 March 2022).

⁵³ Maputo Protocol, 2003.

women covering the entire spectrum of civil and political, economic, social, and cultural and environmental rights.⁵⁴ More interestingly, the Maputo Protocol specifically details protection rights for widows.⁵⁵ In Article 20, Maputo Protocol details that state parties must ensure that widows enjoy all human rights through the implementation of measures listed in Articles 20 (a), (b), and (c).⁵⁶ The African Bill of Rights of Women's Human Rights would be a good name for it.

Another regional human rights instrument is the Southern African Development Community Protocol on Gender and Development (SADC Protocol) adopted by SADC Community heads of states on 17 August 2008 in Sandton, Gauteng. The SADC Protocol encompasses commitments made in all regional, global and continental instruments for achieving gender equality.⁵⁷ The inclusion of gender equality right in the Constitution by State parties as provided for in Article 4(1)(a)-(b) is also accompanied by the prohibition clause that none of the laws, practices, or provisions should limit gender equality and equity rights.⁵⁸ Like the Maputo Protocol, the SADC Protocol in Article 10(1)(a)-(f) provides for widows and widowers rights,⁵⁹ which obligates states parties to enact and enforce legislation and policies that safeguard widows and widowers' rights and well-being.⁶⁰

Locally, the South African Constitution of 1996 affords everyone, without any distinction, the protection and enjoyment of their rights.⁶¹ Although the South African Constitution afford everyone protection, it has not met the standards set by the SADC Protocol Article 10(1) and Maputo Protocol Article 20 to enact laws and legislation that specifically mention and protect widows and widowers' rights. Generally, the Bill of Rights gives everyone the right to equality, which by default includes women.⁶² The equality clause states that no person may be discriminated against based on any grounds listed under s 9(3), which *inter alia* includes sex and gender.⁶³ Furthermore, s181(1)(a) of the South African Constitution enabled the enactment of the Commission for Gender Equality (CGE), which is an independent statutory agency formed under

⁵⁴ See Articles 2(1)(a)-(e) & Articles 5(a)-(d).

⁵⁵ See Article 20 of Maputo Protocol, 2013.

⁵⁶ See Article 20(a)-(c) of Maputo Protocol, 2003.

⁵⁷ See Article 3 of SADC Protocol on gender development, 2008.

⁵⁸ Article 4(1)(a)-(b) of SADC Protocol on gender development, 2008.

⁵⁹ See Article 10(1)(a)-(f) of SADC Protocol on gender development, 2008.

⁶⁰ See Article 10(1)(a)-(f) of SADC Protocol on gender development, 2008.

⁶¹ Constitution of the Republic of South Africa, 1996.

⁶² Constitution of the Republic of South Africa, 1996.

⁶³ See s 9(3) of the Constitution of the Republic of South Africa, 1996.

Chapter 9 of the Constitution.⁶⁴ Through research, public education, policy formulation, legislative efforts, effective monitoring, and litigation, the CGE seeks to promote, protect, monitor, and evaluate gender equality. Therefore this can be another powerful legal instruments to be used by widows.

Similarly, the South African Human Rights Commission (SAHRC) was set in terms of s 181(1)(b) of the Constitution.⁶⁵ The SAHRC's mandate is to monitor and seek redress for human rights violations, both pro-actively and in response to complaints made before it.⁶⁶ Although SAHRC is not specifically for women, they can still utilise this platform to lodge any complaint arising from any violations of their human rights.

Lastly, South Africa promulgated the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), regarded as the most important law after the Constitution.⁶⁷ The Promotion of Equality and Prevention of Unfair Discrimination Act aims to give effect to the letter and spirit of the Constitution, particularly the equal enjoyment of all rights and freedoms by all people.⁶⁸ Section 8 deals with the prohibition of gender discrimination, mainly s(8)(d), which deals with customary practices that impair the full enjoyment of any rights of women and the girl child.⁶⁹ Remarkably, PEPUDA is also mandated to facilitate the compliance of international law obligations in terms of s(2)(h) of PEPUDA.⁷⁰ In other words, PEPUDA acts as a local 'watchdog' to oversee the implementation of CEDAW's obligations. For instance, according to liberal feminism, all human rights instruments can and must be utilised as legal reform to protect and advance the status of women in every society. Through the lens of liberal feminism, the absence of political will to eradicate harmful customary practices that violate women's rights contribute to the perpetual women's rights infringements. In other words, South Africans have no excuse to explain the violation and discrimination that widows endure today, despite the abundance of human rights instruments safeguarding their rights.

⁶⁴ See s 181 of the Constitution of the Republic of South Africa, 1996.

⁶⁵ See s 181 (1)(b) of the Constitution of the Republic of South Africa, 1996.

⁶⁶ See s 181 (1)(b) of the Constitution of the Republic of South Africa, 1996.

⁶⁷ PEPUDA, 2000.

⁶⁸ See s 2(b)(i) of PEPUDA, 2000.

⁶⁹ See s8(d) of PEPUDA, 2000.

⁷⁰ See s2(h) of PEPUDA, 2000.

In light of the above discussion on legal instruments, one cannot help but notice that the thrust of liberal feminism is that an individual woman should determine her social role with as great freedom as does a man.⁷¹ Therefore, liberal feminism has required removing the historical structure of patriarchal law that denied women's civil rights,⁷² which CEDAW also presents. These were evident to most, if not all, the legal instruments discussed above.⁷³ Therefore, in terms of any cultural practice, including *ukuzila*, liberal feminism can determine its compliance with standards set to protect, promote, and advance women's rights. This is vital because *ukuzila* is one of those cultural practices that violate women and invite society to treat widows with hostility and differently than men, which then amounts to gender inequality and gender discrimination.

Liberal feminism claims that discrimination against women often arises from stereotyped expectations.⁷⁴ These gender stereotypes and prejudices are often learned in the family.⁷⁵ Private sphere issues are of concern mainly as they influence or impede equality in the public sphere.⁷⁶ However, the solution is social change through legal means and legislation that will put women on equal footing with men in all areas of life. Although these legislations may not dictate or regulate family structures' functioning, individuals who make up such families must be protected.

Liberal feminist theory is frequently criticised for underestimating the significance of pluralism.⁷⁷ According to Enslin and Tjiattas, liberal feminism threatens cultural diversity by pursuing equality and universal rights.⁷⁸ This critique is misplaced because liberal feminism does not attack cultural diversity; instead, in pursuing gender equality, it demands that cultural practices that avert the enjoyment of all rights must be eradicated.

⁷¹ Ghorfati A & Medini R 'Feminism and its Impact On woman (sic) in the Modern Society' (Unpublished MA Dissertation, University of Tlemcen 2015) 9.

⁷² Ghorfati A & Medini R (2015) 9.

⁷³ See CEDAW, 1979; Constitution of the Republic of South Africa, 1996; Maputo Protocol, 2003; SADC Protocol, 2008; PEPUDA, 2000.

⁷⁴ Bittman M 'Family and Gender' in International Encyclopedia of the Social & Behavioral Sciences (2001) available at <https://www.sciencedirect.com/topics/computer-science/liberal-feminism> (accessed 13 September 2020)

⁷⁵ Bittman M in International Encyclopedia of the Social & Behavioral Sciences, 2001.

⁷⁶ Johnson LJ 'Liberal Feminism' *ThoughtCo* 2020 available at <https://www.thoughtco.com/liberal-feminism-3529177> (accessed 13 September 2020).

⁷⁷ Enslin P & Tjiattas M 'Liberal feminism, cultural diversity and comparative education' (2004) 40 *Philosophy, Education and Comparative Education* 503-16.

⁷⁸ Enslin P & Tjiattas M (2004) 503-16.

In respect of gender inequality and culture, Okin states that most cultures are structured in a way that men are superior to women.⁷⁹ Further adding that many cultural practices prevent women from living a good life as they wish it.⁸⁰ It can never be far from the truth, as *ukuzila* custom, among other things, restricts widows' freedom and threatens their well-being. Therefore to accuse liberal feminism of threatening cultural diversity is unfair. Cultural diversity may not be sustained by infringing on women's rights. Liberal feminism demands that women be endowed with a right to partake in all cultural activities and the right to a culture of their choice, which then debunks Enslin and Tjiattas's claims.

Defending liberal feminism from Enslin and Tjiattas' critique above is Sanday, who supports Okin's assertion that the gendered nature of a society's origin story predicts the status of women.⁸¹ Members of cultural groups that are essentially traditional and patriarchal are allowed to continue with their blatant chauvinistic behaviour, including humiliation and disparagement of women.⁸² The above assertion mirrors the reality of most South African traditional communities, where *ukuzila* is practised, while it exacerbates discrimination, humiliation and oppression on women. As previously stated, this thesis believes that liberal feminism may never defend multiculturalists or a pluralistic view that seeks to put the 'group's interest first' at the expense of women's rights.

Furthermore, another critique from Walby is about liberal feminism's failure to deal with the deep rootedness of gender inequality and interconnectedness between its different forms.⁸³ For instance, the origin or reasons for the persistence of patriarchal attitudes.⁸⁴ Walby states that it does not account for the social and cultural factors that maintain inequality, even when women have attained equality 'on paper'.⁸⁵ This thesis submits that Walby's argument is somewhat biased and seems to undermine liberal feminism's effort to curb the damage caused by male dominance. First, women have been denied education and have lacked what scholars above have called '*reason*'. That is why women have been used to propagate the very same customs that oppresses them. Secondly,

⁷⁹ Susan Moller Okin (1946–2004) was a leading liberal feminist political philosopher. Okin's writings explore the ways in which liberal political philosophy needs to be revised in order to realise the equal status of women. Much of Okin's later work addresses issues of global justice, especially those concerning the condition of women.

⁸⁰ Okin SM *Is multiculturalism bad for women?* (1999) 7-24.

⁸¹ Sanday PR *Female Power and Male Dominance: on the Origins of Sexual Inequality* (1981) 7-9.

⁸² Okin SM *Is multiculturalism bad for women?* (1999) 7-24.

⁸³ Walby S *Theorizing Patriarchy* (1990) 5.

⁸⁴ Walby S *Theorizing Patriarchy* (1990) 5.

⁸⁵ Walby S *Theorizing Patriarchy* (1990) 5.

women have not been given the freedom to make their own informed decisions. Thirdly, traditional roles attached to women have slowed down the realisation of gender equality guaranteed on paper. Lastly, cultural practices under customary law have not been thoroughly developed or transformed to match the modern society subject to equality and respect for all. Therefore, asserting that liberal feminism is not dealing with the issue is somewhat unfounded. Liberal feminism, as stated above, has demanded that legal reform advance and protect women. In the current study, although all of the human rights instruments do not deal directly with *ukuzila* custom. Rather, they provides the mechanism to challenge the practice and allow for various interventions to be implemented in order to protect women. Despite this, *ukuzila* custom continues to perpetuates discrimination against widows.

2.3 Radical feminist theory

Radical feminism locates the origins of women's oppression in the patriarchal control of female sexuality and female fertility.⁸⁶ This perspective identifies male power and privilege in patriarchal relations as the essential determinant of women's subordination.⁸⁷ Radical feminism emphasises that in the existing social order, women are oppressed and exploited primarily in sexual and procreative relations in the home, defined by the male culture as personal rather than political.⁸⁸ Thus, they examine the different ways through which men attempt to control women's bodies and enslave female sexuality to serve their desires.⁸⁹ Radical feminists attempt to present new ways to free women from the grips of men.⁹⁰ They argue that patriarchy is hard to eradicate because it is rooted in the belief that women are different, and that inferiority is deeply embedded in most men's consciousness. They believe that women's oppression is the most widespread and most profound form of oppression. In other words, according to radical feminism a women's status is tied to that of men and without men, they have no status.

⁸⁶ Freeman ML 'Beyond Women's Issues: Feminism and Social Work' (1990) 5 *Affilia* 139.

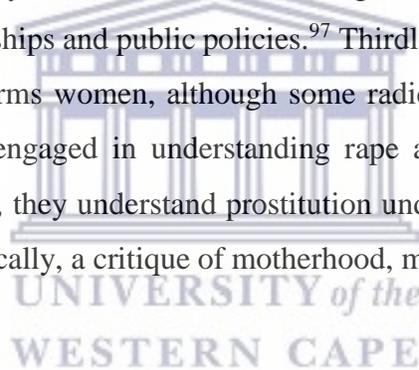
⁸⁷ Freeman ML (1990) 5 *Affilia* 139.

⁸⁸ Freeman ML (1990) 5 *Affilia* 139.

⁸⁹ Aboudaif S 'Aspects of Radical Feminism in the Fiction of the 21st Century (A Theoretical Study)' available at <https://www.researchgate.net/profile/Said-Aspects-of-Radical-Feminism-in-the-Fiction-of-the-21st-Century-A-Theoretical-Study.pdf> (accessed 10 February 2021).

⁹⁰ Aboudaif S 'Aspects of Radical Feminism in the Fiction of the 21st Century (A Theoretical Study)' available at <https://www.researchgate.net/profile/Said-Aspects-of-Radical-Feminism-in-the-Fiction-of-the-21st-Century-A-Theoretical-Study.pdf> (accessed 10 February 2021).

Radical feminism advocate for revolutionary means to tackle oppression which they believe is a result of the biological differences between men and women.⁹¹ Samkange states that “the dominance of patriarchy in our perceptions and practices has to be challenged as it makes society accept inequality between men and women as normal. Some elements of radicalism may be necessary to change such thinking.”⁹² Similarly, Dahlin-Jones provides that radical feminism believe that women are the superior sex and that a social revolution is required for them to obtain control in society.⁹³ In addition, radical feminism was responsible for putting women's emancipation on the map and for making sexual politics a public issue.⁹⁴ They are also responsible for creating the lexicon which include inter alia "consciousness-raising," "the personal is political," "sisterhood is powerful,".⁹⁵ First, radical feminism became the pioneers who sparked the drive to legalize abortion, to demand total equality in the private sphere and equal attention to emotional and sexual needs.⁹⁶ Secondly, they took a stance in evaluating and then breaking down traditional gender roles in personal relationships and public policies.⁹⁷ Thirdly, they perceive pornography as an industry and practice that harms women, although some radical feminists disagree with this position.⁹⁸ Fourthly, they also engaged in understanding rape as an expression of patriarchal power, not seeking sex.⁹⁹ Lastly, they understand prostitution under patriarchy as the oppression of women sexually and economically, a critique of motherhood, marriage, the nuclear family, and



⁹¹ Gbaguidi C & Allagbe M ‘African Social Appraisals of Women’s Liberal and Radical Feminism in Selected Contemporary West and Central African Female and Male Novels’ (2018) *International Journal of Linguistics, Literature and Culture* 45. See also Willis E ‘Radical Feminism and Feminist Radicalism’ (1984) *Social text* 91-118: The radical feminists in the United States created the Women’s Liberation Movement (WLM) in the 1960s. During this period, the figures at the forefront included Shulamith Firestone, Kathie Sarachild, Ti-Grace Atkinson, Carol Hanisch, Roxanne Dunbar, Naomi Weisstein and Judith Brown. Among other things, radical feminists helped translate the radical protest for racial equality, which many had experience, over to the struggle for women's rights. They took up the cause and advocated for various women's issues, including abortion rights, the Equal Rights Amendment, access to credit, and equal pay.

⁹² Samkange W ‘The liberal feminist theory: Assessing its applicability to education in general and early childhood development (ECD) in particular within the Zimbabwean context’ (2015) *Global Journal Advanced Research* 1174.

⁹³ Dahlin-Jones A *The Radical Feminists’ Misrepresentation of Catherine Barkley in Ernest Hemingway’s A Farewell to Arms* (published thesis, Hogskolan I Gavle 2014) 5-6.

⁹⁴ Willis E (1984) 92.

⁹⁵ Willis E (1984) 92.

⁹⁶ Willis E (1984) 92.

⁹⁷ Jone JL ‘What Is Radical Feminism?’ available at thoughtco.com/what-is-radical-feminism-3528997 (accessed 07 February 2021).

⁹⁸ Jone JL ‘What Is Radical Feminism?’ available at thoughtco.com/what-is-radical-feminism-3528997 (accessed 07 February 2021).

⁹⁹ Jone JL ‘What Is Radical Feminism?’ available at thoughtco.com/what-is-radical-feminism-3528997 (accessed 07 February 2021).

sexuality, questioning how much of the culture is based on patriarchal assumptions.¹⁰⁰ They also criticised other institutions, including government and religion, as centred historically in patriarchal power.¹⁰¹

Furthermore, radical feminism challenges society's basic structure and identifies the need for revolutionising its existing organisation. An essential strategy for eliminating women's oppression is establishing a woman culture separate from the lives of men, thus redefining social relations and overthrowing or undermining the present dominant patriarchy. Radical feminism has faced several criticisms.¹⁰² The main problems that critics have raised about radical feminism include: first, essentialism; secondly, an implicit or explicit biological reductionism; thirdly, a false universalism which cannot understand historical change or take enough account of divisions between women based on ethnicity and class.¹⁰³ Critics also claim that radical feminists simplify the issues and suggest that men are victimisers and women the victims. On the other hand, radical feminists seek to understand the roots of women's subordination. In support of other critics, this paper proclaims that scrapping family structures and starting afresh can never be a solution nor work in African communities as their values are built on communalism.

This study is not aiming to establish the root of the problem, nor does it seek to establish a new system of society. It sought to identify rituals of *ukuzila* practice that infringe on women's constitutional rights and invoke the existing human rights for women within their families and societies, particularly those coerced into observing the custom of *ukuzila*. Therefore, changing family structures will not necessarily solve the problems surrounding the *ukuzila* practice and women's rights. Dealing with harmful customary practices could slowly eradicate this male dominance and eventually set women free.

2.4 Marxist feminist theory

Marxist feminism considers classism to be the root of women's oppression. This assertion stems from Tong's explanation which states that:

¹⁰⁰ Jone JL 'What Is Radical Feminism?' available at thoughtco.com/what-is-radical-feminism-3528997 (accessed 07 February 2021).

¹⁰¹ Jone JL 'What Is Radical Feminism?' available at thoughtco.com/what-is-radical-feminism-3528997 (accessed 07 February 2021).

¹⁰² Walby S *Theorizing Patriarchy* (1990) 3.

¹⁰³ Walby S *Theorizing Patriarchy* (1990) 3.

...classical Marxist feminists work within conceptual terrain laid out by Marx, Engels, Lenin, and other nineteenth-century thinkers. They regard classism rather than sexism as the fundamental cause of women's oppression....¹⁰⁴

According to Marxist Feminist theory, capitalism created the conventional nuclear family.¹⁰⁵ It has also created the traditional female position of housewife to promote capitalism.¹⁰⁶ Thus, women are oppressed twice, by the nuclear family and by the capitalist system.¹⁰⁷

Jagger holds a different view from the above scholars, who argue that the primary cause of women's oppression is capitalism.¹⁰⁸ She claims that capitalism oppresses women as labourers, but patriarchy oppresses women as women.¹⁰⁹ For example, domestic labour, including childcare, provides the capitalist system with an army of unpaid labourers whose actions allow family members, mainly men, to work, sustaining the capitalist system. Jagger rejects the view that women will be liberated once they partake in roles directly in productive work.¹¹⁰ Similarly, Di Stefano claims empowerment and equality for women cannot be achieved within the framework of capitalism.¹¹¹ In other words, it is not the abolishment of capitalism per se that would end women's oppression. Instead, the elimination of patriarchy would lead to the advancement and liberation of women.

Marxist feminism is reluctant to treat 'women' as a stand-alone group with similar interests and aspirations.¹¹² Marxist feminism thus, distinguishes itself from other modes of feminists thoughts and politics by attending critically and systematically to the economic organisation of societies,

¹⁰⁴ Tong R *Feminist Thought: A more Comprehensive Introduction* 3 ed (2009) 96.

¹⁰⁵ Karl T 'Liberal, Marxist and Radical Feminist Perspectives on Society: An Introduction' available at <https://revisesociology.com/2016/07/11/liberal-radical-marxist-feminist-perspectives-society-sociology/> (accessed on 11 February 2021).

¹⁰⁶ Karl T 'Liberal, Marxist and Radical Feminist Perspectives on Society: An Introduction' available at <https://revisesociology.com/2016/07/11/liberal-radical-marxist-feminist-perspectives-society-sociology/> (accessed on 11 February 2021).

¹⁰⁷ Karl T 'Liberal, Marxist and Radical Feminist Perspectives on Society: An Introduction' available at <https://revisesociology.com/2016/07/11/liberal-radical-marxist-feminist-perspectives-society-sociology/> (accessed on 11 February 2021).

¹⁰⁸ Jagger AM *Feminist Politics and Human Nature* (1983) 114-15, 308.

¹⁰⁹ Jagger AM *Feminist Politics and Human Nature* (1983) 114-15, 308.

¹¹⁰ Jagger AM *Feminist Politics and Human Nature* (1983) 114-15, 308.

¹¹¹ Di Stefano C 'Marxist feminism' in *The encyclopedia of political thought* [Abstract] available at <https://onlinelibrary.wiley.com> (accessed 10 September 2020).

¹¹² Di Stefano C 'Marxist feminism' in *The encyclopedia of political thought* [Abstract] available at <https://onlinelibrary.wiley.com> (accessed 10 September 2020).

by its commitment to overthrow capitalism, and its allegiance to working-class and impoverished women.¹¹³

The Marxist notion that capitalism and class are the primary roots of women's oppression invites numerous criticisms. Critics state that women's oppression within the family existed before capitalism and in communist societies. Thus, capitalism cannot be the sole root for women's oppression. For Marxist feminists, the solutions to gender inequality are economics.¹¹⁴ They believe that patriarchy would be tackled by default through tackling capitalism, and women would be free.¹¹⁵ Unfortunately, this theory does not meet the standards of the feminist view that can address the issues brought about by the *ukuzila* practice, which has little to do with the economic status of women. This study is limited to women's rights and how the observance of *ukuzila* impacts their constitutional rights. Rosenblatt and Nkosi have already discussed the experiences of widows and their economic statuses in the literature review.¹¹⁶

2.5 Socialist feminist theory

Socialist feminism is a movement that calls for an end to capitalism through a socialist reformation of the South African economy.¹¹⁷ Socialist feminism argues that capitalism strengthens and supports the sexist status *quo* because men are the ones who currently have power and money.¹¹⁸ Those men are more willing to share their power and money with other men, meaning that women are continually given fewer opportunities and resources. Socialist feminism is concerned about the reasons why women are paid less than men for the same work.¹¹⁹ Socialist feminism points out

¹¹³ Di Stefano C 'Marxist feminism' in *The encyclopedia of political thought* [Abstract] available at <https://onlinelibrary.wiley.com> (accessed 10 September 2020).

¹¹⁴ Thompson K 'Liberal, Marxist and Radical Feminist Perspectives on Society: An Introduction' available at <https://revisesociology.com> (10 September 2020).

¹¹⁵ Thompson K 'Liberal, Marxist and Radical Feminist Perspectives on Society: An Introduction' available at <https://revisesociology.com> (17 September 2020).

¹¹⁶ Rosenblatt PC & Nkosi BC (2007) 31 *Death Studies* 67-85.

¹¹⁷ Goodfriend W 'Feminism Types and Definitions: Liberal, Socialist, Culture & Radical' available at <https://study.com/academy/lesson/feminism-types-and-definitions-liberal-socialist-culture-radical.html>. (accessed 30 September 2020).

¹¹⁸ Goodfriend W 'Feminism Types and Definitions: Liberal, Socialist, Culture & Radical' available at <https://study.com/academy/lesson/feminism-types-and-definitions-liberal-socialist-culture-radical.html>. (accessed 30 September 2020).

¹¹⁹ Goodfriend W 'Feminism Types and Definitions: Liberal, Socialist, Culture & Radical' available at <https://study.com/academy/lesson/feminism-types-and-definitions-liberal-socialist-culture-radical.html>. (accessed 30 September 2020).

that the pay difference is based on a capitalist system, which keeps women under the control of men.¹²⁰

Socialist feminism attempted to integrate the women's liberation movement with the struggle against other oppressive systems based on race, class, sexual orientation, or economic status.¹²¹ Also, socialist feminism wanted to recognise sex discrimination to achieve justice and equality for women, working classes, the poor, and all humanity.¹²² However, this invited strong criticism towards socialists, mainly post-modern feminists.

Post-modern feminism argues the impossibility of unifying women in the sense of unified representation.¹²³ This would lead to another hierarchical system of knowledge construction and an additional risk of reproducing similar dualising distinctions that feminists object to under the patriarchal discourse.¹²⁴

Relatively, Socialist feminists proclaim that women depend on men financially in exchange for their 'freedom'. In other words, financial dependence is the glue that keeps women subordinated to men. Male rulers are capitalists, and women are subjected to them because of wealth imbalances. As a result, socialists assert that the steering force that drives women to be subjugated to men is their economic dependence. Socialist feminism describes oppression based on gender as just one of many and not the sole causal factor of women's oppression, as radical feminists proclaim.¹²⁵

Social feminists argue that the development of capitalism and class creation is yesterday's phenomenon, whereas oppression of women dates back to the ancient times.¹²⁶ In other words, women's oppression could not have been caused by the division of the class system. Socialist

¹²⁰ Goodfriend W 'Feminism Types and Definitions: Liberal, Socialist, Culture & Radical' available at <https://study.com/academy/lesson/feminism-types-and-definitions-liberal-socialist-culture-radical.html>. (accessed 30 September 2020).

¹²¹ Goodfriend W 'Feminism Types and Definitions: Liberal, Socialist, Culture & Radical' available at <https://study.com/academy/lesson/feminism-types-and-definitions-liberal-socialist-culture-radical.html>. (accessed 30 September 2020).

¹²² Goodfriend W 'Feminism Types and Definitions: Liberal, Socialist, Culture & Radical' available at <https://study.com/academy/lesson/feminism-types-and-definitions-liberal-socialist-culture-radical.html>. (accessed 30 September 2020).

¹²³ Tickner AJ *Gender in International Relations – Feminist Perspectives on Achieving Global Security* (1992) 1.

¹²⁴ Tickner AJ *Gender in International Relations – Feminist Perspectives on Achieving Global Security* (1992) 1.

¹²⁵ Napikoski L 'Socialist Feminism Definition and Comparisons' available at <https://www.thoughtco.com/socialist-feminism-womens-history-definition-3528988/> (accessed 07 October 2020).

¹²⁶ Napikoski L 'Socialist Feminism Definition and Comparisons' available at <https://www.thoughtco.com/socialist-feminism-womens-history-definition-3528988/> (accessed 07 October 2020).

feminists argue that in dealing with the class system to dismantle it, the first step is to dismantle women's oppression.¹²⁷ This argument is correct to a certain extent because socialist feminism does not explain how to dismantle women's oppression.

Women's oppression is a collection of various factors that keep women weakened and powerless. Therefore, this study claims that harmful cultural practices such as *ukuzila* must be dealt with as they form part of the system that oppresses women.

The crux is that socialist feminism is just the hybrid of all these other ideologies, and the difference would be its pragmatism. Consequently, it does not meet the level of the argument made by this study on *ukuzila* practice and the Constitution because Socialist feminism is under the assumption that all women are in the labour market; hence, the emphasis on pay difference, fewer opportunities and resources. In South Africa, the pay difference is no longer the issue as policies exist for that. However, harmful cultural practices persist, which is what needs attention at this very moment

2.6 South African feminist theory

It is evident that women's oppression and discrimination is prevalent and call for all corners of the world to respond. South Africa is one of many countries where women's rights have been, and are still being grossly violated, which has led to the emergence of feminists in South Africa to fight for women's rights and protection. In South Africa, women's experiences of gender oppression based on race and class were significantly different.¹²⁸ For example, Buiten provides that racial and political disenfranchisement, racist misogyny against black women by white men, as well as racial and class oppression by white women are some of the factors that resulted from these inequities and had a tremendous impact on black women's lives.¹²⁹ Consequently, during the South African transitional period from the apartheid era to the democratic era in the mid-1990s, South African feminism played a huge role in transforming society. Among other things, its contributed immensely to the process of reconstruction of the non-racial and non-sexist country.¹³⁰ However,

¹²⁷ Napikoski L 'Socialist Feminism Definition and Comparisons' available at <https://www.thoughtco.com/socialist-feminism-womens-history-definition-3528988/> (accessed 07 October 2020).

¹²⁸ Buiten D 'Feminism in South Africa' in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* available at <https://onlinelibrary.wiley.com> (accessed 07 October 2020).

¹²⁹ Buiten D 'Feminism in South Africa' in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* available at <https://onlinelibrary.wiley.com> (accessed 07 October 2020).

¹³⁰ Steyn M 'A new agenda: Restructuring feminism in South Africa' (1998) 21 *Women's Studies International Forum* 41-52.

during this period the feminist activism and radical transformational politics weakened in the process. In the new South African constitutional dispensation, South African feminism is involved in national to international struggles to bring about gender and racial equality.¹³¹

Specifically, feminism in South Africa gained new life in 1994 when the Constitution was rewritten to cater to a post-apartheid, democratic society.¹³² During this reconstruction phase, women unified and lobbied for a more equitable positioning of women within the constitutional framework.¹³³ Women benefited from South Africa's democratisation as they were most significantly impacted and oppressed by the male-dominated state repression.¹³⁴ Moreover, women in South Africa have historically faced countless state-facilitated and socially practised discrimination, including pay discrimination.¹³⁵

Like liberal feminists, South African feminists' focus was on women's suffrage and civic engagement, equal pay, anti-discrimination laws, as well as marital rape law.¹³⁶ In terms of suffrage and civic engagement, women in post-1994 South Africa occupy more positions of power within the government which led to the identification of South Africa as one of the few countries with high women representation in national government.¹³⁷ The mandatory quotas by the government to include women in all spheres of government has facilitated the improvement and advancement of women in politics.¹³⁸ There is no distinction in South Africa between women and men who do the same work considering equal pay. This defect was corrected by law and has since been realised. Legislation such as Basic Conditions of Employment Act 75 of 1997 (BCEA) has even provided for paid maternity leaves for women, which is an indication that they are no longer facing significant issues when it comes to payments and the line of work they do.¹³⁹ Thus, it solved the problem of payment and prevented discrimination and prejudice against women because they fall pregnant at some stage in their lives and need to raise children.

¹³¹ Buiten D 'Feminism in South Africa' in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* available at <https://onlinelibrary.wiley.com> (accessed 07 October 2020).

¹³² Hassim S 'Voices, hierarchies and spaces: reconfiguring the women's movement in democratic South Africa' (2005) 32 *Politikon: South African Journal of Political Studies* 175-93.

¹³³ Hassim S (2005) 175-93.

¹³⁴ Hassim S(2005) 175-93.

¹³⁵ Rhoda K 'Constitutional Equality: The Implications for Women in South Africa' (1995) *Social Politics* 211.

¹³⁶ Hassim S(2005) 175-93.

¹³⁷ Bauer G & Britton HE (eds) *Women in African parliaments* (2006) 119-57.

¹³⁸ Porter E *Peacebuilding: Women in International Perspective* (2007) 11-42.

¹³⁹ See ss 25(1) of Basic Conditions of Employment Act 75 of 1997.

Additionally, several influential organisations historically played a significant role in promoting the rights and privileges of women in South Africa, as discussed above. To name a few,¹⁴⁰ first, the Federation of South African Women was a group that actively protested discriminatory pass laws aimed at restricting the movement of women of colour. Second is the African National Congress Women's League (ANCWL), established in 1948 and re-established in the 1990s, to organise women politically and within the African National Congress. Today, the ANCWL has been criticised for being more of a recruitment arm for the ANC. The third organisation is the Women's National Coalition (WNC), established in the early 1990s to bring gender equality into the public discourse. In addition, there is the Federation of South African Women (FSAW), the umbrella organisation established in 1954 for all women-oriented organisations in South Africa.¹⁴¹

Furthermore, one cannot help but notice the ideological synonymity between western liberal feminism and South African feminism. As much as it is assumed that women have been oppressed in more or less the same way globally, how each country deals with that is of much importance. South Africa has done considerably well for women and young girls. Through legal reforms, for example, underage girls are no longer allowed to be part of forced marriages. For instance, the Prevention of Family Violence Act 133 of 1993 criminalised marital rape and other domestic violence.¹⁴² Thus, marital rape is now part of the specific sexual offences under South African Criminal law. Cultural practices such as *ukuthwala*¹⁴³ have been condemned for violating many women's constitutional rights. Tolerance of forced marriage has long been a source of reinforcement for oppressive patriarchal social customs which disempower females, deprive them of their freedoms and rob them of their dignity.¹⁴⁴ It has since been condemned and prohibited by law through case laws, legal reforms and legislation.

The South African government working together with South African feminists and many other organisations, fight hard to end cultural practices that contravene children and women's rights. However, when examining the persistent practice of *ukuzila*, for example, it is clear that not all the

¹⁴⁰ Hassim S *Women's Organizations and Democracy in South Africa: Contesting Authority* (2006) 23-7.

¹⁴¹ Hassim S (2006) 47-9.

¹⁴² See ss 2(1)a-d of the Prevention of Family Violence Act 133 of 1993. See also s1 of Domestic Violence Act 116 of 1998.

¹⁴³ See chapter 2 s3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. This section provides the definition of rape which fit the cultural practice of *ukuthwala*.

¹⁴⁴ See *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31, para 78.

work has been done to protect women's constitutional rights and well-being in all areas of society, especially in rural areas. Perhaps through this study, a substantive consensus between *ukuzila* and the South African Constitution could contribute to the work that has been championed and done by both Liberal and South African feminists.

2.7 Conclusion

Therefore, from the discussion above, it is clear that liberal feminism has a considerable impact on women's liberation, particularly in South Africa. It is evident how South African feminists decided to align themselves and the struggle for women's rights. For this reason, this study aims to identify women's rights that are grossly violated by the *ukuzila* practice; it is befitting that liberal feminism is used to steer the argument of this thesis.¹⁴⁵ The liberal feminism lens is used to understand the relationship between *ukuzila* cultural practice and its implications on women's constitutional rights. The question of how *ukuzila* can be aligned with constitutional rights is still one of the critical elements of the liberal feminist approach that underpins this study.

Other feminist theories do not meet the threshold of the argument of this thesis, even if they may be impactful in matters dealing with empowering of women. Further, it must be indicated that this study is limited to women's rights only, not their economic status, patriarchy, capitalism, or all since other scholars have dealt with these.¹⁴⁶

¹⁴⁵ Wendell S 'A (Qualified) Defense of Liberal Feminism' (1987) 2 *Hypatia* 65-93. Arguing in defence of the Liberal feminism is Wendell. She argues that there are important multitudes elements in order to effectively facilitate liberation of women. For example, she mentions the following: "liberal feminism's clearest political commitments to the promotion of women's greater recognition and self- value as individuals, to equality of opportunity, to the promotion of equal education for girls and boys, to ending sex prejudice and *de facto* discrimination, to equality of legal rights, and to the use of education as a major tool of social reform, are important to women's liberation. She also points out that these elements are not necessarily incompatible with the goals of socialist and radical feminism".

¹⁴⁶ See Rosenblatt PC & Nkosi BC (2007) 67-85 on literature review.

CHAPTER THREE

IMPLICATIONS OF *UKUZILA* CUSTOM ON WOMEN'S CONSTITUTIONAL RIGHTS

3.1 Introduction

In the previous chapter, different feminist theories were thoroughly discussed. Among these, the liberal feminist theory was chosen as a theoretical framework for this study. As a point of departure, this chapter focuses on answering how the *ukuzila* custom infringes women's constitutional rights. Through the liberal feminist approach, the first section describes *ukuzila* and its significance, identifies its rituals, discusses its prevalence in modern-day societies and determines its pattern within South African communities. The chapter further discusses the right to equality, right to human dignity, right to freedom and security, right to religion, belief and opinion, and right to freedom of movement and residence in the second section.

3.2 Description of *Ukuzila*

There are many ways in which *ukuzila* (spousal mourning) can be described. Various authors have described *ukuzila* as a public display that a woman has lost a husband. According to Stroebe, "grief does not occur in isolation but interaction with others."¹ In other words, coming together of community members to pledge support constitutes *ukuzila*. Similarly, Wolfelt describes *ukuzila* as a ritual undertaking which is a public event that draws people together.² According to Worden, *ukuzila* rituals are intended for the bereaved to make sense of loss, achieve healing, and continue with life in the absence of the deceased.³ Meanwhile, others view it as a sign to show the deceased respect. During death rituals, the bereaved has the opportunity to validate the life of the person that died by affirming that his life was meaningful, and the person is being missed.⁴

¹ Stroebe M, Stroebe W & Hansson R (Eds) *Handbook of Theory, Research and Intervention* (1993) 175-195.

² Wolfelt A 'A nation mourns: How rituals and ceremony will help us heal' available at <http://www.thefuneraldirectory.com/aftermath2.html/> (accessed on 24 November 2020).

³ Worden WJ *Grief therapy and grief counselling: A handbook for the mental health practitioner* (3 ed) 2001.

⁴ Randall K 'The importance of rituals in bereavement' available at http://willowhouse.org/news_old/springs04.htm/ (accessed on 25 November 2020).

According to Kagawa-Singer, *ukuzila* can be described as a social custom and cultural practice that follows the death of anybody in the communities where it is practised.⁵ Kagawa-Singer views *ukuzila* as a simple act that one observes after a death of a loved one for the sole purpose of facilitating and supporting the healing journey.⁶

Expanding the description and scope of the practice is Durkheim, who states that *ukuzila* is not a natural movement of personal feelings wounded by a cruel loss, but a duty imposed by the group.⁷ He adds that this duty is participation in customary rituals and behaviours, acknowledging that a loss has occurred for the individual and the group.⁸ These practices ensure that the individual and group adjust their relationships to move forward without the presence of the deceased. Holding a similar view is DeSpelder and Strickland,⁹ who also view *ukuzila* practice as a process in which a “bereaved person integrates the loss into his ongoing life.”¹⁰ They also echoed Durkheim’s view that the *ukuzila* process is partly determined by social and cultural norms for expressing grief.¹¹

Ukuzila practice begins with the report that a family member has died. In this case, it starts when the husband’s death has been reported to the family if he was not at home during the time of his passing. The woman, commonly known as a chief mourner, must sit on a mattress, and a candle is lit. During this period, the widow is isolated from the community for the period of mourning. The widow is ordered to remain covered with a blanket while having only married women sitting with her.¹² Immediately after the husband’s burial, a series of rituals begin. According to Manyedi et al., the mourning process of the Batswana people indicates a stressful experience for the widows.¹³

⁵ Kagawa-Singer M ‘The cultural context of death rituals and mourning practices’ (1998) 25 *Oncology Nursing Forum* 1752-56.

⁶ Kagawa-Singer M (1998) 25 *Oncology Nursing Forum* 1752-56.

⁷ Durkheim E *The Elementary Forms of Religious Life* (1961) 443.

⁸ Durkheim E *The Elementary Forms of Religious Life* (1961) 443.

⁹ DeSpelder LA & Strickland AL *The Last Dance* 9 ed (2011) 336.

¹⁰ DeSpelder LA & Strickland AL *The Last Dance* 9 ed (2011) 336.

¹¹ DeSpelder LA & Strickland AL *The Last Dance* 9 ed (2011) 336.

¹² Cebekhulu LM (2015) 25.

¹³ Manyedi ME, Koen MP & Greeff M (2003) 8 *Interdisciplinary Research Journal* 69-87.

For example, as a symbol of *ukuzila*, a widow's head is shaved by an elderly female of the family.¹⁴ She must also wear black mourning clothing. Colonialists imposed wearing a black garment on widows whose husbands had died during wars, and the black colour was used to mark them to receive the stipend.¹⁵ Apparently, before the arrival of the settlers, the colour of mourning was white.¹⁶ Therefore the use of black is a distorted form of mourning dictated by colonial invaders.¹⁷ Likewise, AmaZulu and AmaXhosa community wearing (*inzilo*) a black garment is a mourning process that takes the form of public display or the external expression of mourning.¹⁸ The purpose of wearing black mourning clothes is for widows to be distinguishable, preventing men from approaching them for sexual relationships.¹⁹ In addition, the stipulated time for a widow to be in mourning, decided by the family or cultural group, is usually a year.²⁰ Among AmaXhosa and AmaZulu, the exception only applies to health conditions, not on age. In other words, the maximum mourning period is one year; however, this period is subject to the health condition of a widow, meaning it can be reduced to six months.²¹ During that time, the widow and other bereaved members stay at home and are not allowed any social contact or sexual contact.²² The widow will continue to be isolated from contact with the community before and after the burial for a culturally stipulated time frame.²³

These rituals bear negative implications on women who are forced to observe them. According to Daber, during this period, the widow is regarded as 'impure' and lives under a 'black cloud'; only a series of purification ceremonies can give her the status of being a "normal human being again".²⁴ As a result, widows are prohibited from partaking in any social activities such as parties, funerals, church services, weddings and any other events held in public and consist of many people.²⁵ It was

¹⁴ Cebekhulu LM (2015) 26.

¹⁵ Zide GN *Burial and Funeral Practices In The Ciskei: An Enquiry into Present-Day Practices and Associated Ideas* (Unpublished Master's Thesis, Fort Hare University, 1984) 157.

¹⁶ Hirst M 'Isiko lokuzila: The custom of mourning' (2006) 18 *Imvubu* 7-8.

¹⁷ Ngqangweni H (2013) 158.

¹⁸ Ngqangweni H (2013) 2.

¹⁹ Mtshemla S (2005) 25-9.

²⁰ Setsiba THS *Mourning Rituals and Practices in Contemporary South African Townships: A Phenomenological Study* (Unpublished PhD Thesis, University of Zululand, 2012) 23.

²¹ Akol G *Widows' experiences of spousal mourning among AmaXhosa: An interpretative phenomenological study* (Unpublished Master's Thesis, University of Fort Hare, 2011) IX.

²² Setsiba THS (2012) 23. Amongst the Zulus, it is usually year long. See also Daber B (2003) 49.

²³ Setsiba THS (2012) 23.

²⁴ Daber B (2003) 89.

²⁵ Magudu B (2004) 18 *Agenda* 140-48.

stated earlier in the first chapter and the above section that since a widow is presumed to be a carrier of ‘bad luck’ and is ‘engulfed by darkness’, she must bathe from a running stream or river early in the morning and late in the evening daily to wash away this bad luck for the duration of *ukuzila*.²⁶

Accordingly, among the Pedi community, Kgatla states that when the death of a husband or wife occurs, the widow or widower is secluded from the public, referred to as the ritual of decontamination.²⁷ According to the decontamination ritual, “death should be contained from spreading to other people, including animals, by secluding the widow or widower ritually.”²⁸ Additionally, the widow is forbidden from arriving home after sunset, and she is prohibited from visiting neighbours or attending any family and community social functions.²⁹ The widow wears the black dress or garments, which “symbolise the dark cloud of death which is associated with loss and pain”³⁰ The widower from the Pedi community is also forbidden to have an affair until the mourning period lapses, which is usually six to twelve months.³¹ This widower restriction is not observed by other tribes such as AmaZulu, AmaXhosa, Batswana, AmaNdebele. Nevertheless, in the Pedi community, the widower is not forced, nor is it culturally prescribed that she must wear ‘all black’ for the duration of *ukuzila*; a small button or armband is enough.³²

Likewise, widows from Tsonga tribes face similar restrictions and isolations from the family and community. For example, they are also not allowed to visit anyone; they are prohibited from sexual relationships; they are not allowed to cook food for other people as it might ‘invite death’ to those who eat the food.³³ Moreover, there are ‘test rituals’ that elderly women do to the widow

²⁶ See Mdletshe M ‘Black day: widow stands up for her rights as village turns against her’ *Sunday Times: Daily* 15 March 2021; Daber BN (2003); Magudu B (2004) above.

²⁷ Kgatla ST ‘Rituals of death enhance belief and belonging: Analysis of selected elements of Northern Sotho death rituals’ (2014) 3 *Online Journal of African Affairs* 81-86.

²⁸ Kgatla ST (2014) 81-86.

²⁹ Baloyi L & Makobe-Rabothata M The African conception of death: A cultural implication (2014) in Jackson LTB, Meiring D, Van de Vijver FJR, Idemoudia ES & Gabrenya WK Jr. (eds) *Toward sustainable development through nurturing diversity. Proceedings from the 21st International Congress of the International Association for Cross-Cultural Psychology* available at https://scholarworks.gvsu.edu/iaccp_papers/119/ (accessed on 26 November 2020).

³⁰ Baloyi L & Makobe-Rabothata M ‘The African conception of death: A cultural implication’ available at https://scholarworks.gvsu.edu/iaccp_papers/119/ (accessed on 26 November 2020).

³¹ Baloyi L & Makobe-Rabothata M The African conception of death: A cultural implication’ available at https://scholarworks.gvsu.edu/iaccp_papers/119/ (accessed on 26 November 2020).

³² Pauw BA ‘Widows and ritual danger in Sotho and Tswana communities’ (1990) 49 *African Studies* 75-99.

³³ Khosa-Nkatini HP, Wepener CJ & Meyer EE ‘Tsonga widow’s mourning rituals practices in the Evangelical Presbyterian Church in South Africa: A ritual-liturgical exploration’ (2020) 44 *Theologia Viatorum* 1-8.

to detect if the widow had anything to do with the husband's death. For example, a widow will be taken to the river and given an egg, which she is instructed to break using her thighs.³⁴ If the egg does not crack, she is labelled a witch or having had a hand in the death of her husband, despite the cause of death.³⁵ Another ritual includes jumping over the fire, in which if the widow gets burnt, it would be concluded that the ancestors are angry that she killed her husband.³⁶ The level of abuse that women in societies like Tsonga have to endure is extreme and need immediate attention. None of the texts above suggested any rituals or similar 'test rituals' that widowers have to do in the event of their wives' deaths. The above is a gross violation of women's rights and their well-being.

Lastly, Tshoba studied AmaNdebele mourning practices where the focus was on rituals performed or conducted during the mourning process that would be useful to reach a state of healing and restoration.³⁷ Unlike other tribes, Tshoba's study revealed that widows or widowers follow the same process of shaving hair.³⁸ In the case of a husband's death, the first person to shave the hair is the widow, and an elderly widow must shave her.³⁹ The same principle is applied to widowers; an elderly widow or widower must shave them.⁴⁰ Tshoba discovered that Ndebele people do not dwell much on other bereavement rituals, but cutting or shaving hair is the most practised ritual. Although Amandebele observe *ukuzila* in their own way, they seem to have a common understanding of why *ukuzila* rituals must be done by everyone. Interestingly, there is no evidence of gender differentiation that grossly violate women's rights.

In light of the above discussion, there is a prevalence pattern on how different widows from different communities must observe the *ukuzila* custom. The common thread in this pattern is that widows are perceived to be contaminated and must be isolated and excluded from the public. The wearing of a black garment also appeared to be a common practice in most communities discussed above. The purpose of this ritual is to monitor the behaviour of a widow. It is also to warn men to stay away from the widow and alert the general community members that the woman is

³⁴ Khosa-Nkatini HP, Wepener CJ & Meyer EE (2020) 44 *Theologia Viatorum* 1-8.

³⁵ Khosa-Nkatini HP, Wepener CJ & Meyer EE (2020) 44 *Theologia Viatorum* 1-8.

³⁶ Khosa-Nkatini HP, Wepener CJ & Meyer EE (2020) 44 *Theologia Viatorum* 1-8.

³⁷ Tshoba ZM *The psychological significance of shaving hair as a ritual during mourning within the Ndebele culture* (Unpublished Master's Dissertation, University of South Africa 2014) Abstract (vi).

³⁸ Tshoba ZM (2014) 124.

³⁹ Tshoba ZM (2014) 124.

⁴⁰ Tshoba ZM (2014) 124.

contaminated and must be avoided at all costs since contact with her might bring misfortunes or even death. Sadly, based on the literature reviewed above, none of these rituals brings healing and support to widows.⁴¹ All of them seem to be oppressive, discriminatory and degrading towards women. This is contradictory to what the scholars above have portrayed or describe *ukuzila* to be.

Furthermore, South Africa is made up of urban townships, in which many black people have settled. As a result, black people have adopted the lifestyle of the urban township environment, which is different from that in rural areas. Rural locations are viewed as the seat of cultural custodians and are less tolerant of the lack of visibility in mourning.⁴² Thus, practices such as *ukuzila* and many other traditional customs have been modified and adapted to best suit the urban township environment.⁴³ But compared to rural areas, the situation of widows remains unchanged. As stated in chapter one, the study conducted by Dlukulu had focused on the experiences and coping with the bereavement of Black urban widows in a transitional society.⁴⁴ The findings of Dlukulu's study highlighted that the absence of some traditional rituals in the mourning process of widows living in urban environments appeared to have been significant in determining coping with the loss of their loved ones.⁴⁵ Shange asserts that *ukuzila* is a complex process that cannot be measured by days, weeks or months.⁴⁶

Since most urban people are economically active, upon the death of a family member or a spouse, in this case, they are given few days to prepare for a funeral.⁴⁷ This family responsibility leave is not enough to observe and adhere to all the rituals discussed.⁴⁸ Soon after the burial, a widow or widower is expected to report back to work.⁴⁹ Therefore, women who work as security guards, police officers and medical nurses required to wear a uniform may not observe *ukuzila* and other traditional rituals.⁵⁰ As a result, their daily work life may interfere with the culturally prescribed mourning period and the demand to interact with different people in their line of work. The

⁴¹ See Cebekhulu LM (2014) above.

⁴² Ngqangweni H (2013) 198.

⁴³ Setsiba THS (2012) 32.

⁴⁴ Dlukulu PM (2010) 17.

⁴⁵ Dlukulu PM (2010) 62.

⁴⁶ Shange LO *Bereaved Employees in Organisations: Managers and workers Co-Responsibility* (Unpublished Doctoral Thesis, University of Zululand 2009) 76.

⁴⁷ Shange LO (2009) 77.

⁴⁸ See ss 27(2)(c)(i) Basic Conditions of Employment Act 75 of 1997.

⁴⁹ Setsiba THS (2012) 33.

⁵⁰ Setsiba THS (2012) 35.

economic status and environmental conditions create a huge difference between rural and urban widows among the black community. The above discussion indicates that as one moves to the townships, the pressure of observing all these oppressive, discriminatory and degrading rituals is reduced.

Moreover, it has been established that most women suffering under this custom are those from rural areas. Kanyoro asserts that the space for women with fewer resources contributes to less visible forms of resistance and may require the listener to hear their ‘choked silence’ as expressions of resistance.⁵¹ In other words, the economic status of women in rural areas and their dependence on men for financial support makes it harder for them to resist and be vocal about questionable customs. In the previous chapter, the liberal feminist proclaimed that women without education and equal opportunities in public and private spheres are susceptible to abuse and oppression. As previously explained above this thesis is not asserting nor suggesting that education is a yardstick and requirements for women to have their rights respected and to have access to opportunities. Rather, it is recommended in order to increase the understanding and access to human right instruments, being literate will increase the chance of women speaking out based on what they understand and have access to. Thus, liberal feminists call for equal rights, equal educational opportunities, and equal economic status for women, allowing women a space to be vocal, sit on the decision-making table, and most importantly, be free from any coercions.

Although the historical and traditional intention behind the practices has been storied to show respect and encouraging solidarity,⁵² Batswana widows have also described these practices as oppressive, contributing to increased isolation, discrimination, and stress.⁵³ Therefore, the scrutiny of these rituals is required as South Africa cannot afford to have a situation where women are abused, oppressed, and discriminated against in the name of culture.

3.2.1 Significance of *ukuzila*

Various scholars share similar views about the significance of the *ukuzila* custom. Tasie states that “widowhood rites were not primarily designed to de-womanise African womanhood or impoverish

⁵¹ Kanyoro M ‘Engendered communal theology: African women's contribution to theology in the twenty-first century’ (2001) 27 *Feminist Theology* 36-56.

⁵² Nafukho F ‘Ubuntu worldview: A traditional African view of adult learning in the workplace’ (2006) 8 *Advances in Developing Human Resources* 408- 15.

⁵³ Manyedi ME, Koen MP & Greeff M (2003) 8 *Interdisciplinary Research Journal* 69-87.

and oppress women, nor are they part of the so-called male chauvinism. Instead, the widowhood rites are generally intended for the overall good of the widow.”⁵⁴ Makatu asserts that *ukuzila* is a healing process “since death has a negative impact on the remaining persons lives, rituals are considered a therapeutic value that assists the griever in moving on with her life.”⁵⁵ Similarly, Walsh and Goldrick suggest that rituals are seen as the best entry point to facilitate healing.⁵⁶ During *ukuzila*, groups of people join in expressing words and behaviours symbolic of support and comfort.⁵⁷ Neighbours have the opportunity to express their condolences, share what they have to assist the widows in dealing with the reality of loss.⁵⁸ Ngubane also adds that community members participate in the ceremonies that aim to remove unclean spirits from the widows and be reunited with society again.⁵⁹ *Ukuzila* rituals are believed to assist in the purification of the widows in this regard.⁶⁰

Furthermore, Radzilani states that these mourning rituals serve as a public display of grief among the people and provide an avenue for approval and validation by the community.⁶¹ Moreover, Niemeyer argues that mourning rituals give identity to the widow who has lost the husband and assists in her status change to a widow.⁶² During mourning rituals, family and friends gather around to support, empathise and share grief and pain.⁶³ However, this leaves little or no personal space for the widow.⁶⁴ It is assumed that such support is a source of great strength for the affected person.⁶⁵ Ariès further proclaims that “mourning expressed the anguish of a community that had

⁵⁴ Tasié GIK 'African widowhood rites: A bane or boom for African women' (2013) 3 *International Journal of Humanities and Social Science* 155-62.

⁵⁵ Makatu MS, Wagner C & Ruane I 'Discourse analysis of the perceptions of bereavement and bereavement rituals of Tshivenda speaking women' (2008) 18 *Journal of Psychology in Africa* 573-80.

⁵⁶ Walsh F & McGoldrick M *Living Beyond Loss* (1991) 3-26.

⁵⁷ Setsiba THS (2012) 19.

⁵⁸ Setsiba THS (2012) 19.

⁵⁹ Ngubane S (2005) 3 (2) *Indilinga. African Journal of Indigenous Knowledge Systems* 171 -77.

⁶⁰ Ngubane S (2005) 3 (2) *Indilinga. African Journal of Indigenous Knowledge Systems* 171 -77.

⁶¹ Radzilani MS *Discourse Analysis on performance of bereavement rituals in a Tshivenda-Speaking community: An African Christian and traditional African perspectives* (Unpublished Doctoral Thesis, University of Pretoria, 2010) 67.

⁶² Neimeyer RA 'Widowhood, grief, and the quest for meaning: A narrative perspective on resilience' In Carr D, Nesse RM & Wortman CB (eds) *Late life widowhood in the United States* (2005) 227-46.

⁶³ Ramphela M 'Political Widowhood in South Africa: The Embodiment of Ambiguity' (1996) 125 *Daedalus* 99-117.

⁶⁴ Ramphela M (1996) 125 *Daedalus* 99- 117.

⁶⁵ Ariès P *The Hour of Our Death* (1981) 83-90.

been visited by death, contaminated by its presence, weakened by the loss of one of its members.”⁶⁶ As a result, helping the survivor was neither the only nor key purpose of *ukuzila*.

Most scholars, however, have shown less interest in rituals that have been discussed that degrade, oppress, and discriminate widows. Their focus is on the results of the *ukuzila* custom. Their failure to be detailed in what *ukuzila* means from the widow's position is regrettable. Arguably, it may perpetuate the abuse of women by the custom, seeing they are not given the opportunity to share their reservation against this custom. The liberal feminists would assert that until widows are given the freedom to choose how they prefer to mourn their spouses, no one has a right to impose the one-sided significance of *ukuzila* rituals. This one-sided view is evident from the literature above as most scholars suggest that the custom is essential to support and heal the widow and not necessarily the widower. If *ukuzila* is a healing process, it would be wise to let professionals help widows' through the grieving period. However, this would not be widely accepted because affirming that widows can get healing from professionals would mean that these rituals used as instruments to oppress women will no longer be required. Thus, it would threaten the patriarchal society that desires to control women in contemporary South Africa.

Lastly, upon the lapsing of *ukuzila* duration, the widow is cleansed of impurities and bad luck associated with losing a husband.⁶⁷ In addition, an animal is slaughtered, and herbs are used to cleanse the widow. However, a widow's struggle does not end there; despite enduring these torturous rituals and humiliation, she continues to be called *umfelokazi* (widow), which is derogatory.⁶⁸ This status and a name stigmatises and renders her less of a woman regardless of her age and abilities.⁶⁹ The following section focuses on the right to equality, right to human dignity, the right to freedom and security, right to freedom of movement, and the right to religion, belief and opinion that are infringed by the practice of *ukuzila*.

⁶⁶ Ariès P *The Hour of Our Death* (1981) 83-90.

⁶⁷ Cebekhulu LM (2015) 25.

⁶⁸ Cebekhulu LM (2015) 25.

⁶⁹ Cebekhulu LM (2015) 25.

3.3 The right to equality

As previously discussed in the second chapter, liberal feminism strongly demands that liberty, rights, and opportunities be equally afforded to all without prejudices and discrimination. This section outlines how *ukuzila* is violating various Constitutional rights of widows, such as the right to equality, the right to human dignity, the right to freedom of movement, and the security of a person. In the previous chapter, it was evident that liberal feminism seeks to advance the legitimate status of women as equal and homogeneous from that of men. It was also discussed that women and men might be different in biological structures, but where their capacity to reason is concerned, there is no difference. Therefore, gender equality must be achieved between women and men.

Equality is said to consist of formal equality and substantive equality. According to Mitchell, formal equality advocates for the neutral treatment of all people based on society's dominant group's norms.⁷⁰ Formal equality asserts that, as equals, women and men should be treated the same.⁷¹ Aristotle was the first philosopher to articulate the connection between equality and justice.⁷² Aristotle believed equals were to be treated alike and those unequal differently.⁷³ Aristotle's notion of equality influenced the conception of formal equality in western jurisprudence.⁷⁴ Thus, formal equality simply means that the law and institutions of the society ignore all the inequalities in society.⁷⁵ Those inequalities caused by race, gender, socio-economic positions, and many other factors affecting previously disadvantaged groups are overlooked.⁷⁶

From the description of formal equality and *ukuzila*, no evidence suggests that widows and widowers are treated equally under this custom. Instead, the *ukuzila* custom applies arbitrarily between men and women in traditional communities where women are oppressed, degraded, and stigmatised because of their gender. Therefore, the conception of formal equality being blind in

⁷⁰ Mitchell B 'Process equality, substantive equality and recognizing disadvantage Constitutional Equality Law' (2015) 53 *Irish Jurist* 36-57.

⁷¹ Cusack S & Pusey L 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 1-39.

⁷² Goonesekere SWE 'The concept of substantive equality and gender in South East Asia' (2011) *United Nations Entity for Gender Equality and the Empowerment of Women* 8.

⁷³ Goonesekere SWE (2011) *United Nations Entity for Gender Equality and the Empowerment of Women* 8.

⁷⁴ Goonesekere SWE (2011) *United Nations Entity for Gender Equality and the Empowerment of Women* 8.

⁷⁵ Albertyn C 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441-68.

⁷⁶ Albertyn C (2018) 34 *South African Journal on Human Rights* 441-68.

differences between women and men creates a loophole. Thus, making it harder to adopt formal equality in its rigid description in addressing inequality caused by the *ukuzila* practice. Consequently, substantive equality can be adopted to address this challenge of inequality between widows and widowers in a less severe form.

Phooko and Radebe assert that equality as a value gives meaning to the Constitution's vision by acting as an interpretive tool.⁷⁷ Meanwhile, equality as a right provides a justifiable cause of action to seek substantive equality for persons and groups affected by structural forms of domination and material disadvantage.⁷⁸ Substantive equality places a demand that the social implications or harm must be assessed subject to the circumstances of peoples' lives and the effects of the act in question. Although liberal feminism focuses on formal equality, substantive equality would be the best to address the challenges engulfing women. In other words laws through formal equality may be enacted but further differences through substantive equality will have to be taken into account. Constitutional values give content to the right and guidance in determining whether differentiation is 'constitutionally' harmful.⁷⁹

Fredman infers from existing understandings of the right to substantive equality by outlining four-dimensional frameworks of substantive equality.⁸⁰ First, she states that the right to substantive equality should aim to redress disadvantages.⁸¹ Secondly, substantive equality should counter prejudice, stigma, stereotyping, humiliation, and violence based on a protected characteristic.⁸² Thirdly, Fredman claims that substantive equality should enhance voice and participation, countering political and social exclusion.⁸³ Finally, she argues that this substantive equality should accommodate differences and achieve structural change.⁸⁴ Fredman's framework outline is further echoed by the CEDAW, a compass for most countries to form substantive equality.

⁷⁷ Phooko MR & Radebe SB 'Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa: Progress or Regression' *Constitutional Court Review* (2016) 8 306-31.

⁷⁸ Phooko MR & Radebe SB (2016) 8 306-31.

⁷⁹ Albertyn C (2018) 34 *South African Journal on Human Rights* 441-68.

⁸⁰ Fredman S 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712-38.

⁸¹ Fredman S (2016) 14 *International Journal of Constitutional Law* 712-38.

⁸² Fredman S (2016) 14 *International Journal of Constitutional Law* 712-38.

⁸³ Fredman S (2016) 14 *International Journal of Constitutional Law* 712-38.

⁸⁴ Fredman S (2016) 14 *International Journal of Constitutional Law* 712-38.

For example, Article 3 of CEDAW requires state parties to take appropriate measures to ensure substantive equality between women and men.⁸⁵ Similarly, widows are stigmatised, humiliated, prejudiced due to their widowhood status. Further, they are women who have suffered historical oppression and discrimination due to their gender and socio-economic status. Therefore, when it comes to the practice of *ukuzila* and how women are treated, Fredman's dimensions fit precisely to the situation of widows in South Africa. In other words, prioritising women's rights is the key in achieving equality.

Furthermore, as discussed above, women are the only group that is disadvantaged by the *ukuzila* custom. Several scholars have argued that rituals such as wearing a black garment bring about stigma, humiliation and attract violence towards widows. Thus, in addressing these specific practices, widows may then realise their right to equality. Likewise, Moseneke DCJ in *Minister of Finance & Another v Van Heerden* stated that taking positive steps to redress past inequality "promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination."⁸⁶

Furthermore, one of the critical assertions of liberal feminism mentioned in the previous chapter is that a legal reform enables the process of women's liberation. South Africa as a country adopted a Constitution in 1996, which is the supreme law.⁸⁷ Thus, the Constitution is the highest law in the country, and no one is above the law.⁸⁸ The Constitution obliges the South African government to protect and promote the rights of every individual.⁸⁹ The South African Constitution section 9(1) states that "everyone is equal before the law and has the right to equal protection and benefit of the law".⁹⁰

⁸⁵ See Art. 3 of CEDAW, 'States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'.

⁸⁶ *Minister of Finance & Another v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) para 106.

⁸⁷ See s 1(c) of the Constitution of the Republic of South Africa, 1996.

⁸⁸ See s 2 of the Constitution of the Republic of South Africa, 1996.

⁸⁹ See s 7(2) of the Constitution of the Republic of South Africa, 1996.

⁹⁰ See s 9(1) of the Constitution of the Republic of South Africa, 1996.

In addition, sections 9 (2) and (4) of the South African Constitution⁹¹ state that:

2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).⁹² National legislation must be enacted to prevent or prohibit unfair discrimination.

In other words, according to section 9(2) when the equality right is violated or infringed, the enjoyment of other rights is impaired. In this case *ukuzila* custom is among other sources of this violation, that is why it must be challenged as it cannot be above the Constitution.

The court in *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*, stated that:

A democratic, universalistic, caring, and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of their human personality and violatory of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not denials of self. Equality, therefore, does not imply a levelling or homogenisation of behaviour or extolling one form as supreme and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.⁹³

It is clear that since widows are treated differently than widowers, this constitutes a violation of the right to equality in terms of the abovementioned section. This discrimination based on gender is not because of oversight through cultural practices only but is also due to the historic prejudice levelled against women in general. Consequently, as discussed in chapter 2, liberal feminists call for the government to establish institutions and design legal instruments to eradicate oppressive customs and bring equality between men and women.

⁹¹ See ss 9 (2)& 4 of the Constitution of the Republic of South Africa, 1996.

⁹² See s 9(3) of the SA constitution “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.

⁹³ *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) para 60.

Furthermore, a comprehensive South African anti-discriminatory law such as the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was signed in February 2000. This Act intends to give effect to section 9⁹⁴ of the South African Constitution and is to be read with section 24(1) and (2) of Chapter 5 of PEPUDA.⁹⁵ It is to prevent and prohibit unfair discrimination and harassment, promote equality and eliminate unfair discrimination.⁹⁶ The PEPUDA similarly prohibits gender discrimination, gender-based violence, and “any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men”.⁹⁷ Oddly, *ukuzila* custom is still lingering, terrorizing women in customary marriages despite the availability of instruments like PEPUDA and CEDAW that seek to eliminate all harmful cultural practices.

Furthermore, equality ensures that every individual has an equal opportunity to make the most of their lives and talents.⁹⁸ It is the belief that no one should have poorer life chances because of how they were born, their origin, beliefs, and whether or not they have a disability.⁹⁹ Historically, equality recognises that certain people with protected characteristics such as race, gender, sex, and sexual orientation have experienced discrimination.¹⁰⁰ Additionally, in an attempt to regulate spousal equality and protection of women in customary marriages according to constitutional values of non-discrimination, South Africa’s Recognition of Customary Marriages Act (RCMA)¹⁰¹ was enacted. This is evident in section 6¹⁰² of RCMA, which states that:

a wife in a customary marriage has, on the basis of equality with her husband, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into

⁹⁴ Section 9 of the Constitution of the Republic of South Africa, 1996.

⁹⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁹⁶ PEPUDA, 2000.

⁹⁷ PEPUDA, 2000.

⁹⁸ Equality and Human Right Commission ‘Understanding Equality’ available at <https://www.equalityhumanrights.com/en/secondary-education-resources/useful-information/understanding-equality/> (accessed-26 November 2020).

⁹⁹ Equality and Human Right Commission ‘Understanding Equality’ available at <https://www.equalityhumanrights.com/en/secondary-education-resources/useful-information/understanding-equality/> (accessed-26 November 2020).

¹⁰⁰ Equality and Human Right Commission ‘Understanding Equality’ available at <https://www.equalityhumanrights.com/en/secondary-education-resources/useful-information/understanding-equality/> (accessed-26 November 2020).

¹⁰¹ Recognition of Customary Marriages Act 120 of 2000.

¹⁰² See s6 of the Recognition of Customary Marriages Act 120 of 2000.

contracts and to litigate, in addition to any rights and powers that she might have at customary law.¹⁰³

This RCMA section clearly states that women and men in a customary marriage are equal and should be treated as such. Therefore, this equal status should not only be limited to administration of assets, but it should also be seen when the husband dies, that the wife deserve respect and is capable of making her own decisions, even in matters concerning mourning for her husband.

Moreover, Sanday claims that the gendered nature of a society's origin predicts the status of women.¹⁰⁴ Similarly, a liberal feminist advocate, Mill, expresses a firm conviction that the subordination of women, which deprives them of freedom, is an unjust violation of the principle of liberty.¹⁰⁵ When speaking about women's status, especially in the family and marriage, Mill uses the image of slavery, asserting that "a wife is the actual bondservant of her husband: no less so, as far as legal obligation goes than slaves commonly so called."¹⁰⁶ This analogy is vividly evident during the observance of *ukuzila* practice, whereby the expectations from women are higher than that of men when it comes to *ukuzila*. Women are obligated to observe all the oppressive rituals that mostly violate their rights, but this is not the case for men. The discussion above indicates that the widower is easily absorbed in the new social circle.

In contrast, the widow is excluded for the same reason; the most prominent is widows perceived to be bearers of bad luck.¹⁰⁷

It is an illustrative fact that women are systematically discriminated against in the social treatment of both genders.¹⁰⁸ Also, it violates the right to equality and is against liberal feminists who champion individual equal rights and freedom for women. To facilitate this shift of affording women equal status and equal rights, liberal feminists call for the enactment of legal instruments and legal reform.

The CEDAW requires that states take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations. CEDAW seeks to ensure that

¹⁰³ See s6 of the Recognition of Customary Marriages Act 120 of 2000.

¹⁰⁴ Sanday PR *Female Power and Male Dominance: on the Origins of Sexual Inequality* (1981) 7-9.

¹⁰⁵ Mill JS *The Subjection of Women In: The Collected Works of John Stuart Mill* (1984) 284.

¹⁰⁶ Mill JS *The Subjection of Women. In: The Collected Works of John Stuart Mill* (1984) 284.

¹⁰⁷ Daber BN (2003) 16.

¹⁰⁸ Daber BN (2003) 16.

women have the same right to enter into marriage with their free and full consent.¹⁰⁹ Moreover, it proclaims that state parties: condemn discrimination against women in all its forms; agree to pursue by all appropriate means, and without delay, a policy of eliminating discrimination against women; embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein; and ensure through law and other appropriate means, the practical realisation of this principle.¹¹⁰

Similarly, the legal framework of the Protocol is a reflection of the specific violations against African women.¹¹¹ The Maputo Protocol contains several articles that directly bear and traverse with global frameworks that address women's equality and security.¹¹² These include inter alia: the elimination of discrimination against women; the right to dignity; the right to life, integrity, and security of the person; the right to access to justice and equal protection under the law.¹¹³ In terms of Article 2(1) of this Protocol, state parties are obliged to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”.¹¹⁴ Additionally, Article 2(1)(b) provides that “States must enact and implement measures prohibiting and curbing “all forms of discrimination particularly those harmful practises which endanger the health and general well-being of women and take corrective action in areas “where discrimination against women in law and in fact continues to exist.”¹¹⁵

Furthermore, under Article 2(2) of the Maputo Protocol, state parties must commit themselves to modify social and cultural patterns through public education, information, education, and communication strategies, “with a view to the elimination of harmful cultural and traditional practices 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.”¹¹⁶

¹⁰⁹ CEDAW, adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

¹¹⁰ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979 available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx/> (accessed on 06 September 2020).

¹¹¹ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol Text). African Union, 2003.

¹¹² Maputo Protocol, 2003.

¹¹³ Maputo Protocol, 2003.

¹¹⁴ Maputo Protocol, 2003.

¹¹⁵ Maputo Protocol, 2003.

¹¹⁶ Maputo Protocol, 2003.

Remarkably, Article 19 of the Maputo Protocol addresses specifically widow's rights.¹¹⁷ It asserts that "States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions":¹¹⁸

- a) widows are not subjected to inhuman, humiliating, or degrading treatment.
- b) That a widow shall automatically become the guardian and custodian of her children after the death of her husband unless this is contrary to the interests and the welfare of the children.
- c) That a widow shall have the right to remarry, and in that event, to marry the person of her choice.

Accordingly, Article 19(a) and (b) above both resonate with the rights to human dignity and gender equality as provided by the South African constitution.¹¹⁹ By extension, these sections echo the call by liberal feminism to employ legal reform in addressing women's rights violations.

In testing and applying all these provisions and courts' judgements, it appears that the *ukuzila* practice diverges from the adherence to equality right for widows. *Ukuzila* has been described as a way of showing respect and loyalty to the departed, the family and the cultural group or society and as a healing, therapeutic process. However, this is not required from widowers. A widower is encouraged to be strong, endure the pain and pick up the pieces to face life again.¹²⁰ Also, a widower is only required to shave his head and wear a small black button and or armband. Consequently, they do not face any discrimination as they do not have any external markings which means no humililation and stigmatisization for them.

Meanwhile, the widow is marked by a black garment and head-shaving.¹²¹ In most cases, widowers are usually required to mourn for few months, but it is one year for widows. In addition, a widower's status is influenced by the man's identity in the patriarchal societies; that a man is complete and independent of a woman.¹²² This is problematic as the Constitution and RCMA

See also Article 5 of Maputo Protocol which deals with the elimination of harmful practices subject to international laws. It provides that "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards". See also, Article 12(b) obliges "States parties to eliminate all stereotypes in textbooks, syllabi, and media that perpetuate discrimination".

¹¹⁷ Maputo Protocol, 2003.

¹¹⁸ Maputo Protocol, 2003.

¹¹⁹ See Maputo Protocol, 2003 and the Constitution of the Republic of South Africa, 1996.

¹²⁰ Ramphele M 'Political Widowhood in South Africa: The Embodiment of Ambiguity' (1996) 125 *Daedalus* 99-117.

¹²¹ Ramphele M (1996) 99- 117.

¹²² Ramphele M (1996) 99- 117.

emphasise equal status and treatment for husband and wife in a customary marriage. Thus, the perception that men are strong and independent from their wives is hypocritical and perpetuates the ideology that women are inferior and men are superior even after death.

Moreover, this unequal treatment raises the question: is the wife not worthy of such respect when she passes on? It does not suggest that widowers must observe the same rituals of *ukuzila*. Still, it points out that if the family or community does not require the widower to observe such rituals, they are irrelevant and must be discarded. It is stated in the previously mentioned provisions that States parties must eradicate all discriminatory practices. If losing a spouse suggests that the surviving spouse is contaminated or engulfed by a 'dark cloud', why does it only apply to women?

Thus, *ukuzila* custom lead to the persistent unfair treatment and discrimination that widows go through, demeaning, discriminatory, and emotional torture. This is the indication that women in traditional communities will never be considered equal to men, whether dead or alive as long as *ukuzila* practice is still actively gendered. As discussed in the previous chapter, liberal feminism demand that all discriminatory rituals towards women be prohibited and eradicated. They argue that laws must be developed to deal with or regulate such practices. Surprisingly, all the legal reforms that liberal feminism calls to be enacted already exist in South Africa but have not been implemented throughout traditional communities. That is, of course, due to many factors, including *inter alia*, the socio-economic status, and the level of education.

The violation of the right to equality by the *ukuzila* custom creates a massive problem for accessing and enjoying other Constitutional rights, such as the right to human dignity.

3.4 The right to human dignity

The South African Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected.¹²³ However, the rituals performed during *ukuzila* violate widows' right to human dignity. The English word *dignity* comes from the Latin word *dignitas*, which

¹²³ See s10 of the Constitution of the Republic of South Africa, 1996.

means *worthiness*.¹²⁴ Dignity implies that each person is worthy of honour and respect for who they are, not just what they can do.¹²⁵

Thus, human dignity cannot be traded or taken away. In the South African Constitution, the first line of the founding values mentions human dignity.¹²⁶ The importance of dignity to all humans is symbolic, and all other rights are connected.

O'Regan in *Makwanyane* asserted that:

Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right, therefore, is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights].¹²⁷

Furthermore, the right to human dignity was also affirmed in *Dawood's* case,¹²⁸ another South African Constitutional Court decision. The court stated that human dignity entrenched in section 10 of the Bill of Rights is fundamental to our society and constitutional interpretation, “especially because of our past, where it was routinely and cruelly denied”.¹²⁹ Also, “human dignity is a foundational value which informs the interpretation of many, perhaps all, other rights”.¹³⁰

Similarly, in *S v Chapman*¹³¹ the court held that:

The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.¹³²

¹²⁴ Douglas H ‘Online Etymology Dictionary’ available at <https://www.etymonline.com/search?q=dignity>. (accessed-02 September 2020).

¹²⁵ Douglas H ‘Online Etymology Dictionary’ available at <https://www.etymonline.com/search?q=dignity>. (accessed-02 September 2020).

¹²⁶ Section 1 of the Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

¹²⁷ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 para 328.

¹²⁸ *Dawood and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) para 34.

¹²⁹ *Dawood and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) para 35.

¹³⁰ *Dawood and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) para 35.

¹³¹ *S v Chapman* 1997 (3) SA 341 (A).

¹³² *S v Chapman* 1997 (3) SA 341 (A) para 4.

Additionally, the Vienna Declaration and Programme of Action also adopted dignity as a foundational value not just to human rights in general,¹³³ but also adopted the concept of dignity in their provisions dealing with particular areas of human rights, such as the treatment of indigenous peoples,¹³⁴ the prohibition of torture,¹³⁵ and the prohibition of gender-based violence and harassment.¹³⁶

The protection of human dignity rights was also proclaimed in the UDHR. Its preamble states “...whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.¹³⁷ Moreover, Article 1 of the UDHR indicates that all human beings are born free and equal in dignity and rights.¹³⁸ Similarly, in the preamble of the United Nations, its members “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”¹³⁹ In addition, Article 2(1) (b) of Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa prohibits discrimination that endangers women's health and general wellbeing.¹⁴⁰ In terms of Article 5 of the Maputo Protocol, every individual shall have the right to respect, the dignity inherent in a human being and recognition of his legal status.¹⁴¹ Article 20 of the Protocol addresses the unique issues associated with widows. Furthermore, Article 20 caters for situations where widows are subjected to all sorts of degrading and humiliating treatment because of their status as widows.¹⁴²

¹³³ UN General Assembly ‘Vienna Declaration and Programme of Action’ 12 July 1993 available at: <https://www.refworld.org/docid/3ae6b39ec.html/> (accessed on 02 September 2020).

¹³⁴ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993. Article 20-The World Conference on Human Rights recognises the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development.

¹³⁵ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993 Article 55- The World Conference on Human Rights emphasises that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities.

¹³⁶ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993 Article 18- The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

¹³⁷ Preamble of the Universal Declaration of Human Rights (UDHR), 1948.

¹³⁸ Article 1 of the UDHR, 1948.

¹³⁹ United Nations ‘Charter of the United Nations’ 24 October 1945 available at <https://www.refworld.org/docid/3ae6b3930.html> (accessed 8 September 2021).

¹⁴⁰ Maputo Protocol, 2003.

¹⁴¹ Maputo Protocol, 2003.

¹⁴² Maputo Protocol, 2003.

As mentioned in chapter two, Article 20 of the Maputo Protocol presents that state parties shall take appropriate legal measures to ensure that widows enjoy all human rights.¹⁴³ This means that widows should not be subjected to inhuman, humiliating or degrading treatment. Therefore, the *ukuzila* custom is degrading and humiliating to widows because of its rituals, including shaving the widow's hair, wearing black garment, and bathing in public rivers. And simple because there is the absence of connection between 'healing of widows' and these rituals, instead these rituals have proven the contrary to what *ukuzila* ought to achieve, atleast according to the scholars above. However, since family members and or cultural groups enforce the rituals, they violate these rights, including the right to human dignity. Their customary loyalty infringes on the guaranteed constitutional right of widows, the right to human dignity. The enforcement of *ukuzila* ritual practices strips away the worthiness of widows. Consequently, stigmatisation infringes on women's right to human dignity. For instance, Ndlovu conducted a study about the mourning cultural practices amongst the Zulu-speaking widows of the KwaNyaswa community, and one of the participants shared her experience of *ukuzila*.

*I was like a smelling dog even to my family; even the dishes I was using were washed and kept separately so that others could not use them. Even the bathing dish was not touched by other people except the grannies of the family.*¹⁴⁴

The above comment is not unique to one widow, but most if not all of them, they are not allowed to attend any gatherings, they are not allowed to cook food for others, etc.

That is why they are forced to wear *inzila* so that they are distinguishable and easily avoided and excluded as it is believed they will contaminate others.

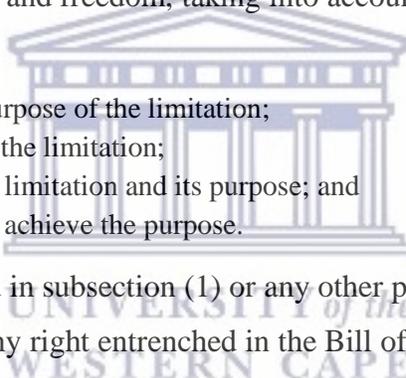
Moreover, being called *umfelokazi* (widow) which simple means someone who has lost her spouse, has a negative connotation and negative impact attached to it, which affects the very dignity of a woman who has lost her husband. It is apparent that from the widow's perspective, the mourning cultural practice is harsh.¹⁴⁵ As a result, they are met with humiliation, discrimination, and perceived worthless, while their dignity is taken away.

¹⁴³ Maputo Protocol Article 20 (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination.

¹⁴⁴ Ndlovu CD *The Mourning Cultural Practices Amongst the Zulu-Speaking Widows of the Kwanyuswa Community: A Feminist Perspective* (Unpublished MA Thesis, University of Kwazulu-Natal, 2013) 43.

¹⁴⁵ Ndlovu CD *The mourning cultural practices amongst the Zulu-speaking widows of the KwaNyaswa community: A feminist perspective* (Unpublished MA Thesis, University of Kwazulu-Natal, 2013) 45.

The above proclamations, judges' comments in court judgements, and scholars indicate that human dignity is one of the fundamental human rights that must be guaranteed for all persons, especially women because they fall under the group or category that has suffered oppression and discrimination in the past.¹⁴⁶ It is also clear that human dignity is not just a stand-alone human right but is also attached to other important human rights: the right to freedom of speech, movement, right to equality, right to security of a person, right to life, right to privacy and many more.¹⁴⁷ Therefore, due to the magnitude of the rights to human dignity and equality, the whole spectrum of other rights is also infringed if these rights are violated. Additionally, the right to equality and human dignity are protected by section 36 (1) of the Constitution.¹⁴⁸ This section states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- 
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

Section 36(2), except as provided in subsection (1) or any other provision of the Constitution, indicates that no law may limit any right entrenched in the Bill of Rights.¹⁴⁹

For example, in *S v Makwanyane*, it was found that the rights affected by the death penalty¹⁵⁰ were fundamentally essential and that the death penalty constituted a severe and irrevocable infringement of these rights.¹⁵¹ For these reasons, the state needed a particularly compelling justification for the limitation of these rights.¹⁵² Regarding the various factors identified in s 36(1) of the Constitution, the Court found that the severity of the death penalty outweighed the importance of the limitation of the right.¹⁵³

¹⁴⁶ Dickson M & Louis N 'Discrimination and Oppression of Women: A Social Work Exploration in Zimbabwe' (2018) 6 *Social Criminology* 185.

¹⁴⁷ Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 272–79.

¹⁴⁸ Section 36 (1) of the Constitution of the Republic of South Africa, 1996.

¹⁴⁹ Section 36(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁰ The rights to life, and dignity, and not to be subjected to cruel, inhumane or degrading punishment

¹⁵¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 26.

¹⁵² *S v Makwanyane* 1995 (3) SA 391 (CC) para 297.

¹⁵³ *S v Makwanyane* 1995 (3) SA 391 (CC) para 234.

In light of the above discussion, the custom of *ukuzila* does not pass the test of compelling widows to have their fundamental rights limited or infringed. From the discussion in the previous section, various scholars argued that widows are presumed to be contaminated, contagious, impure, and engulfed by a ‘dark cloud’. According to these scholars, wearing a black dress draws humiliation and mortification and insults widows. As a result, community people discriminate against widows and perceive them as worthless human beings. Therefore, this treatment towards widows is against what all international, regional and domestic human rights provisions affirm and stand for. Thus, the enforcement of *ukuzila* rituals grossly violates widows’ right to human dignity.

3.5 Implications of *ukuzila* on additional rights

3.5.1 The right to freedom and security

Liberal feminism claim that if women are denied freedom and subordinated to men, their freedom of will is violated. Therefore, they argue that families must be built on the model of “virtues of freedom”.¹⁵⁴ Section 12 (1)(a) and (d) of the South African Constitution, respectively, presents that everyone has the right to freedom and security, which includes the right not to be tortured in any way; and not to be treated in a cruel, inhuman or degrading way.¹⁵⁵ It also emerged from the previous discussion of *ukuzila* that part of its ritual is for the widow to bathe by the river every morning and evening to clean the ‘bad spirits’ of the dead husband. Here, the security of a widow is compromised as rivers in rural areas are public and secluded spaces which widows can get raped and assaulted by strangers.

Due to social ills such as violent crimes and violence against women, this ritual and wearing the black dress make widows a target to criminals in the community.¹⁵⁶ This ritual also contravenes sections 12(1)¹⁵⁷ and 12(2)(b) of the South African Constitution, which states that “everyone has the right to bodily and psychological integrity, which includes the right ... to security in and control over their body.”¹⁵⁸ The right to physical integrity amounts essentially to a “right to be left

¹⁵⁴ Mill JS *The Subjection of Women, in On Liberty and Other Writings* ed Stefan Collini (1989) 289.

¹⁵⁵ Section 12 (1)(a) and (d) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁶ Guzana NV *Memory into narratives: an analysis of stories of widows in the Eastern Cape* (unpublished Master’s thesis, University of Fort Hare, 2004).

¹⁵⁷ Section 12(1) and (2) b of the Constitution of the Republic of South Africa, 1996.

¹⁵⁸ ...states: ‘everyone has the right to bodily and psychological integrity, which includes the right ... to security in and control over their body’ of the constitution.

alone”¹⁵⁹ and to have control of what happens to one’s body. Thus, the right to security prohibits unwanted tampering of bodily integrity, as this is evident in bathing in the river, shaving the head and wearing black clothes. The right to control over the body that amounts to will and liberty is also a violation since women or widows do not have any opinion in these rituals.

3.5.2 The right to religion, belief and opinion

In all discussions of *ukuzila* practice, the voice of widows is not spotted anywhere in the text; the loudest voices are from family members and community members, including church leaders. Also, the stigma and stereotypes created by *ukuzila* practice silence widows’ voices.¹⁶⁰ Hlonelwa states that silence during mourning is common among widows.¹⁶¹ Thus, a widow may not voice any concerns or dissatisfaction about the practice because it is considered disrespectful.¹⁶² Therefore, it is a gross violation of section 15(1) of the South African Constitution, which states that “everyone has the right to freedom of conscience, religion, thought, belief and opinion.”¹⁶³ Likewise, Article 18 of UDHR also presents that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change religion or belief, and freedom either alone or in community with others in public or private, and freedom to manifest religion or belief in teaching, practice, worship and observance.¹⁶⁴ Similarly, Article 19 of UDHR further states that everyone has the right to freedom of opinion and expression.¹⁶⁵ The coercion and interference of family members and community members on how the widow must mourn for her husband violate the abovementioned rights. The silencing of widows makes it challenging for them to express how they feel about specific rituals and whether they believe in such or want to practice them.

In the previous chapter, liberal feminism argued that women and men must equally have the right to freedom from coercive interference with their person and property.¹⁶⁶ Thus, the right to freedom from coercive interference must consist of, at least, rights to freedom of conscience and expression, freedom to control what happens to one’s body, and freedom of association.¹⁶⁷

¹⁵⁹ Currie I & De Waal J *The Bill of Rights Handbook* (2005) 287.

¹⁶⁰ Bhana JA (2007) 172.

¹⁶¹ Ngqangweni H (2013)118.

¹⁶² Ngqangweni H (2013)118.

¹⁶³ See ss 15(1) of the Constitution of the Republic of South Africa, 1996.

¹⁶⁴ Article 18 of UDHR, 1948.

¹⁶⁵ Article 19 of UDHR, 1948.

¹⁶⁶ Bimer EE & Alemeneh GM ‘Liberal feminism: Assessing its compatibility and applicability in Ethiopia context’ (2018) 10 *International Journal of Sociology and Anthropology* 59-64.

¹⁶⁷ Bimer EE (2018) 59-64.

Furthermore, liberal feminism also argued that the right to freedom from coercive interference has powerful implications for women's lives.¹⁶⁸ They argued that tampering with these rights has severe and negative implications for women's livelihood. For example, as mentioned in chapter one, bathing in the river may bring about health and safety issues for women.

3.5.3 The right to freedom of movement and residence

The practice of *ukuzila* places many restrictions on widows; according to Sossou, far more restrictions are placed on a widow than a widower.¹⁶⁹ For example, widows sit on a mat or mattress before the husband's burial and are not allowed to wander about in the yard. Even after the funeral, widows are not allowed to do social visits, which requires them to leave their residences. Furthermore, in South Africa, some of the Bapedi tribes that originate from Limpopo province believe that when a married man dies, his widow is forbidden from arriving home after sunset, visiting neighbours, and attending family and community functions.¹⁷⁰ Similarly, Manyedi et al. reported that some widows expressed they had to be within their houses, with no visitation from and to other people's houses; talking to people was also forbidden.¹⁷¹

Thus it is a gross violation of section 21(1)¹⁷² of the South African Constitution, which states that everyone has the right to freedom of movement; the practice of *ukuzila* violates this right since widows are secluded and prohibited from any movements.

In addition, widows are excluded from any form of amusement or family activities and other social ceremonies.¹⁷³ They are subjected to humiliations, mortifications and insults inherent in widowhood.¹⁷⁴ Echoing this is Hirst, who asserts that although the family of the deceased is affected by the death, the woman is regarded as the most contaminated and therefore the most contagious.¹⁷⁵ Thus, the widow is the focus of the *ukuzila* rituals.¹⁷⁶ She is usually in strict exclusion from public life. Her observance of *ukuzila* is the most extensive until ritual cleansing

¹⁶⁸ Bimer EE & Alemeneh GM (2018) 59-64.

¹⁶⁹ Sossou MA (2002) 11 *Int J Soc Welfare* 201-09.

¹⁷⁰ Baloyi L & Makobe-Rabothata M 'The African conception of death: A cultural implication' available at http://iaccp.org/sites/default/files/stellenbosch_pdf/Baloyi.pdf (accessed 1 September 2020) 236.

¹⁷¹ Manyedi ME, Koen MP & Greeff M (2003) 8 *Health SA Gesondheid* 69-87.

¹⁷² Section 21 (1) of the Constitution of the Republic of South Africa 1996.

¹⁷³ Sossou MA (2002) 11 *International Journal of Social Welfare* 201-09.

¹⁷⁴ Bremmer J & Van Den BL *Between poverty and the pyre: Moments in the history of widowhood* 1995 14-15.

¹⁷⁵ Hirst M 'Isiko lokuzila: The custom of mourning' (2006) 18 *Imvubu* 7-8.

¹⁷⁶ Hirst M (2006) 18 *Imvubu* 7-8.

has been performed. It is believed she might contaminate other people with bad luck,¹⁷⁷ which is grossly discriminatory and in violation of widows rights to freedom of movement.

Article I of CEDAW provides a comprehensive definition of discrimination against women:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁷⁸

From the above definition, one can identify all elements of the *ukuzila* practice described as discriminatory. For example, the exclusion from the rest of the family and the community and being restricted from mingling with other people based on social and cultural gatherings. Therefore, it can be concluded that the adherence to these rituals violates women’s rights and discriminate against them. The main reason is these rituals are only imposed on women and not men. Nevertheless, it is not to say that they would be less discriminatory if they applied to men. Besides being a practice to pay respect to the dead, *ukuzila* is a violation and a threat to the well-being of widows.

As scholars have previously indicated, *ukuzila* is beyond a personal choice. Instead, it is pressure by the family elders and the community that coerce women into this practice. For instance, Magudu conducted a study that focused on the experience and perceptions of *ukuzila* among the Amahlubi tribe in the Eastern Cape, South Africa.¹⁷⁹ The article highlighted that the mourning customs were more oppressive to women than men¹⁸⁰ because a man is free to remarry soon after burying his wife, usually thirty-six days after the burial.¹⁸¹ However, this is not the case with a woman mourning the death of her husband.¹⁸² The main reason for this deprivation is the stigma and the stereotype that widows are bearers of ‘bad luck’. Therefore, many mourning customs diminish a

¹⁷⁷ Hirst M (2006) 18 *Imvubu* 7-8.

¹⁷⁸ Article I of CEDAW, 1979.

¹⁷⁹ Magudu B (2004) 18 *Agenda* 140–48.

¹⁸⁰ Magudu B (2004) 18 *Agenda* 140–48.

¹⁸¹ Sossou MA (2002) 11 *Int J Soc Welfare* 205.

¹⁸² Sossou MA (2002) 11 *Int J Soc Welfare* 205.

widow's attractiveness by desexualising her through dress codes and placing taboos on her participation in social activities.¹⁸³

Moreover, if the widow leaves the house or her home under exceptional circumstances, she has to give way to other road or path users she meets.¹⁸⁴ In addition, the widow wearing black clothes also has to sit at the back of a bus or taxi not to expose other travellers to her back and the possibility of a 'bad omen or bad luck'.¹⁸⁵ Additionally, widows who get permission from church leaders to attend must sit at the back pew during the worship service.¹⁸⁶ They are usually isolated from other worshippers who sit at a distance from them.¹⁸⁷ As discussed in chapter two, liberal feminists state that men and women have the same human qualities; therefore, they should have equal rights and be treated equally with dignity. According to liberal feminists, women and men are both capable of having self-owned rights.

Liberal feminists also firmly believe that there is a massive gap between how men and women are treated as far as cultural practices are concerned. They suggest that there must be equal treatment between men and women. However, regarding the *ukuzila* practice, the liberal feminism calls for eradicating oppressive practices only if aligned with all legal documents and observed by both widows and widowers. In the previous chapter, liberal feminism highlighted that women must voluntarily adhere to any traditional morality or cultural practices to ensure their independence and self-restraint.¹⁸⁸ Moreover, liberal feminism embraces the value of voluntary choice for women. Still, they argue that women often cannot exercise it because sexist socialisation and a homogeneous culture render them incapable of critically assessing their preferences and imagining life otherwise.¹⁸⁹

¹⁸³ Ngqangweni H (2013) 136.

¹⁸⁴ Kotzé E, Lishje L & Rajuili-Masilo N 'Women ... mourn and men carry on': African women storying mourning practices - A South African example' (2012) 36 *Death Studies* 742-66.

¹⁸⁵ Kotzé E, Lishje L & Rajuili-Masilo N (2012) 36 *Death Studies* 742-66.

¹⁸⁶ Manala M 'African traditional widowhood rites and their benefits and/or detrimental effects on widows in a context of African Christianity' (2015) 71 *Theological Studies* 2.

¹⁸⁷ Manala M (2015) 71 *Theological Studies* 2.

¹⁸⁸ Baehr AR 'Liberal Feminism' in Edward NZ (ed.) *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition) available at <https://plato.stanford.edu/archives/fall2018/entries/feminism-liberal/> (accessed 22 August 2020).

¹⁸⁹ Meyers D *Being Yourself: Essays on Identity, Action, and Social Life* (2004) 168.

In support of liberal feminist ideology is Nussbaum.¹⁹⁰ Nussbaum claims that there is a danger of confusing the toleration of diversity with relativising cultural practices which harm women.¹⁹¹ Women and men can have self-owned rights¹⁹² and the right to compensation when rights become violated.¹⁹³ Despite these rights guaranteed by the South African constitution, continuing the *ukuzila* practice constitutes rituals that violate these rights.

3.6 Conclusion

This chapter discussed various vital points on *ukuzila* practice. Through the discussion, it emerged that *ukuzila* violates multiple women's rights, which include *inter alia* the right to equality, the right to human dignity, the right to freedom and security of a person, the right to religion, belief and opinion, and the right to freedom of movement and residence. Thus, *ukuzila* custom is a source of women's right violation under customary marriage. The next chapter will deal with the question of whether *ukuzila* practice can be aligned with the Constitutional values of gender equality.



¹⁹⁰ Nussbaum MC (born Craven, May 6, 1947) is an American philosopher with a particular interest in ancient Greek and Roman philosophy, political philosophy, feminism, and ethics, including animal rights.

¹⁹¹ Nussbaum MC *Women and Human Development: The Capabilities Approach* (2000) 49.

¹⁹² such rights include but not limited to, rights to freedom of conscience and expression, freedom to control what happens to one's body, freedom of association, freedom to acquire, control and transfer of property, freedom of contract...

¹⁹³ Baehr AR 'Liberal Feminism' in Edward NZ (ed.) *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition) available at <https://plato.stanford.edu/archives/fall2018/entries/feminism-liberal/> (accessed 22 August 2020).

CHAPTER FOUR

ALIGNMENT OF *UKUZILA* CUSTOM WITH CONSTITUTIONAL VALUES

4.1 Introduction

In the previous chapter, the liberal feminist approach was used to describe the *ukuzila* custom, its significance, and how it violates women's rights, specifically the right to equality and human dignity. In addition, the analysis in chapter three suggested that most traditional communities view or understand *ukuzila* in the same way. In communities such as AmaPedi, AmaZulu, AmaXhosa and AmaNdebele, the rituals of *ukuzila* are similar, for example, wearing a black garment, imposition of movement restrictions, and desexualising widows. In a nutshell, the discussion in the previous chapter shows that *ukuzila* is mainly gendered and proves that the preservation and practice of the *ukuzila* custom clashes with women's rights, such as the right to equality, human dignity, and many others.¹ For that reason, liberal feminism proclaims that since the *ukuzila* custom does not advance women's status, it must be eradicated from society to liberate women.²

At the same time, those who observe *ukuzila* may justify it as their constitutional right provided under sections 30 and 31 of the South African Constitution.³ In other words, the Constitution protects both the right to equality and the right to culture, implying that communities have a right to both. Hence, the balancing of these rights could ascertain whether they can co-exist or not. This chapter, therefore, seeks to answer the determine how can *ukuzila* custom be aligned with the constitutional values of gender equality under the Constitution of South Africa.

Thus, to ascertain if cultural rights can override women's rights within the context of *ukuzila*, the first section of this chapter discusses the relationship between human rights, women's rights and cultural rights as provided by both national and international legal instruments. The second section uses the *Harksen case test* of (gender) equality to assess the justification of the cultural practice of *ukuzila* in limiting women's right to equality.

¹ See Chapter 2 of the Constitution of the Republic of South Africa, 1996.

² Nussbaum MC *Women and Human Development: The Capabilities Approach* (2000) 7.

³ Bennett TW *Customary Law in South Africa* (2004).

4.2 The relationship between human rights, women's rights and the right to culture under the international legal framework

The universal human rights instruments protect women's rights as well as the right to culture.⁴ According to Margalit and Halbertal by virtue of being human, one has a right to culture of their own choice.⁵ However, they also point out that while the right to culture is a guaranteed right, it poses challenges if it is exercised in a manner that violate individual rights.⁶ This is because the right to culture, although is said to be an individual rights, it is practiced in a group.⁷ This means that when given too much power, a group may want to preserve or observe cultural practices that are in conflict with individual human rights. The biggest challenge with this is that the mostly affected group in the process is that of women and young girls. *Ukuzila* is an example of a cultural practice that is keen to be preserved by many communities mentioned above, while individual rights of widows are violated in the process.

The right to culture is guaranteed and protected by various human rights instruments.⁸ According to Article 18 of UDHR,⁹ everyone may invoke the right to religious and cultural practice "either alone or in community with others and in public or private."¹⁰ This provision negates the notion that groups must dictate culture and the threats of being outcasted if one disobeys the cultural group practices, and guarantees freedom to join or leave the group. Therefore, those who coerce women into observing cultural practices that infringe on their fundamental rights violate such provisions.

In addition, Article 27(1) of the UDHR¹¹ highlights the enjoyment of cultural rights, stating that "everyone has the right to freely participate in the cultural life of the community, to enjoy the arts

⁴ These include inter alia , International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, Convention on the Elimination of all Forms of Discrimination against Women.

⁵ Margalit A & Halbertal M 'Liberalism and the Right to Culture' (1994) *Social Research* 61(3) 491

⁶ Margalit A & Halbertal M 'Liberalism and the Right to Culture' (1994) *Social Research* 61(3) 491

⁷ See Article 27 of ICCPR, 1976 above.

⁸ See UDHR, 1948; ICESCR, 1976; ICCPR, 1976; the Constitution of the Republic of South Africa, 1996.

⁹ Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

¹⁰ Article 18 of UDHR, 1948.

and to share in scientific advancement and its benefits.”¹² The enjoyment and entitlement of these rights are guaranteed and presented in Article 2 of the UDHR, which states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹³ Since the right to culture is enshrined in the UDHR, it is therefore, created a framework that ensured that nation states promote and protect human rights of everyone.

Furthermore, while the right to cultural life is guaranteed herein, it is not without limitations. The UDHR presents that “no one invokes cultural diversity to infringe upon human rights guaranteed by international law or limit their scope.”¹⁴ Moreover, all persons have the right to participate in the cultural life of their choice and conduct cultural practices, subject to respect for human rights and fundamental freedoms.¹⁵ Therefore, if cultural practices infringe on fundamental rights, it loses protection under the right to culture and thus, becomes a violation of the above provision. Likewise, Article 29(2) of UDHR also indicates that everyone must be mindful of the limitations when exercising their rights and freedom.¹⁶ This provision further states that such limits shall be determined by law to protect and in respect of the rights and freedom of others.¹⁷ Although UDHR is a declaration, it set the foundation for two main conventions; the ICESCR and the ICCPR.¹⁸ South Africa signed the ICESCR and ICCPR, indicating its intention to become a party to, and be bound by, these conventions.

Under ICESCR, the right to cultural development is guaranteed in Article 1(1) which provides that “all peoples have the right [...] to] freely pursue their economic, social and cultural development.”¹⁹ According to this provision, ‘all peoples’ also includes women. The Committee on Economic, Social and Cultural Rights (CESR) has stated that cultural rights may be exercised by a person as an individual, in association with others, or within a community or group.²⁰ Thus, women as

¹² On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights.

¹³ Article 2 of UDHR, 1948.

¹⁴ Universal Declaration on Cultural Diversity, Article 4.

¹⁵ See UDHR, 1948.

¹⁶ Article 29(2) of UDHR, 1948.

¹⁷ Article 29(2) of UDHR, 1948.

¹⁸ The ICCPR and the ICESCR, are binding treaties and were also adopted by the United Nations General Assembly on 16 December 1966. It is also worth noting that these treaties were rectified at different times. South Africa signed the ICESCR on 3 October 1994 and ICCPR was rectified on 10 December 1998.

¹⁹ See Article 1 of ICESCR, 1976.

²⁰ ICESCR General comment No 21 (2019) para 07, pp2.

individuals have an inherent right to cultural development.²¹ Moreover, under Article 15(1)(a) of the ICESCR, states parties to the Covenant recognise “the right of everyone...to take part in cultural life.”²² This provision further supports Article 1(1) that ‘all peoples’ have a right to develop culture and partake in cultural life. Arguably, the ICESCR addresses this emphasising the special protection of women by imposing obligations on states parties in Article 3 of ICESCR “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.”²³

Likewise, Article 2 of the ICESCR places an obligation to “states parties to take steps to achieve progressively the full realisation of the rights recognised in the Covenant”²⁴ What is more prominent with this Covenant is the obligation it imposes on states to ensure the enjoyment of cultural rights by all people. In other words, a state does not satisfy its obligation to recognise the right to take part in cultural life merely by removing any formal barriers to the equal participation of each of its citizens in the community's cultural life.²⁵

Furthermore, the ICESCR states direct limitations in Articles 4²⁶ and 5.²⁷ Since the Covenant recognises cultural rights, they are not immune from limitations if they infringe on other fundamental rights. In promoting and protecting women’s rights, the ICESCR stresses that restrictions to the right to take part in cultural life may be necessary to counter “negative practices, including those attributed to customs and traditions that infringe upon other human rights.”²⁸

In addition, in the event of a conflict between human rights and cultural rights, the Vienna Declaration and Programme of Action indicates that states parties must promote and protect all

²¹ ICESCR General comment No 21 (2019) para 07, pp2.

²² Article 15(1)(a) of the ICESCR, 1976.

²³ Article 27 of ICESCR, 1976.

²⁴ Article 27 of ICESCR, 1976.

²⁵ O’Keefe R ‘The “Right to Take Part in Cultural Life” under Article 15 of the ICESCR (1998)’ (1998) 47 *International and Comparative Law Quarterly* 904–923.

²⁶ Article 4 of ICESCR indicates that States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

²⁷ See ICESCR Article 5(1) nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant.

²⁸ Article 15(1)(a) of the ICESCR, 1976.

human rights and fundamental freedoms regardless of their political, economic and cultural systems.²⁹ Also, all customary practices that prove to be harmful in any way to a person must be contested and eradicated.³⁰ Failure to eliminate these harmful traditional practices would hinder the full enjoyment of other rights by the person or group concerned.³¹

Similarly, Article 1 of the ICCPR states that “all people have a right of self-determination and [to...] freely pursue their economic, social and cultural development.”³² Under Article 27 of ICCPR, the right to culture is provided for individuals belonging to “ethnic, religious and linguistic minority to enjoy their own culture, profess their own religion, and use their own language.”³³ The right to enjoy and benefit from culture includes, *inter alia*, the right of all persons to participate in cultural life. Although Article 27 presents that the right to culture be enjoyed in groups, it is also an individual right, not just a communal right. Thus, this right may also be claimed and enjoyed by individuals. However, since individuals share common cultures, religions, or languages within a society, individuals enjoy this right through association with others.

Unlike ICESCR, which emphasises the limitation of the right to culture, the ICCPR is vague in this regard. Article 4 of the ICCPR allows for certain circumstances for state parties to derogate from their responsibilities under the Covenant, such as during times of public emergencies.³⁴ Therefore, since Article 27 is not mentioned, it may arguably mean that states may limit cultural rights during times of crisis.

There is no direct limitation of Article 27 regarding the conflict between individual rights and the right to culture. Nonetheless, this is indirectly addressed by Article 26, which sets out the prohibition of discrimination based on, *inter alia*, sex, and the equal rights of men and women to enjoy all rights contained in the treaty.³⁵

²⁹ Vienna Declaration and Programme of Action, para 5.

³⁰ Article 15(1)(a) of the ICESCR, 1976.

³¹ Article 15(1)(a) of the ICESCR, 1976.

³² ‘International Covenant on Civil and Political Rights’ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

³³ Article 27 of ICCPR, 1976.

³⁴ Article 4 of ICCPR, 1976.

³⁵ Article 26 of ICCPR, 1976.

Despite the absence of direct limitation of the right to culture, Article 27 of ICCPR guarantees women's protection in minority communities.³⁶ Furthermore, it is proposed that states report on any legislation or administrative practices related to membership in minority communities. These practices might constitute an infringement of women's equal rights under the Covenant and on measures envisaged to ensure the equal rights of men and women in the enjoyment of all civil and political rights in the Covenant.³⁷

Likewise, States should report on measures to discharge their responsibilities concerning cultural or religious practices within minority communities that affect women's rights.³⁸ In their reports, States parties should pay attention to the contribution made by women to the cultural life of their communities.³⁹ Similar to ICESCR and UDHR, it is indicated under ICCPR that women also have inherent responsibility to partake in roles of cultural development.⁴⁰ Therefore, these provisions do not view women as passive participants but as having the powers to develop their cultural practices subject to individual rights and capabilities.

The fact that women under international instruments are allowed to take part in cultural development is of great importance because violation and discrimination of women have been dismissed as “cultural or customary”. For the longest time, human rights violations against women, such as those resulting from inter alia, *ukuthwala*, a male primogeniture rule, have been accepted as cultural practices.⁴¹ According to Neuwirth, this indicates that discrimination perpetually allowed cultural practices to be determined and defined by those primarily responsible for such violations.⁴² In the same vein, Msuya states that culture impedes women’s ability to enjoy their individual rights the same way men do.⁴³

³⁶ Article 27 of ICCPR, 1976.

³⁷ Article 3 of ICCPR, 1976.

³⁸ ICCPR General Comment No. 28 (2000) para 32.

³⁹ ICCPR General Comment No. 28 (2000) para 32.

⁴⁰ ICCPR General Comment No. 28 (2000) para 32.

⁴¹ Mubangizi JC ‘A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions’ (2012) 13(3) *Journal of International Women's Studies* 33-48.

⁴² Neuwirth J ‘Bringing Women's Rights Back into the Human Rights Movement’ available at <https://www.carnegiecouncil.org> (accessed 5 March 2021).

⁴³ Msuya NH ‘Concept of culture relativism and women’s rights in Sub-Saharan Africa’ (2019) 54 *Journal of Asian and African Studies* 1145-58.

In cultural practices, such as *ukuthwala*, payments of dowry, female genital mutilation, and widows' inheritance perpetuate the violation of women's rights.⁴⁴ Therefore, women under international law forming part of the group in developing and redefining culture should be applauded. These provisions may be used to address violations that disproportionately affect women in the culture.⁴⁵ Thus, since women are the agents who carry, through practice, most of these cultures from generations to generations, they must be actively involved in determining the relevance of the cultures affecting and violating their human individual rights.

The UDHR, ICESCR and ICCPR leave no doubt that these instruments were intended to cater for men and women equally and have provisions that may be used to address women's rights violations resulting from cultural practices such as *ukuzila* custom. However, the persistent abuse, marginalisation, oppression and discrimination of women led to the formation of specific women's rights instruments such as the Declaration on the Elimination of Discrimination Against Women (DEDAW),⁴⁶ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Declaration on the Elimination of Violence Against Women (DEVAW) and many others.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) appears to be the most influential instrument that addresses harmful cultural practices that may violate women's rights. Article 1 of CEDAW clearly outlines what constitutes discrimination.⁴⁷ Article 2(f) of CEDAW requires States parties to "condemn discrimination against women in all its form."⁴⁸ States parties are mandated to do this by taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute

⁴⁴ Msuya NH *Harmful cultural and traditional practices: A roadblock in the implementation of the convention on the elimination of discrimination against women and the Maputo Protocol on women's rights in Tanzania*. (Unpublished PhD Thesis, University of KwaZulu-Natal 2017) 223.

⁴⁵ Neuwirth J 'Bringing Women's Rights Back into the Human Rights Movement' available at <https://www.carnegiecouncil.org> (accessed 5 March 2021).

⁴⁶ CEDAW, 1979.

⁴⁷ Article 1: For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

⁴⁸ Article 2 of CEDAW, 1979.

discrimination against women.⁴⁹ Article 3 obliges States parties to take appropriate measures to ensure the development and advancement of women in cultural fields, among others.⁵⁰

In addition, Article 5(a) provides one of the crucial obligations to States parties in protecting and promoting the right to culture for women. Under this provision, states parties should take all proper actions “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”⁵¹ Likewise, Article 13(c) presents that states parties eliminate discrimination against women to ensure equality between men and women, that they both enjoy and participate in all aspects of cultural life.⁵²

In light of the above provisions, it is safe to state that these substantive provisions of CEDAW have paved the way for States parties to address discriminatory cultural practices affecting women, such as *ukuthwala*, primogeniture rule and genital mutilation. Another important instrument that specifically addresses women’s rights violations is the Beijing Declaration and Platform for Action (BPA),⁵³ adopted in 1995 at the UN’s Fourth World Conference in Beijing.⁵⁴ The Platform includes numerous economic, social and cultural objectives parallel to the economic, social and cultural rights enumerated in the CEDAW Convention and the ICESCR. The BPA instrument is a rallying cry to embed gender equality and women’s rights in every facet of life.⁵⁵ Its objective is to eradicate all hindrances to women’s active participation in private and public spheres to enjoy a full equal share in social, economic, cultural, and political decision-making.⁵⁶

⁴⁹ Article 2 of CEDAW, 1979.

⁵⁰ Article 2 of CEDAW, 1979.

⁵¹ Article 5(a) of CEDAW, 1979.

⁵² Article 13(c) of CEDAW, 1979.

⁵³ Beijing Declaration and Platform for Action is not legally binding. However, every five years, member states are asked to report voluntarily to the United Nations on the progress that they have made towards achieving the goals set out in the Beijing Declaration and Platform for Action. See Beijing Report: South Africa’s First Progress Report, December (1999) Available at https://www.gov.za/sites/default/files/gcis_document/201409/sbeijing990.pdf (accessed 5 May 2021).

⁵⁴ ‘Fourth World Conference on Women, Beijing’ 1995 [NGOs] United Nations Available at <https://www.un.org/womenwatch/daw/beijing/> Retrieved (23 January 2021).

⁵⁵ ‘Fourth World Conference on Women, Beijing’ 1995.

⁵⁶ Chapter 1(1) of ‘Fourth World Conference on Women, Beijing’ 1995.

Moreover, BPA affirms that equality between women and men is a matter of human rights and a condition for social justice.⁵⁷ Chapter II (10) of BPA emphasises women's full and equal participation in political, civil, economic, social and cultural life at the national, regional and international levels.⁵⁸ It further states that “the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.”⁵⁹

Echoing the above provisions in the international women's instruments are specialised regional human rights instruments, namely, the Maputo Protocol⁶⁰ and the SADC Protocol.⁶¹ Article 17 of the Maputo Protocol emphasises the right to education and freedom to participate in cultural life, more so as individual rights.⁶² This right is protected by Article 5, which focuses exclusively on women's protection from harmful practices. The Protocol presents that states parties are required to “eradicate elements in traditional and cultural beliefs, stereotypes, practices which exacerbate violence against women and to end all forms of harmful practices which negatively affect the human rights of women.”⁶³ Similarly, Articles 4 and 21 of SADC Protocol indicate that states parties are obliged to prioritise gender equality in their Constitutions and eradicate harmful practices that negatively affect women's fundamental rights.⁶⁴

Accordingly, the international human rights legal instruments have all pronounced eradicating cultural practices that violate women's rights,⁶⁵ in line with liberal feminism. It is suggested that developing a legal framework to promote women's rights is critical in ensuring that women achieve equal treatment and have equal opportunities as men. South Africa has been very consistent in developing and promoting women's rights.⁶⁶

⁵⁷ ‘Beijing Report: South Africa's First Progress Report, December’ available at https://www.gov.za/sites/default/files/gcis_document/201409/sabeijing990.pdf (accessed on 5 May 2021).

⁵⁸ Chapter II (10) of ‘Fourth World Conference on Women, Beijing’ 1995.

⁵⁹ Chapter II (10) of ‘Fourth World Conference on Women, Beijing’ 1995.

⁶⁰ The Maputo Protocol guarantees women several comprehensive rights including the right to social and political equality with men and the right to control their reproductive health. It requires member states to eliminate all forms of discrimination against women through appropriate legislative and institutional measures. Member states are also required to integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities.

⁶¹ The Southern African Development Community Protocol on Gender and Development (SADC Protocol) was adopted by SADC Community heads of state on 17 August 2008 in Sandton, Gauteng. The SADC Protocol encompasses commitments made in all regional, global and continental instruments for achieving gender equality.

⁶² Article 17 of Maputo Protocol.

⁶³ Article 5 of Maputo Protocol.

⁶⁴ Article 4 of SADC Protocol.

⁶⁵ See CEDAW, 1979; Maputo Protocol, 2003, SADC Protocol, 2008 above.

⁶⁶ See *Shilubana, Shibi, and Bhe* cases above.

Throughout the discussion, it is evident that women's rights focus on expanding the existing scope of the right to culture to be more inclusive and sensitive to gender discrimination and provide solutions to the conflict between women's rights and cultural practices. In addition, it is worth noting that women's rights are not by any means an attack on traditional cultural practices.⁶⁷ Indeed, many forms of cultural distinctiveness offer valuable contributions that preserve the very essence of humanity.⁶⁸ Thus, not all cultural practices are in contention; instead, only harmful practices are.⁶⁹ As generally observed, cultural practices which infringe on women's rights to equality and do not award equal cultural participation between men and women should not be protected under the right to culture.⁷⁰ Regardless of the importance of traditional cultural norms, modern human rights protect all cultures equally and thus is not limited by historical, cultural influences.⁷¹

Therefore, sensitivity to women's issues and customary law is necessary for women's rights to be advanced and upheld and for the rights of customary law adherents to be recognised and developed subject to the Constitution.⁷² Farida, a UN expert in the field of cultural rights, proposes that the paradigm that views culture merely as an obstacle to women's rights should be shifted to the right of women to seek equal enjoyment of cultural rights.⁷³ Traditions and culture should not be obstacles to the realisation of women's rights, but they should be a means of paving the way for the right of women to take part in cultural and traditional life.⁷⁴ This right should include the right not to participate in particular traditions and customs that infringe on human dignity and other rights.⁷⁵

⁶⁷ Kühn B 'Universal Human Rights vs. Traditional Rights' (2009) *Topical Review Digest: Human Rights in Sub-Saharan Africa* 62.

⁶⁸ Kühn B (2009) 62.

⁶⁹ Kühn B (2009) 62.

⁷⁰ Wright C 'Western human rights in a diverse world: Cultural suppression or relativism?' 2013 *E-International Relations* 7.

⁷¹ Wright C 2013 *E-International Relations* 7.

⁷² Venter CM 'The New South African Constitution: Facing the Challenges of Women's Rights and Cultural Rights in Post-Apartheid South Africa' (1995) 21 *Journal of Legislation* 21.

⁷³ Shaheed F 'Women's cultural rights: empowering and transformative' *UN Human Rights Office of the High Commissioner* available at: <https://www.ohchr.org/EN/NewsEvents/Pages/WomenCulturalRights.aspx> (accessed on 06 March 2021).

⁷⁴ Msuya NH 'Concept of Culture Relativism and Women's Rights in Sub-Saharan Africa' (2019) 54 *Journal of Asian and African Studies* 1145-58.

⁷⁵ UN Human Rights Office of the High Commissioner, 2012.

Additionally, Phillips contemplates that few people are driven by culture and argues that bad behaviour mostly constitutes a threat to women's rights.⁷⁶ She further proposes that when men and women equally partake in cultural life and development, it will be easier to identify and remedy harmful cultural practices.⁷⁷ She also argues that the pre-assumption that people's actions, values and attributes are determined by a cultural group should be eradicated.⁷⁸ Women's rights are rights, just like any other rights of human beings.⁷⁹ Thus, women should be protected by all states parties regardless of the political, economic and cultural system in which they live.⁸⁰

In advancing the assertion made by Phillips on disempowering toxic cultural groups, Reidel asserts that cultural rights must be conceptualised as primarily individual rights for numerous reasons.⁸¹ First, she states that cultural groups are essentially composed of individuals that must have the capacity to act within their groups.⁸² This has a positive outcome as only individuals within their groups can be the agents of traditions from one generation to the next. Secondly, she argues that according to most definitions of culture, people draw their identity from culture.⁸³ Thus, the determining and protection of culture must ensure the enhancement and quality of individual life. Reidel highlights that if people relate to culture as individuals, then culture must serve a valuable purpose to their lives and not harm them. Thirdly, she claims that there is no need to compete between the right to culture and individual rights since cultural groups are made up of individuals.⁸⁴ Therefore, if individuals are disregarded and forced into observing harmful traditions because they relate to that cultural group, it will ultimately strengthen the conflict between cultural and individual rights. In any case, individual rights shall prevail.

Lastly, Reidel posits that culture by its very nature is not static; people advance and change from time to time.⁸⁵ Thus, as individuals adapt to new eras of life, they must not be forced into rigid

⁷⁶ Phillips A *Gender and Culture* (2010) 58.

⁷⁷ Phillips A *Gender and Culture* (2010) 58.

⁷⁸ Phillips A *Gender and Culture* (2010) 58.

⁷⁹ Msuya NH (2019) 54 *Journal of Asian and African Studies* 1145-58.

⁸⁰ Msuya NH (2019) 54 *Journal of Asian and African Studies* 1145-58.

⁸¹ Reidel L 'What are Cultural Rights? Protecting Groups with Individual Rights' (2010) 9 *Journal of Human Rights* 65-80.

⁸² Reidel L (2010) 9 *Journal of Human Rights* 65-80.

⁸³ Reidel L (2010) 9 *Journal of Human Rights* 65-80.

⁸⁴ Reidel L (2010) 9 *Journal of Human Rights* 65-80.

⁸⁵ Reidel L (2010) 9 *Journal of Human Rights* 65-80.

cultural practices contrary to their unique adopted lifestyles. Cultural rights cannot be protected by violating and infringing on fundamental rights.⁸⁶

Furthermore, Okin vocalises how culture uses women to preserve harmful and oppressive practices to advance patriarchal power.⁸⁷ Okin claims that one of the challenges in championing group rights for minorities, as provided by ICCPR above, is that cultural groups are treated as monolithic. Little attention is also paid to the substantial variances in power within these groups, especially between men and women.⁸⁸ Therefore, group rights that permit oppressive practices should not be accepted because they are fundamental to minority cultures whose existence may be threatened.⁸⁹ In other words, the preservation and sustainability of minority cultures cannot be done at the expense of individuals' fundamental rights and freedom.

Kymlicka affirms Okin's argument by stating that "group rights are permissible if they help promote justice between ethnocultural groups, but are impermissible if they create or exacerbate gender inequalities within the group"⁹⁰ He further suggests a division of group rights, as internal restrictions and external protections.⁹¹ In terms of 'internal restrictions', he states that it should not be permitted in a liberal nation since they restrict individuals within groups, whereas 'external protection' should shield the group from majority cultural domination.⁹² In summary, these authors seem to be in line with liberal feminism, which claims that cultural practices that violate women's rights must be eradicated.⁹³ In other words, individual rights, according to liberal feminism, are a priority in protecting and advancing women's status in society. According to liberal feminism though, women must be equally afforded cultural right and participation in cultural activities as long as these will be done within the spirit and ambit of promoting and and advancing their individual liberty and rights.

In South Africa, CEDAW and other human rights treaties have been ratified. In responding to the calls from the international and regional women's rights provisions set forth above, the relationship between the right to culture and women's rights under South Africa is provided for in the

⁸⁶ Reidel L (2010) 9 *Journal of Human Rights* 65-80.

⁸⁷ Okin SM *Is multiculturalism bad for women?* (ed) (1999) 3.

⁸⁸ Okin SM *Is multiculturalism bad for women?* (ed) (1999) 3.

⁸⁹ Okin SM *Is multiculturalism bad for women?* (ed) (1999) 7.

⁹⁰ Kymlicka W 'Liberal Complacencies' in Okin SM (ed) *Is Multiculturalism Bad for Women?* (1999) 31-5.

⁹¹ Kymlicka W 'Liberal Complacencies' in Okin SM (ed) *Is Multiculturalism Bad for Women?* (1999)31-5.

⁹² Kymlicka W 'Liberal Complacencies' in Okin SM (ed) *Is Multiculturalism Bad for Women?* (1999) 31-5.

⁹³ See also See CEDAW, 1979; Maputo Protocol, 2003, SADC Protocol, 2008 above.

Constitution. Like the international legal instruments, cultural rights are also guaranteed by the new South African Constitution.⁹⁴ According to s 30 of the Constitution, “everyone has the right to use the language and to participate in the cultural life that they choose.”⁹⁵ However, a responsibility is placed on everyone exercising cultural rights to respect other human rights when they practice it.

Similarly, s 31 of the Constitution “guarantees the right of members of cultural, religious and linguistic communities to enjoy their culture, religion and language and for these purposes, may form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”⁹⁶ These rights are limited in terms of s 30(2) of the South African Constitution as it states that they may not be exercised in a manner inconsistent with any provision of the Bill of Rights.⁹⁷ As discussed in the previous chapter, these rights may also be limited in s 36 of the Constitution.

In the celebrated ground-breaking cases of *Bhe and Others v Magistrate Khayelitsha and Others*⁹⁸, *Shibi and Sithole and Others*⁹⁹, and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*¹⁰⁰, the court dealt with the conflict between gender equality and culture. In these cases, the crux of the matter was inheritance under



⁹⁴ See section 30 of the Constitution of The Republic of South Africa 1996.

⁹⁵ Section 30 of the Constitution of The Republic of South Africa 1996.

⁹⁶ Section 31 of the Constitution of The Republic of South Africa 1996.

⁹⁷ See s 30 (2) of the Constitution of The Republic of South Africa 1996.

⁹⁸ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC).

In this case, the applicant brought an application on behalf of her two minor daughters and on public interest. The applicant and the deceased were not married but have lived together as husband and wife for a period of 12 years and had two daughters. According to the principle of male primogeniture, the widow and her children could not inherit, but a close male relative of the deceased was the one who is supposed to inherit the deceased’s estate. The court held that the primogeniture rule is invalid and unconstitutional as it infringes on equality (section 9 of the Constitution) and human dignity (section 10 of the Constitution) and that it also discriminates against extra marital children (section 2 of The Children’s Act 38 of 2005).

⁹⁹ *Shibi v Sithole* 2005 (1) SA 580 (CC).

The applicant was a sister whose brother died intestate. The deceased did not have any children, was not married nor had he any partner. By the time of his death, his closest male relative was his cousin whom according to primogeniture principle, was the one who must inherit. The applicant argued that section 23 of the Black Administration of Estate Act 66 of 1965 is inconsistent with equality and human dignity rights. The court concluded that the violation of equality and human dignity caused by section 23 is very serious and that it cannot be justified and was to be struck down.

¹⁰⁰ *SA Human Rights Commissioner v President of RSA* 2005 (1) SA BCLR 1 (CC).

There were two main issues to be decided. The first was the constitutional validity of section 23 of the BAA and the second concerned the constitutional validity of the principle of primogeniture in the context of customary law of succession. In this case the rule of primogeniture was attacked as being unconstitutional and in conflict with the interests of women and children.

primogeniture rule, whereby the male heir sought to inherit the estates in case the father dies. This rule undermined the constitutional right to equality of women.

Langa DCJ then stated as follows:

Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In a similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights.¹⁰¹

As discussed in chapter three, the right to equality and human dignity are the most important rights in the Constitution. Consequently, when the rights to equality and human dignity are violated, it is almost impossible for one to enjoy other rights. The male primogeniture rule tampered with these rights when discriminating against women based on gender and excluding them from inheriting the deceased estates. Consequently, the court declared this rule to be unconstitutional.¹⁰² *Ukuzila*, as explained in previous chapters, has not been challenged and tested before the court. However, its descriptive and practical nature, mainly gendered, indicates that it would not withstand the court's scrutiny. This is because it is gendered, as it differentiates between women and men without any justification. This differentiation further led into violation of widow's rights as explained above.

Furthermore, the South African constitutional and legislative provisions also play a significant role in reinforcing and restating customary law provisions relating to women's position in traditional leadership.¹⁰³ The Constitution of South Africa recognises the institution of traditional leaders. Section 211 (1) of the Constitution presents that "the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution."¹⁰⁴ Since the Constitution of South Africa prohibits discrimination on sex and gender,¹⁰⁵ women's rights are protected by both the Constitution and by customary law. Any customary law practice, including one that involves traditional leadership that discriminates against women, cannot withstand

¹⁰¹ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC) para 41.

¹⁰² See *Bhe case* above.

¹⁰³ Makanatsa M 'Customary Law and its Implications on the Enjoyment of Human Rights by Women in Southern Africa: A Focus on Botswana, Lesotho and South Africa' (2006) *SADC Lawyers' Association* 28-30.

¹⁰⁴ Section 211(1) of the Constitution of The Republic of South Africa 1996.

¹⁰⁵ See section 9(3) of the Constitution of The Republic of South Africa 1996.

constitutional scrutiny.¹⁰⁶ Such is the case of *Shilubana*, whereby the Constitutional Court emphasised the position that discrimination against women based on customary law has no place in a constitutional democracy.¹⁰⁷ Although in South Africa, courts are obligated to apply customary law where applicable, it must be applied subject to the Constitution or any other legislation dealing with customary law.¹⁰⁸ In other words, customary law is applicable only when it conforms to the dictates of the Constitution, and any customary law that tramples upon any provisions of the Bill of Rights or the Constitution is deemed invalid.

The above cases have a golden thread: the exclusion of discrimination against women in customary practices. This exclusion and discrimination violate women's rights based on gender, which is prohibited by the Constitution, as discussed in chapter three.¹⁰⁹ The South African constitution endows every individual the right to equality, human dignity, the right to culture and many others.¹¹⁰ Some of these rights have clauses attached, specifying that no one, either by a state or a private person, might be discriminated against on many grounds, including sex and gender.¹¹¹

Additionally, the South African Human Rights Commission (SAHRC) was established through the Constitution to assist those who might have been discriminated against or those whose rights have been in any way violated. Section 184(1)¹¹² of the Constitution encapsulates the functions of the SAHRC by stipulating its mandate,¹¹³ while section 184(2) sets out its powers.¹¹⁴ It has established a Commission on Gender Equality (CGE) to act as a supervisory body to ensure that women are not discriminated against and have access to their rights.¹¹⁵ Its supervisory function is similar to SADC's; the difference is that CGE is for domestic use only.

¹⁰⁶ Mkanatsa M 'Customary Law and its Implications on the Enjoyment of Human Rights by Women in Southern Africa: A Focus on Botswana, Lesotho and South Africa' (2006) *SADC Lawyers' Association* 30.

¹⁰⁷ *Shilubana and Ors vs. Nwamitwa and Ors* CCT 03/07 [2008] ZACC 9.

¹⁰⁸ Section 211 (3) of the Constitution of Republic of South Africa.

¹⁰⁹ Section 9(3) of the Constitution of Republic of South Africa.

¹¹⁰ See Chapter two of the Constitution of the Republic of South Africa, 1996.

¹¹¹ See Section 9(3) of the Constitution of the Republic of South Africa, 1996.

¹¹² Section 184(1) of the Constitution of the Republic of South Africa, 1996.

¹¹³ '(a) Promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic'.

¹¹⁴ 'To investigate, monitor and evaluate, research, educate and secure appropriate redress where there are human rights violations.'

¹¹⁵ The mission of the Commission for Gender Equality (CGE) is 'to promote respect for gender equality and the protection, development and attainment of gender equality. The CGE advances, promotes and protects gender equality in South Africa through undertaking research, public education, policy development, legislative initiatives, effective monitoring and litigation' .

South African Human Rights Commission (SAHRC) has an obligation constitutionally enshrined to “promote respect for human rights and ensure the development and attainment of *all* human rights.”¹¹⁶ In the *Bhe case*, the SAHRC acted as a litigant in unity with the Women’s Legal Centre Trust. They sought a relief that the principle of male primogeniture rule under the South African customary law of intestate succession be declared unconstitutional.¹¹⁷ Although the SAHRC is not exclusively concerned about women’s rights, it has played a massive role in promoting and protecting women’s rights.

The discussion of these cases has shown that even in South Africa, where there is a conflict of rights, such as women's rights and cultural rights, women's rights prevail. The connection between this study of *ukuzila* and the above-discussed cases is a cultural practice that violates women's fundamental rights, including the right to equality and human dignity. Therefore, if the cultural practice of having a male heir to inherit everything were declared unconstitutional, the *ukuzila* custom would not stand constitutional scrutiny. As pointed out earlier, *ukuzila* may be protected under cultural rights in section 30 of the Constitution of South Africa.¹¹⁸ However, section 31 of the Constitution of South Africa imposes internal limitations for any cultural practices that violate the Bill of Rights.¹¹⁹

4.3 Alignment of *ukuzila* custom with the constitutional values of gender equality

This section discusses the use of *Harksen v Lane No & Others*,¹²⁰ also known as Harken’s test, to determine if *ukuzila* could be aligned with constitutional values of gender equality.¹²⁰ In the case of *Harksen v Lane*, the entire test for equality and the circumstances under which different treatment may constitute unfair discrimination were pronounced by the Constitutional court.¹²¹

In this case, the Constitutional Court laid down the test for determining whether or not a specific act or legislative provision is unconstitutional for compliance with the equality clause.¹²²

¹¹⁶ Constitution of the Republic of South Africa, 1996.

¹¹⁷ *Bhe and Others v Khayelitsha Magistrate and Others; Shibi v Sithole and Others* 2005 (1) BCLR 1 (CC)

¹¹⁸ See s30 of the Constitution of the Republic of South Africa, 1996.

¹¹⁹ See s31 of the Constitution of the Republic of South Africa, 1996.

¹²⁰ *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC) para 53.

¹²¹ *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC) para 52.

¹²² *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC) para 53.

In this regard, the Court adopted a three-stage approach:

- a) It will first seek to establish discrimination.
- b) Secondly, once discrimination is established, the unfairness thereof would have to be established.
- c) Thirdly, even if the discrimination is unfair, the next step will seek to justify it in terms of the limitation's clause.¹²³

4.3.1 Establishment of discrimination

In establishing discrimination, one may question whether the act or legislative provision differentiates or distinguishes between people or categories of people. In determining this, one has to look at whether the measures taken make a difference in its application between people or groups of people.¹²⁴ Suppose it does, then there must be a rational connection between the differentiation and a legitimate government purpose.¹²⁵ In the absence of a logical connection, the differentiation falls foul of section 9(1) of the Constitution, and the measure is unconstitutional.¹²⁶

Applying the above test to the practice of *ukuzila* highlighted in the discussion that the practice is gendered and thus differentiates between widows and widowers.¹²⁷

For example, only widows are required to do the sitting and to wear black garments but not widowers; only widows are required to mourn for a more extended period, while the expectation is not similar for widowers. In this stage, differentiation alone does not amount to gender inequality. However, the differential practice of *ukuzila* between widows and widowers is not justified or reasoned.

Therefore, the rational connection and justification of why widows are treated differently from widowers fall short under section 9 of the Constitution, as this differentiation is based on gender. But the question is, does this gender differentiation exhibited by *ukuzila* amount to unfair discrimination?

¹²³ *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC) para 53.

¹²⁴ *Prinsloo v Van der Linde* (1997) 6 CLR 759 (CC) para 25.

¹²⁵ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) para 55.

¹²⁶ *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC) para 42 and 44.

¹²⁷ See *Daber B* (2003) 49.

4.3.2 Establishment of unfairness

In the *Harksen* case, the court held that the provision in the Interim Constitution¹²⁸ envisaged two categories of differentiation. The first is differentiation on one of the specified grounds, and the second is differentiation because it is analogous to the specified grounds. If the differentiation is based on one of the grounds listed in s 9(3), such as race, gender, sex or pregnancy, discrimination will be established and is called direct discrimination. Suppose the differentiation is based on grounds not listed in s 9(3), the court will examine whether or not they have to do with attributes and characteristics, which, when manipulated, have the potential to degrade or dehumanise people.¹²⁹ These grounds are often based on biological attributes or characteristics outside of a person's control or ways people associate, express, or practice religion or culture. Thus, s 9(3) should prohibit the state or anyone from discriminating directly or indirectly.¹³⁰ If it is found to have been on a specified ground, then unfairness will be presumed.¹³¹ If found on an unspecified ground, unfairness will have to be established by the complainant.¹³² The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in their situation.¹³³ In determining whether or not the discrimination is unfair, the courts observe its effect on the complainant and others in the case. For instance, they look at the persons affected and whether or not they belong to a vulnerable group, which has suffered from unfair discrimination in the past.¹³⁴ Coming back to the focus of this thesis, the discussion of the practice of *ukuzila* in chapter three shows that the practice differentiate in terms of gender.¹³⁵ Since gender is one of the listed grounds under s 9(3), the unfairness of this differentiation, according to the above test, has been established. Moreover, in chapter two, liberal feminism claimed that women belong to the vulnerable group that was and still oppressed and discriminated against based on their gender for the longest time.¹³⁶ Thus, the unfairness of differentiation brought by *ukuzila* has also been established in terms of the

¹²⁸ *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) at para 31 & *Harksen v Lane* (1997) 11 BCLR 1489 (CC) para 46.

¹²⁹ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) para 53.

¹³⁰ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) para 53.

¹³¹ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) para 53.

¹³² *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) para 53.

¹³³ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) para 53.

¹³⁴ *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) para 41.

¹³⁵ See Daber B (2003) 49.

¹³⁶ Hassim S 'Voices, hierarchies and spaces: reconfiguring the women's movement in democratic South Africa' (2005) 32 *Politikon: South African Journal of Political Studies* 175-93.

historical oppression of women. This unfair differentiation is discriminatory as widows are often described as bearers of ‘bad luck’ or the ‘black cloud’ is hanging over them. The black garment prescribed for them stigmatises and desexualises them.¹³⁷ In other words, their status as women is degraded, and that attracts both direct and indirect unfair discrimination. Nevertheless, the question remains whether continuing the practice of *ukuzila* could justify the limitation of the right to equality in terms of s 36 of the Constitution.¹³⁸

4.3.3 Establishment of justification in terms of the limitations clause

After establishing and concluding that an act or legislative provision amounts to unfair discrimination, a determination would have to be made about whether the provision can be justified under the limitations clause.¹³⁹ As stated in chapter three, s 36 allows the limitation of constitutional rights under certain conditions.¹⁴⁰ In other words, an act or a provision may infringe or violate the right to equality but still be constitutional if it meets the threshold set out under s 36 of the South African Constitution.

Furthermore, to pass constitutional muster, the person wanting to uphold the discriminatory section must prove that the legislative provision, which discriminates unfairly, is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹⁴¹ The conflict between human rights and cultural rights is discussed in the previous section. Through various international and national human rights framework provisions, cultural rights have internal limitations. For example, the South African Constitution, s 30 and 31, state that the practice and enjoyment of culture may not be done in a manner that is inconsistent with any of the provisions in the Bill of Rights.¹⁴² In other words, the Constitution prohibits any individual’s absolute freedom in any way, to unfairly justify the infringement of any right that is guaranteed in the Constitution. Therefore, *ukuzila* may not overstep the right to equality because under s 36, limiting

¹³⁷ See Ngqangweni H (2013)136.

¹³⁸ See s36 of the Constitution of the Republic of South Africa, 1996.

¹³⁹ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 53.

¹⁴⁰ Section 36 of the Constitution of the Republic of South Africa, 1996.

These include: (i) the nature of the right (ii) the importance of the purpose of the limitation, (iii) the nature and extent of the limitation, (iv) the relationship between the limitation and its purpose and any less restrictive means to achieve the purpose.

¹⁴¹ Tameshnie D & Rashjee B ‘The Constitutional Court’s approach to equality’ (2003) 44 *Codicillus* 92-100.

¹⁴² Section 30 & 31 of the Constitution of the Republic of South Africa, 1996.

the right to equality in order to practice *ukuzila* cannot be justified both in terms of s36 and through the *Harksen's case* test as discussed above.¹⁴³

Regarding stage one of Harksen's test, the fact that *ukuzila* differentiates between widows and widowers alone does not necessarily amount to discrimination. However, stage two is the key. First, it establishes that *ukuzila* constitutes discriminatory rituals enforced on widows but not widowers; thus, it amounts to unfair discrimination based on gender. Secondly, it establishes that women belong to the 'vulnerable' group that have historically faced discrimination, oppression, and unequal treatment. Thirdly, it also shows that the continued practice of *ukuzila* negatively impacts the lives of those affected by it, in this case, widows. Thus, based on this test, *ukuzila* fails to be compatible with the right to gender equality.

Notwithstanding the *Harksen* test, several other cases have been decided, where (gender) equality is regarded emphatically as the most crucial right in the constitution. In the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*, Ngcobo J claimed that:

The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one "in which there is equality between men and women and people of all races."¹⁴⁴

In other words, this commitment to achieve equality is shown by s 9 of the Constitution. As explained in the *Harksen* test, *ukuzila* discriminates against women on one of many grounds listed under section 9(3).¹⁴⁵ Therefore, the continued practice of *ukuzila* is undermining the constitutional mandate to achieve gender equality between men and women.

Furthermore, Ackermann J made a point in *National Coalition for Gay and Lesbian Equality v Minister of Justice* that:

It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are

¹⁴³ See s36 of the Constitution of South Africa, 1996.

¹⁴⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environment and Others* 2004 7 BCLR 687 (CC) para 74.

¹⁴⁵ *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 53.

eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.¹⁴⁶

The point made by the court is befitting to what transpires to widows as they assume widowhood status. As argued in chapter three by scholars such as Cebekhulu, the struggle of widows does not end after a year of mourning.¹⁴⁷ Still, the status and name tag ‘*umfelokazi*’ stigmatises them and makes them less of a woman.¹⁴⁸ Therefore the negative impact of this discrimination caused by *ukuzila* will indefinitely continue unless action is taken. In this case, *ukuzila* may not be reconciled with the Bill of Rights, as its continuation would mean limiting fundamental rights such as right to equality; right to human dignity; right to freedom of religion, belief and opinion.

In addition to Ackermann J’s assertion above, Langa DCJ in the *Bhe case* described the intrinsic interface between the constitutional value of equality and the right to equality:

The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. Not only is the achievement of equality one of the founding values of the Constitution, [but] section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past.¹⁴⁹

Similarly, Mahomed DP in *Fraser v Children’s Court, Pretoria North*, referred to the preamble of the Constitution and the constitutional value of equality in commenting that:

There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble, it is declared that there is a “. . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.”¹⁵⁰

The above cases stand out from how they emphatically show the significance of the right to equality, especially to women, since they have suffered unfair gender discrimination in the past. Most importantly, the court has reiterated the connection between the right to equality and the

¹⁴⁶ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* (1998) (6) BCLR 726 para 60.

¹⁴⁷ See Cebekhulu LM (2015)5.

¹⁴⁸ See Cebekhulu LM (2015)5.

¹⁴⁹ *Bhe v Magistrate Khayelitsha* 2005(1) SA 580 (CC) para 50.

¹⁵⁰ *Fraser v Children’s Court Pretoria North and Others* (CCT31/96) [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) para 20.

enjoyment and exercise of other rights as enshrined in the Bill of Rights. It is an indication that the Constitutional Court has been more consistent in the interpretation of section 9(2)¹⁵¹ of the Constitution, particularly within the context of the relationship between cultural rights and the right to equality. It is because this section states that equality *inter alia* entails full enjoyment of other rights.¹⁵² In addition, special attention is given to groups of people or persons who have suffered past injustices, including women.¹⁵³ Therefore, using the lens of liberal feminism, the nature of *ukuzila* and its practice does not allow for the full enjoyment of other constitutional rights and does not advance women's status in society; it must be prohibited and eradicated. Based on the *Harksen* case's test, *ukuzila* and the gender equality rights are in conflict. And assuming that the right to culture has pure intention, *ukuzila* does not seem to have a clause in the Constitution to hold on for its protection. Thus, liberal feminism would suggest or recommend that *ukuzila* be practised in the same manner by both women and men. At least if both men and women practice *ukuzila* the same way, s 6 of RCMA¹⁵⁴ will be complied with since the status between men and women under customary law would have remained equal.

For example, the sitting and covering of women with blankets, wearing a black garment, bathing in the rivers and prohibiting sexual cleansing should be abolished, as there is no nexus between these rituals and the healing process. Thus, s 9 of the Constitution would not be violated together with any other rights, because the practice would not be associated with advancing gender discrimination against women. Therefore, both widows and widowers would be subjected to the practice or process other than *ukuzila*, that will deal with grief and their healing process without any infringement of anyone's constitutional rights.

Furthermore, liberal feminism also proposes that a solution to address gender inequality is through legal reform.¹⁵⁵ Women experienced *de jure* discrimination, meaning legal-based discrimination,

¹⁵¹ See s 9(2) of the Constitution of the Republic of South Africa 1996. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

¹⁵² See s 9(2) of the Constitution of the Republic of South Africa, 1996

¹⁵³ See s 9(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁴ See s 6 of Recognition of Customary Marriages Act 120 of 2000.

¹⁵⁵ Enyew BE & Alemeneh GM 'Liberal feminism: Assessing its compatibility and applicability in Ethiopia context' (2018) 10 *International Journal of Sociology And Anthropology* 59-64.

which was very serious in human rights violation.¹⁵⁶ In the move to promote and achieve gender equality proposed by liberal feminism, South Africa has ratified different international human rights instruments to protect, promote, and fulfil human rights. For example, in the section above, various provisions of CEDAW that address harmful practices which violate women's rights were outlined. As stated previously, Article 2(f) of CEDAW requires states parties to condemn all forms of discrimination against women and enact laws and policies that modify or abolish customary discriminatory practices.¹⁵⁷ It is in line with the South African Constitution, which also guarantees everyone the right to equality under s 9 of the Constitution, including not being discriminated against based on gender.

Moreover, through the liberal feminism lens, the legal reform to rescue women from all forms of discrimination and oppression has made it possible to filter harmful cultural practices. It has been achieved by applying the Constitution, legislation and court judgements discussed in the above sections. Therefore, the legal reform through the lens of liberal feminism can transform and align *ukuzila* with the new constitutional dispensation and enact laws that will prohibit further practices of harmful customs such as *ukuzila* custom.

4.4 Conclusion

This chapter has shown through liberal feminism that the individual rights of women should take precedence in situations where there is a conflict or when it is clear that the cultural practice is incompatible with women's rights.¹⁵⁸ South African Constitutional Court has also played a massive role in elevating and advancing women's status to achieve gender equality in cultural practices that undermined the right to equality. It is evident in various groundbreaking Constitutional Court decisions, as discussed previously.¹⁵⁹

The relationship between universal human rights, women's rights and the right to culture explicitly highlights that women have a right to partake in cultural life and participate in cultural development.¹⁶⁰ Various provisions mentioned above have also emphasised that women may enjoy

¹⁵⁶ Enyew BE & Alemeneh GM 'Liberal feminism: Assessing its compatibility and applicability in Ethiopia context' (2018) 10 *International Journal of Sociology And Anthropology* 59-64.

¹⁵⁷ See Article 2 (f) CEDAW.

¹⁵⁸ See UDHR, Constitution of the Republic of South Africa above.

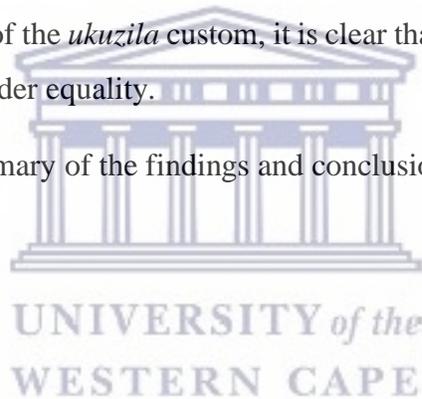
¹⁵⁹ See *Shibi, Bhe, Shilubana* above.

¹⁶⁰ See UDHR, 1948; ICESCR, 1976 and the Constitution of the Republic of South Africa, 1996 above.

this right as individuals or in association with others.¹⁶¹ However, on the protection and promotion of women's fundamental rights, the right to culture is limited and may not be invoked if it tramples other fundamental rights.¹⁶² In adopting liberal feminism to use legal reform to advance and liberate women, the attempt to align *ukuzila* custom with constitutional values of gender equality using *Harksen's case* test, has failed. It is because the *ukuzila* custom is founded on gender inequality and an absence of a rational link between its gendered nature and purpose.

Furthermore, applying the limitations clause under s 36 of the Constitution could not save the *ukuzila* custom by permitting the limitation of gender equality right due to the hierarchy of importance between equality rights and cultural rights. Additionally, the right to equality is also safeguarded by the internal limitations clause of s 31 (2) of the Constitution, which presents that no one may practice culture in a manner inconsistent with the Bill of Rights.¹⁶³ Considering the above discussion and the nature of the *ukuzila* custom, it is clear that the practice cannot be aligned with constitutional values of gender equality.

The next chapter presents a summary of the findings and conclusion.



¹⁶¹ See ICCPR, 1976 and ICESCR, 1976 above.

¹⁶² See UDHR, 1948; ICESCR, 1976 and the Constitution of the Republic of South Africa, 1996 above.

¹⁶³ See section 31(2) of the Constitution of the Republic of South Africa, 1996.

CHAPTER FIVE

SUMMARY OF FINDINGS AND CONCLUSION

5.1 Introduction

This study sought to investigate *ukuzila* practice under the new South African constitutional dispensation using a liberal feminism approach. Two pivotal questions steered this study: first, how does the *ukuzila* custom infringe on women's constitutional rights? Secondly, how can *ukuzila* custom be aligned with the constitutional value of gender equality?

This chapter presents a summary of findings of the *ukuzila* cultural practice. The summary of findings is divided into six sub-topics: first, the varying purposes of *ukuzila*, secondly, marking of widows using a black garment, thirdly, modern women in public spheres, fourthly potential gender-based violence against widows, fifth, health-related issues, lastly, exclusion of women from cultural development, finally, the chapter provides the concluding remarks.

5.2 Summary of findings

5.2.1 The varying purposes of *ukuzila*

The current research identified varying purposes of *ukuzila* practice: the first is public display to get support from community members; the second purpose is to honour and respect the dead, showing love and loyalty to them; and the third is to show loyalty to the family or cultural group by obeying their instruction. In addition, there were common threads that emerged from the purposes of *ukuzila*. The first is that all these purposes stem from the same harmful, discriminatory and derogatory rituals. The second thread is that most of these rituals violate widows' rights, specifically the right to equality, human dignity, freedom of expression, and freedom of movement. The third is that widows' feelings are disregarded, despite the argument that the practice is therapeutic to widows and a healing process to them.

These findings align with Manyedi, Koen and Greeff's, who echoed that loss causes anxiety and rituals such as *ukuzila* aggravate depression and stress due to inter alia, isolation, restriction, ill-treatment, etc.¹

¹ See Manyedi ME, Koen MP & Greeff M 2003 8 *Health South Africa, Gesondheid*, 69–87 & Somhlaba NZ & Wait JW (2009) 196-210.

Throughout this research, it was evident that the *ukuzila* practice violates two significant rights: the right to equality and the right to human dignity. The enjoyment of other rights, such as the right to freedom and security of a person and right to religion, belief and opinion, right to freedom of movement and residence, was rendered impossible because of the violation. In terms of the right to equality, it appeared that widows are treated differently than widowers. The issue is that this treatment seems to be gendered, which leads to gender inequality. Similarly, wearing black clothes, being secluded, and being stigmatised, among other rituals, violate the right to human dignity.

Extant literature proves that liberal feminism has been robust in arguing that women must be liberated and not only treated equally as men but afforded the same opportunities for them to flourish. In chapter three, the discussion on the right to equality highlighted that ‘treated equally’ does not mean ‘equally’ in formal equality, but substantive equality. Therefore, through the lens of liberal feminism, substantive equality would mean prioritising, without any compromises, the right of widows, even if it means giving them more preferences over widowers.

The findings of this study are an extension of the existing literature. For example, studies conducted by Cebekhulu and Ndlovu also revealed the magnitude of oppression and discrimination caused by the *ukuzila* cultural practice.² They echo that women in rural areas lack understanding of human rights; hence they face these challenges.³ The liberal feminism theory adopted as a framework for this study argued that women's liberation requires meaningful education that will challenge gender-based traditions.⁴ Liberal feminism proposes that even the schools' stated and hidden curricula must be designed to promote equality between boys and girls, and by extension, men and women.⁵ Liberal feminism also argued that men and women can ‘reason’; thus, they must be treated equally.⁶ Therefore, these efforts and pragmatic solutions proposed by liberal feminism can ensure that the gap in understanding human rights among women is bridged. Moreover, equality can be achieved, by enabling women to participate in cultural development and through education in order to ensure their understanding of their human rights as provided by various legal instruments.

² See Ndlovu (2013) & Cebekhulu LM (2015).

³ See Ndlovu and Cebekhulu above.

⁴ See Wollstonecraft M (reis 2018) 50 above.

⁵ See Monroe J A ‘A Feminist Vindication of Mary Wollstonecraft’ (1987) 8 *IJL Studies* 143-52.

⁶ See Monroe J A (1987) 144.

5.2.2 Marking of widows using a black garment

This research found that practices that discriminate against women are regarded as ‘culture’. The assertion by scholars on the significance of wearing a black garment is misplaced, as it covers the discrimination of widows.⁷ The widow’s new status often leads to deprivation of certain rights such as the right to property, and loss of social status, marginalisation, suffering various forms of discrimination and stigmatisation.⁸ The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is apparent on what constitutes discrimination.⁹ According to CEDAW’s provision, widows wearing a black garment is a form of discrimination because it impairs widows from enjoying and exercising their fundamental rights.¹⁰ This discrimination is also a result of gender inequality and the violation of human dignity rights in terms of the Constitution of South Africa.¹¹ Ngqangweni points out that this public display can be detrimental to widows’ safety¹² since these garments represent their status, leading to stigmatisation.¹³

Moreover, the visibility of widows has become dangerous due to social and contextual factors.¹⁴ Therefore, marking widows by the colour of their garments makes them a target to violent crimes; this is a problem currently in South Africa since violence against women has increased.¹⁵ Hence, the Maputo Protocol suggests that all elements of cultural practice that draw violence towards women must be eradicated.¹⁶ Similarly, ICESCR and CEDAW state categorically that any practice that proves to be harmful, oppressive, and discriminatory must be eliminated.¹⁷ Wearing a black garment is harmful to widows, as explained by Ngqangweni.¹⁸ It is discriminatory since only widows are expected to wear black garments and not widowers, and oppressive because it hinders widows from enjoying their fundamental rights. These findings partly resonate with Ndlovu’s study, which revealed that the community of KwaNyuswa and church leaders concur that widows

⁷ See Tasie, Makatu, Ngubane, Walsh & McGoldrick in chapter three.

⁸ See Akol G (2011) above.

⁹ See CEDAW Article 1(1).

¹⁰ See CEDAW Article 1(1).

¹¹ See s9 &10 of the Constitution of the Republic of South Africa, 1996.

¹² Ngqangweni H 2013 6.

¹³ See Ngqangweni H (2013) 191.

¹⁴ See Guzana NV (2004) above.

¹⁵ See Guzana NV (2004) above.

¹⁶ See Article 5 of Maputo Protocol.

¹⁷ See ICESCR and Art. 13(c) of CEDAW.

¹⁸ See Ngqangweni H (2013) 191 above.

are treated differently from widowers. In other words, they confirmed that there is a differentiation between widows and widowers, which leads to gender discrimination. Additionally, it has not been established that wearing a black garment has helped widows through their mourning journey. The recommendation is that marking of widows be prohibited and eradicated since it goes against international and domestic human rights provisions that seek to protect women's interests.

5.2.3 Modern women in public spheres

This study also found a shift in the practice of *ukuzila* between rural areas and urban townships. Ngubane proclaimed that most Zulu people could not perform their traditional customs due to the nature of their environment.¹⁹ For instance, women are now involved in many circles of life, making it challenging for them to observe the rituals of *ukuzila*. Women who are employed may not have time to follow most practices.²⁰

Furthermore, the period of *ukuzila* clashes with the conditional bereavement leave, which gives an allowance of few days, and soon after the funeral, a widow is expected to report back to work.²¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Beijing Declaration and Platform for Action continue to rally for women to participate equally in economic, social and cultural developments.²² In the previous chapter, these instruments suggested that all practices that hinder women from actively participating in private and public spheres such as home and work must be eradicated.²³

Moreover, equal pay for equal work and equal educational and professional opportunities are among the significant attributes of liberal feminism to drive equality between men and women.²⁴ Consequently, women hold esteemed positions in their careers and communities; a custom that harms this and takes them away for a year may negatively affect their income and reputation. Thus, these elements of *ukuzila* rituals clash with the above provisions as it potentially contributes to the factors that curtail women from advancing in their respective careers. Therefore, the restriction of widows' movement, the seclusion of widows from the community, and wearing black garments

¹⁹ See Ngubane S (2005) 3 *Indilinga-African Journal of Indigenous Knowledge Systems* 171-77.

²⁰ See Setsiba THS (2012) 35.

²¹ See Shange LO (2009) 77.

²² See ICESCR and Beijing Declaration and Platform for Action above.

²³ See ICESCR and Beijing Declaration and Platform for Action above.

²⁴ See Ghorfati A & Medini R (2015) 9.

for a year is not feasible anymore. Also, it goes against the international human rights standards that seek to protect and promote women's rights, as explained in the previous chapters. Thus, the price to pay for observing the *ukuzila* practice is too high and is not worth it, since it would negatively impact the widow's socio-economic status.

5.2.4 Potential gender-based violence against widows

In the Policy Health Watch news, Adepoju shares some shocking revelations about women abuse in Africa, particularly in South Africa during the Covid-19 lockdown in 2020:

One leader that has spoken up recently was South African President Cyril Ramaphosa, a [powerful political] voice, as he is also the head of the African Union. Speaking to the media last week, he blamed the reopening of liquor stores as lockdown measures eased for a spate of attacks on women in that country. Those included a pregnant woman who was found hanging from a tree, another lady who was stabbed, and another woman whose body was later found in a Soweto township.

South African campaigners note that, in fact, violence against women shot up from the moment the lockdowns began. The police force's gender-based violence hotline received 2,300 calls in the first five days – nearly three times the rate prior to lockdown. Even so, Ramaphosa's remarks were significant as this represented one of the few instances when an African Head of State has spoken out forcefully on the issue.²⁵

The above is a reality in South Africa today, that women and children are not safe anywhere in their societies anymore, even in their private homes. The Maputo Protocol calls for states parties to “eradicate all harmful cultural practices which exacerbate violence against women and to end all forms of harmful practices which negatively affect the human rights of women.”²⁶ Bathing in the river early in the mornings and evenings to wash away a ‘bad spirit’ is one of the rituals that potentially put widows in a very compromising and vulnerable position because widows may be raped and assaulted during the performance of this ritual. The quote above stipulating the facts on the state of women's safety in South Africa makes it harder for widows to observe the ritual of bathing in the river. And besides there is no connection between healing and this ritual. Therefore, it is just an act that seek to humiliate and degrade widows.

²⁵ Adepoju P ‘Gender-based violence – The “shadow pandemic” of COVID-19’ *Health policy watch* 26 June 2020 available at <https://healthpolicy-watch.news/75409-2/> (accessed on 30 October 2020).

“While a face mask could provide some protection against COVID-19, the lives of many women in Africa, and elsewhere, are at the mercy of their abusers.”

²⁶ See Article 5 of Maputo Protocol above.

Furthermore, the ritual is contradictory because honouring this ritual would automatically mean that the widow believes that her late husband is a ‘bad spirit’. In addition, it contradicts those who observe *ukuzila* based on love and honouring their loved ones.²⁷ One cannot claim to love and honour their loved one while cleaning themselves of their ‘bad spirit’ daily for a year. Thus, the fact that only widows are expected to bathe in the river and not widowers violates equality rights based on gender.²⁸ It is worth noting that couples living and married under the customary law are deemed equal, which means if the wife passes, she deserves the same courtesy the husband is afforded even after death.

5.2.5 Health-related issues

Ukuzila practice has health and safety-related issues.²⁹ Manyedi assert that the isolation of widows resulted in stress which is informed by the cultural belief that the widow is polluted with the ‘curse of death’, thus stigmatising her.³⁰ This exclusion leaves the widow ever vulnerable to the sudden unexpected occurrence of painful reminders of the loss.³¹ As mentioned above, bathing in the river, especially during the cold season, may cause sickness to widows. Additionally, as previously mentioned, there is no evidence that bathing in the river supports the widow and facilitates healing.

There is no privacy and security in the public river, meaning this ritual violates a person's right to privacy, bodily integrity, and security.³² Thus, the practice does not serve the purpose of ‘providing support’ to widows or any form of healing. The importance of *ukuzila* discussed in chapter three is not reflected in any of these rituals. These rituals not only violate widows’ rights but are no longer enforceable in the current constitutional dispensation. Therefore, since these rituals are the core of *ukuzila*, they make the practice fail to pass the Constitutional test. While it is argued that customs or cultures are not static, *ukuzila* seem to be rigid and static, and unfortunately, through a series of both statutory and common law tests it cannot be preserved.

²⁷ See Randall K ‘The importance of rituals in bereavement’ (2004) available at http://willowhouse.org/news_old/springs04.htm/ (accessed- 25-November-2020).

²⁸ See s 9 of the Constitution of the Republic of South Africa, 1996 above.

²⁹ See Manyedi ME, Koen MP & Greeff M (2003) 69–87 above.

³⁰ Manyedi ME, Koen MP & Greeff M (2003) 69–87.

³¹ Shear MK ‘Grief and mourning gone awry: pathway and course of complicated grief’ (2012) 14 *Dialogues in clinical neuroscience* 119–28.

³² See s 12 of the Constitution of the Republic of South Africa, 1996.

5.2.6 Exclusion of widows from cultural development

The section above shows that the *ukuzila* custom presents multitudes of concerns and challenges to widows. Chapter three stated that *ukuzila* is mainly enforced by family members and cultural groups to widows.³³ Regarding the ICESCR, ICCPR, Maputo Protocol and the South African Constitution, a person may choose to enjoy culture as an individual or in association with others.³⁴ Thus, the coercion of women to intensively practice *ukuzila* is against women's rights standards set to allow access and enjoyment of the right to culture. Moreover, Guzana focuses on the 'silencing' nature of the practice concerning the widow.³⁵ A woman in mourning is supposed to be silent, keep her voice very low, and not complain about their unhappiness.³⁶

In Magudu's study, this 'silencing' is echoed; the female participants expressed the absence of an appropriate forum to express their feelings, frustrations and needs concerning this practice.³⁷ The 'silencing' violates the rights of women to participate in cultural development enshrined in the international and domestic human rights instruments.³⁸ It is a form of oppression and discrimination that emanates from the ritual and expectation because it hinders women from voicing out what and how they wish to mourn for their spouses. This oppressive behaviour towards women is condemned by CEDAW, SADC Protocol and Maputo Protocol, as discussed above.³⁹ They all recommend that customary practices that seek to oppress women must be eliminated.⁴⁰ Therefore, if women are not permitted to partake in cultural development, their exclusion and discrimination amount to gender inequality and discrimination. Consequently, they violate many human rights provisions that protect and promote women's rights, as discussed in the previous chapter.⁴¹

Another observation is that torturing, oppression, discrimination, and humiliation are not justified according to the culture and women's rights. While a widow must observe one year of mourning

³³ See Durkheim E *The Elementary Forms of Religious Life* (1961) 443.

³⁴ See ICESCR, ICCPR, Maputo Protocol and the South African Constitution above.

³⁵ See Guzana NV (2004) 34-47.

³⁶ See Guzana NV (2004) 34-47.

³⁷ See Magudu B (2004) 140-48.

³⁸ See Art. 27(1) of UDHR, Art. 1(1) of ICESCR, Art. 1 of ICCPR, South African Constitution s 15(1), s 30 and s 31 above.

³⁹ CEDAW, SADC Protocol and Maputo Protocol above.

⁴⁰ See CEDAW, SADC Protocol and Maputo Protocol above.

⁴¹ See UDHR, ICESCR, CEDAW, ICCPR, Maputo Protocol, the Constitution of the Republic of South Africa above.

with strict isolation, wearing a black garment and stigmatisation, a widower observes less mourning and is never stigmatised. Hence, many researchers such as Dlukulu, Manyedi *et al.*, Ndlovu, Cebekhulu and others have emphasised the need to reconsider or eradicate some of these unhealthy rituals and sources of women's rights violations.

In light of the above discussion throughout this thesis, liberal feminism perceives *ukuzila* as a cultural practice incompatible with women's rights standards. It does not allow women to enjoy protection under human rights law. Liberal feminism purports that widows will achieve equality and the full enjoyment of other rights by prohibiting *ukuzila*.⁴² As a result, liberal feminism proposes that legal reform is required as it is one way to achieve equality between widows and widowers. In other words, the eradication of *ukuzila* and other gendered cultural practices or roles, in general, may ultimately free widows from all forms of oppression, discrimination and stigmatisation. Thus, implying that widows must be freed from any role that makes them inferior.

The practical solution may include approaching the Constitutional Court to have *ukuzila* custom declared unconstitutional as it discriminates against women in terms of s 9(3) of the Constitution of the Republic of South Africa. The court may further invoke PEPUDA⁴³ to prohibit further practice of *ukuzila* as it is in contravention with provisions such as s 6 which provides that "neither the State nor any person may unfairly discriminate against any person."⁴⁴ Further s (8) of the same Act, provides for the "prohibition of unfair discrimination on ground of gender,"⁴⁵ which simple give effect to s9(3) of the Constitution. This thesis has established that *ukuzila* unfairly discriminate against women on the bases of both gender and on analogous grounds. In terms of s2(h) of PEPUDA the Court may also facilitate further compliance with international law obligations including treaty obligations amongst others, the CEDAW, to prohibit and eliminate *ukuzila*.⁴⁶ Similarly, in eliminating *ukuzila* custom, the Court may further invoke or rely on Maputo Protocol Article 2(1)(a) - (e) and Article (2) where state parties are ordered to take necessary legislative, institutional, and other steps to combat all kinds of discrimination against women.⁴⁷ Additionally, the court may also rely on common law in declaring *ukuzila*

⁴² See Freeman, ML (1990) 5 *Affilia* 72–89.

⁴³ See ss 2(b)(i); (ii); (iv) & s2 (c) of PEPUDA, 2000.

⁴⁴ See s6 of PEPUDA, 2000.

⁴⁵ See s8(d) of PEPUDA, 2000.

⁴⁶ See s2(h) of PEPUDA, 2000

⁴⁷ See Article 2 (1)(a) - (e) & Article (2) of Maputo Protocol, 2003.

unconstitutional as it unfairly discriminates against women on the basis of gender, while it also violate other womens' rights which include inter alia, right to gender equality; right to freedom of movement and residence and right to human dignity.⁴⁸

5.3 Concluding remarks

This study first expands on how the *ukuzila* practice violates women's rights by specifically attaching problematic rituals to the human rights they are violating. Secondly, this study's most original and outstanding contribution was testing *ukuzila* custom against the Constitution using the *Harksen case*'s test to determine whether it can be aligned with the constitutional values of gender equality, at which it failed.

These findings have social, legal and academic implications for widows, widowers, law researchers and the public, due to the social interaction amongst traditional communities practising *ukuzila*. This research serves as a pathway for future studies to examine whether women have adequate access to human rights under customary law. This research can be extended by investigating how traditional communities have developed the customary law to meet the standards set by international and national human rights in promoting and advancing women under customary law in rural areas. Future research may also involve a comparative study of rural and urban widows' perceptions of the *ukuzila* custom to understand the gap and propose solutions. This study further recommends that the Department of Social Development opens help desks or forums for widows and widowers across municipalities around South Africa. These should provide widows with the necessary psychological, financial, legal and any other form of support related to matters concerning widows and widowers' well-being.

The most urgent intervention needed is to consider whether all these practices can be developed and transformed according to the new Constitutional dictates to ensure that none of them further violate women's rights. It is 2021, therefore, it is not right that women are still treated like '4th class' civilians in their communities and families. They deserve a complete Constitutional protection, and they deserve it now.

⁴⁸ See *Jezile v S and Others (A 127/2014) [2015] ZAWCHC 31*; *Bhe v Magistrate Khayelitsha 2005(1) SA 580 (CC)*; *SA Human Rights Commissioner v President of RSA 2005 (1) SA BCLR 1 (CC)*.

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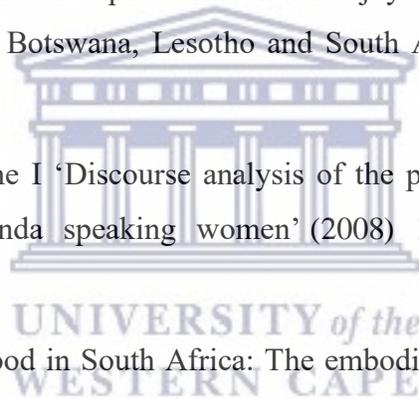
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