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Judicial balancing of cultural relativism and universalism of human rights in post-Apartheid South Africa

A mini-thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws in the Department of Private Law, University of the Western Cape.

DECLARATION

I declare that *Judicial balancing of cultural relativism and universalism of human rights in post-apartheid South Africa* is my own work; that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Sinegugu Ngamnteni **Date**: 14 June 2022

Signed: ____SN_____

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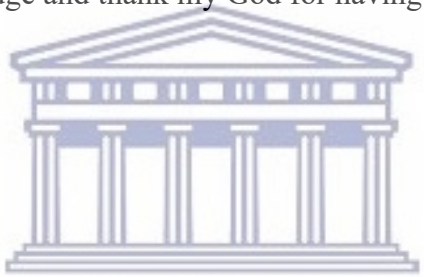

KEYWORDS

African customary law

Bill of rights

Cultural relativism

Human rights

Judicial authority

Legal pluralism

South Africa

Universalism

ABSTRACT

Globalisation did not only bring about major political, social and economic changes; it also strengthened the global reach of universalism of human rights. The concept of universal human rights is presently reconstructing the world order and reshaping national constitutions worldwide. Universalism is based on the ideology that human rights should be recognised universally and applied to all cultures. In opposition, cultural relativism posits that the notion of universal human rights is a Western idea that should not apply to all cultures of the world, as every culture has its own moral standards that are perceived as acceptable or unacceptable in the specific contexts of the people identifying it. The concept of universal human rights has been embodied in constitutions of almost all countries. In particular, the Constitution of the Republic of South Africa has been influenced by a universalist approach to human rights. However, the application of human rights within the South African framework poses many problems. Notable amongst them is the judicial challenge of striking a balance between the protection of human rights and recognition of cultural rights. Judgements from leading cases reveal that whenever this challenge of balance arises, judges tend to remedy the conflict by developing customary norms to adapt to the Western notion of human rights. The study concludes that the judiciary compels customary laws to adapt to changing social and economic circumstances.

Contents

CHAPTER 1: INTRODUCTION

1.1 Research topic

Judicial balancing of cultural relativism and universalism of human rights in post-Apartheid South Africa

1.2 Research background

Globalisation has brought about the adoption of human rights discourses throughout the world, through international conventions, declarations and agreements which are negotiated and implemented by national institutions.[1] Universalism, known as the root of modern human rights law, holds that there is an "underlying human unity which entitles all individuals, regardless of their cultural or regional antecedents, to certain basic minimal rights, known as human rights".[2]

Universalism believes that human rights, which are guaranteed by international conventions and treaties, should be applied in all countries even when these rights are sometimes in conflict with the already established cultural practices of local communities.[3] Universalists argue that human rights are inherent in nature, and that there should be a set of basic ethical standards and principles acceptable to all cultures.

The 1996 Constitution of the Republic of South Africa is based on a universalist conception of human rights, and the Bill of Rights is considered to be the cornerstone of democracy.[4] In South Africa, various international and regional human rights instruments have been adopted and ratified. They include the International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the UN Convention on the Rights of

[1] Cowan, JK; Dembour, MB; Wilson, RA *Culture and Rights: Anthropological Perspective* (2001) 1.
[2] Zechenter, EM 'In the Name of Culture: Cultural Relativism and the Abuse of the individual' (1997) 53 (3) *Journal of Anthropological Research* 3.
[3] Lakatos I "Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights" 2018 *Journal of International and European Law* 1-14.
[4] Grant E "Human Rights, Cultural Diversity and Customary Law in South Africa" 2006 *Journal of African Law* 2.

the Child (CRC); the African Charter on Human and People's Rights (Banjul), and the African Charter on the Rights and Welfare of the Child.[5]

Cultural relativism acquired prominence in the twentieth century and is regarded the hallmark of modern anthropological and scientific thought.[6] According to cultural relativism, "there is no absolute truth, be it ethical, moral or cultural and that there is no meaningful way to judge different cultures because all judgements are ethnocentric.[7] cultural relativism believes that "rights only exist when a society perceives them as such and that culture is the only source of validity of a moral right".[8] To a certain extent, relativists accept the application of a few basic human rights. However, they hold that culture is the only source of validity of a moral right or rule.[9] Cultural relativists are of the view that there is no absolute values or principles upon which any culture could be judged, implying that there is no moral judgement that is univerally valid. From this point of view, if a human right is not indigenous to a particular culture, then its applicability and validity are questionable.[10]

The debate concerning international human rights law is known as the "Universalism-Cultural Relativism". The debate was initiated by those against international human rights law, arguing that the core instruments of international human rights law, which are the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights, have little validity outside the West since these instruments reflect liberal individualism prevalent in the West and ignore non-western cultural values. Thus, cultural relativism critiques international rights law, arguing that it is an expression of western cultural imperialism.[11]

Culture is defined as a set of "basic assumptions and values, orientations of life, beliefs, policies, procedures, and behavioural conventions that are shared by a group of people and that influence

[5] International Covenant on Civil and Political Rights, 1966; the Convention on the Elimination of All Forms of Discrimination Against Women 1979; the UN Convention on the Rights of the Child 1989; the African Charter on Human and People's Rights 1981; and African Charter on the Rights and Welfare of the Child, 1990.
[6] Zechenter (1997) *Pecs Journal of Anthropological Research* 3.
[7] Zechenter (1997) *Pecs Journal of Anthropological Research* 3.
[8] Lakatos (2018) *Pecs Journal of International and European Law* 1-14.
[9] Lakatos (2018) *Pecs Journal of International and European Law* 1-14.
[10] Lakatos (2018) *PecsJournal of International and European Law* 1-14).
[11] Binder, G 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buffalo Human Rights Law Review* 213-215.

each member's behaviour". [12] In this study, the word is used to represent indigenous laws. Human rights discourses provide for a right to culture. The right of an individual to practice and belong to a culture are enshrined in Section 30 of the Constitution of the Republic of South Africa,[13] and the right to participate in the culture of choice is subject to the Bill of Rights. This recognition implies that cultural practices are worth of legal protection and promotion. The right to culture has its own possibilities and limitations.

There is a concern about introducing culture into the human rights concept of universalism. This concern arose from the clashes that appear whenever cultural practices are flagged as human rights violations or infringements of the Bill of Rights according to the context of the Constitution of the Republic of South Africa. This study is particularly interested in looking at how the courts are able to balance the protection of culture and promotion of the international concept of human rights whenever clashes between these concepts arise. To achieve this, the dissertation looks at some of the cultural practices that are observed in South African local communities, which have become contentious issues since the promulgation of the interim and, later, the 1996 Constitution of the Republic of South Africa. These include *Ukuthwala*, which is decsribed as the "culturally-legitimated abduction of a woman, preliminary to a customary marriage";[14] the rule of male primogeniture, where the eldest son, or, failing him, the eldest male descendant of the eldest son inherits from the family head in monogamous traditional families;[15] male circumcision, and virginity testing, which is described as the practice of "inspecting the genitalia of girls and women to determine if they are sexually chaste".[16] These customs have been practiced in South African local communities for decades, but since the adoption and application of the Bill of Rights, some of them have been scrutinised and abolished as they are said to be 'unconstitutional', and to be in

[12] Spencer-Oatey, H 'What is Culture? A Compilation of Quotations' (2012) *GlobalPad Core Concept* 2.
[13] Section 30, *The Constitution of the Republic of South Africa*, 1996.
[14] Mwambene, L; Sloth-Nielsen, J 'Benign Accommodation? *Ukuthwala* 'Forced Marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 3.
[15] Rautenbach, C; Du Plessis, W; Pienaar, G 'Is Primogeniture Extinct Like the Dodo, or is the any Prospect of it Rising from the Ashes? Comments on the Evolution of Customary Succession Laws in South Africa' (2006) 22 *South African Journal on Human Rights* 100.
[16] Maluleke, MJ 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 (1) *PER* 18.

violation of human rights. The abolishing of some of these cultural practices has caused a debate of whether the community's customs and practices are recognised and protected by the State.[17]

1.3 Statement of the research problem

In trying to strike a balance in clashes between cultural relativism and universalism, culture is often subjected to human rights, and the universality of human rights is usually preferred over cultural practices or norms of litigants.[18] This study examines this balance, and the remedies the courts decide on when human rights and culture conflict.

1.4 Significance of the study

The judicial authority of the Republic is vested in the courts, and the mandate of judges is to apply the law impartially and without fear.[19] Judges are said to be independent and subject only to the Constitution and the law. This study can broaden understandings of the judicial attitude to culture and the universalism of human rights in post-apartheid South Africa. It also has potential to shed light on the principles and the procedures the courts use in balancing indigenous cultural norms with universal human rights, and whether the adaptation of culture with international human rights is possible.

1.5 Objectives and research questions

This dissertation aims to investigate how judges in post-apartheid South Africa balance the promotion and protection of human rights with the need to respect cultural practices that seemingly infringe on the Bill of Rights.

[17] Mwambene, L; Kruuse, H 'The Thin Edge of the Wedge: Ukuthwala, Alienation and Consent' (2017) 33 (1) *South African Journal on Human Rights* 11.
[18] Example of leading cases: *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (2) SA 544 (CC); Jezile *v The State* 2015 (3) SA 201 (WCC); *Shibi v Sithole and Others* 2005 (1) SA 580 (CC).
[19] Section 165 (1) (2) of the Constitution, 1996.

The study sought to answer the central question: In what ways do South African judges consider the cultural backgrounds of individuals when applying international human rights in customary law issues? This question was probed with the following sub-questions:

1. What is the nature of clashes between indigenous customs and human rights?
2. What is the influence of the human rights movement on the judicial approach to customary laws in South Africa?
3. To what extent do the courts protect the indigenous cultural practices of individuals?
4. How does culture adapt to universalist human rights in South Africa?

1.6 Hypothesis

To achieve its objectives, this study assumes that in recognition and promotion of the universality of human rights:

a) The courts decide the relevance of culture; and,
b) Cultural practices are often deemed to contravene the Bill of Rights when clashes between culture and universality of human rights arise.

1.7 Research methodology

This study used a qualitative research approach, since it is concerned with investigating judges' attitudes, opinions, and behaviour in balancing cultural relativism and universalism of human rights. The researcher conducted a literature review and a content analysis of judgments, using cases involving the balance of culture and protection of the Bill of Rights in post-apartheid South Africa. Primary and secondary sources were used in this study, and these included books, journal articles, legislation, judicial decisions and materials from the internet.[20]

[20] Goddard, W; Melville, S *Research Methodology: An Introduction* 2nd ed (2001) 18.

1.8 Limitations of the study

Since this is a mini-dissertation, the study was limited to how the courts balance cultural relativism and universalism of human rights. There were no interviews or field research conducted. Rather, there was analysis and review of post-1994 cases or judgments that were deemed relevant to the study. Emphasis was placed on cases that had reached the Constitutional Court.

1.9 Overview of chapters

The study consists of four chapters:

Chapter one deals with the background, research objectives, significance of the study, methodology, and scope of the study.

Chapter two consists of a literature review. It looks at the meaning and arguments of cultural relativism. The meaning of culture, customary law and indigenous law are discussed. The chapter also focuses on reviewing the significance of the concept of legal pluralism in South Africa.

Chapter three focuses on the concept of universalism of human rights and how it has influenced and shaped the Constitution of the Republic of South Africa and judicial culture.

Chapter four examines the judicial mandate according to the Constitution of South Africa, 1996. It does a judicial review and analysis of cases and judgements delivered post-1994. Here, the aim is to investigate the judges' attituttes and the remedies used when conflict between culture and the Bill of Rights arise. The effect that judges' have in balancing cultural relativism with universalism of human rights is highlighted.

CHAPTER 2: CULTURAL RELATIVISM AND LEGAL PLURALISM IN SOUTH AFRICA

2.1 Introduction

Cultural relativism emerged as a response to the legal positivist model of international law, as well as human rights advocates who hold international human rights law as a source of authority superior to the State.[1] It rose to critique the notion of human rights as the source of authority with universal moral principles. The school of cultural relativism had its peak in the second half of the twentieth century in anthropology. Cultural relativism was a construct used by anthropologists and indigenous people to resist the imposition of European cultural values as universalist ideals.[2] It is believed by some scholars that "since decolonization, the concept has been appropriated by the Third- World bourgeois-nationalist elites to undermine pre-colonial rights of members of various non-Western communities".[3] This chapter higlights the meaning and arguments of cultural relativism, indigenous law, and the clashes between customary law and human rights.

2.2 Cultural Relativism

Cultural relativism is based on the notion that there are no objective standards by which we can judge societal conduct better than others since societies have different moral codes.[4] Relativists believe that there are only various cultural codes and there is no universal truth in ethics. This means that there are no moral truths that apply to all people. One of the arguments raised by relativists is that the moral code of our society has no special status, but one among many. The moral code of a society determines what is right or the actions that are considered right within that society.

[1] Binder, G 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buffalo Human Rights Law Review* 212.
[2] Zechenter, EM 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' (1997) 53(3) *Journal of Anthropological Research* 223-225.
[3] Prasad, A 'Cultural Relativism in Human Rights Discourse' (2007) 19 *A Journal of Social Justice* 289.
[4] Rachels, J *The Challenge of Cultural Relativism* (1986) 3.

Cultural relativism holds that in a given society, cultural practices, including religion, political and legal practices, determine the existence and scope of rights enjoyed by individuals. Relativism rests on the conception of self-determination and moral autonomy. The argument is that there is no transboundary moral or legal standards against which human rights practices may be judged acceptable or unacceptable.[5] Relativists claim that substantive human rights standards vary among different cultures and reflect the national features. What is regarded as human rights violation in one society, may be considered acceptable and lawful in another society. Relativists challenge the imposition of European or Western norms and the presumed universality standards of human rights. Relativists critic international human rights law claiming the core instruments of human rights, which are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, have little legitimacy outside the West. Furthermore, human rights reflect liberal individualism that is prevalent in the West, ignoring some of the important non-Western cultures, such as group membership. Relativists deny the idea that rights exist in individual human beings independent of society and culture.[6] They believe that all values are socially constructed, that is, values are products of human beings, acting in specific social and historical contexts. Furthermore, rights are believed to be based on value judgments made culturally and socially by human beings. This implies that rights are the product of a particular culture or society.

2.2.1 Cultural relativism and culture

The cultural relativist argument is that in the face of divergent cultural traditions, Universal Declaration norms have no normative force. Traditional practices are to be evaluated by the standards of the culture in question.[7] It is culture that provides the absolute standard of evaluation.

Relativism stipulates that every culture follows its own moral precepts, which it perceives to be the best. Many have argued that the concept of human rights is a Western one, particularly the

[5] Teson, FR 'International Human Rights and Cultural Relativism' (1985) 25 *Florida State University College of Law* 871.
[6] Binder (1999) *Buffalo Human Rights Law Review* 214.
[7] Donnelly, J 'The relative Universality of Human Rights' (2007) 29 (2) *Human Rights Quarterly* 294.

UDHR. This is because during the drafting of the UDHR, the membership of the drafting committee and the UN were predominantly Western.[8]

The basis of cultural relativism needs to be considered. Cultural relativists hold that "morality is relative to culture".[9] Relativists hold that a moral agent's behaviour is to be evaluated according to culture, and if the culture accepts it, it is moral and if it rejects it, it is immoral. Culture can be defined as "the way of life of a group, a set of socially transmitted beliefs, norms and practices that govern the course of social cooperation within the group and the ways its members conceive and live their lives".[10] Culture contains the ethical code, which are set of norms for prescribing and evaluating the conduct, characters and attitudes of its members as being right or wrong, praiseworthy or blameworthy. Culture includes "customary beliefs, social forms, and material traits of a racial, religious, or social group".[11] It is socially transmitted, and it is passed from one generation to next.

Cultural relativists hold that all standards are culturally constituted, and values, behaviour and emotional disposition are transmitted from one generation to the next.[12] The argument is that there are no transcultural standards that are available by which different cultures might be judged.[13] This is because all judgments are said to be ethnocentric, and the only valid normative judgment is that all cultures are equal. These practices and values are perceived by members of the community or society as superior to all others and uniquely satisfying. This means that culture must be interpreted based on its own values, rather than through the submissions and lens of a universal yardstick.

Cultural relativism holds that the indigenous cultural community and traditions have been disrupted by the introduction of universal human rights. The relativists also acknowledge that there are some communities, particularly in the Third world countries, that have been autonomous in holding onto their traditional values and practices. However, foreign practices have penetrated most rural areas, and the local culture is now corrupted by the international culture of western

[8] Binder (1999) *Buffalo Human Rights Law Review* 213.
[9] Tilley, J 'Cultural Relativism' (2001) 22(2) *Human Rights Quarterly* 1.
[10] Wong, DB 'Cultural Relativism' (1996) 1 *Encyclopedia of life support system* 2.
[11] 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 *Journal of International Women's Studies* 34.
[12] Brown, MF 'Cultural Relativism 2.0' (2008) 49(3) *Current Anthropology* 364.
[13] Spiro, ME 'Cultural Relativism and the Future of Anthropology' (1986) 1(3) *Cultural Anthropology* 260.

values, products, money economy and practices that came with universalism. The indigenous cultural practices have been modified and 'advanced' to accommodate western human rights values. Human rights are inherently individualistic, and held by the individual, while the traditional culture view persons as part of a community or family.

Radical cultural relativism holds that culture is the "sole source of the validity of a moral right or rule".[14] On one hand, strong cultural relativism believes that rights and social practices and values are culturally determined, which affirms the argument that culture is the principal source of the validity of a moral right or rule.[15] Weak cultural relativism, on the other hand, holds that culture may be an important source of the validity of a moral right or rule. Weak relativism recognises universal human rights and allows limited application of human rights, with exceptions.

The central argument of cultural relativism is that ideals like equality, justice and morality do not point to any particular practice or norm at all, except as each culture comes to define them. All cultures have some form of equality, justice and morality. Relativists do not necessarily deny the universal applicability of particular moral standards; however, they hold the view that there is no trans-cultural normative truth.[16] Cultural relativists deny the universal applicability of justice and point out that what counts as justice is culturally defined, and there are no cross-cultural principles of justice.

The South African Constitution contains the Bill of Rights[17] that provides categories of human rights, and inclusive of cultural rights. The inclusion came as a way of recognising the culture and cultural practices of most people from centuries of ignored cultural rights under colonialism and, later, under apartheid.[18] Chapter 4 of this study discusses the balance and the remedies the courts decide on when cultural practices and human rights clash or conflict.

2.3 Legal Pluralism

[14] Donnelly, J 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 400.
[15] Donnelly (1984) *Human Rights Quarterly* 401.
[16] Blumenson, E 'Cultural Relativism' (2011) *Encyclopaedia of Global Justice* 1-2.
[17] Chapter 2 of the Constitution of the Republic of South Africa, 1996.
[18] Mubangizi (2012) *Journal of International Women's Studies* 34.

Legal pluralism is defined as the recognition of more than one legal system within a society to maintain the social order.[19] One leading scholar defines it as the presence of more than one legal order in a social field.[20] It is simply an acceptance of two or more legal systems in a society. Legal pluralism framework serves different functions or purposes. Firstly, it allows for the recognition of different values and social orders of several cultures within a particular society. Secondly, it allows various legal systems to reflect a society's cultures, which contributes to cultural self-determination. In addition, it provides for an opportunity for dealing with cultural practices and customs that are not dealt with under the other legal system.

There are four types of legal pluralism, namely weak, strong, critical, and adaptive legal pluralism. According to Griffiths, weak legal pluralism "is a manifestation of legal centralism because it is a product of state recognition and its message is that all the other laws should be organised in a hierarchy beneath state laws".[21] In strong legal pluralism, normative orders co-exist side by side within a normative social field regardless of their origin. Critical legal pluralism holds that "it is knowledge that maintains and creates realities".[22] Legal subjects are believed to possess the capacity to produce legal knowledge. Lastly, adaptive legal pluralism looks at how norms of globalisation have shaped the behaviour of the people who practice the customs of indigenous laws. Adaptive legal pluralism explains the African struggles to adapt their indigenous practices to modern realities caused by former legacies of colonialism, modernity and globalisation.[23]

South African legal system is pluralistic in nature consisting of Roman law; Roman-Dutch law; English law and indigenous law (commonly referred to as the customary law). This pluralistic system has had problems and conflicts, and amongst them is the situation where some legal systems are viewed as subordinate and the other as dominant. In the past, customary law was taken as a subordinate legal system to common law. One of the areas of prominent conflict between common law and customary law is the law of succession, particularly the law of intestate

[19] Ludsin, H 'What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law' (2012) 21(62) *Berkeley Journal of International Law* 65.
[20] Griffiths, J 'What is Legal Pluralism?' (1986) 18 *Journal of Legal Pluralism* 9.
[21] Tamanaha, BZ *Legal Pluralism Explained: History, Theory, Consequences* (2021) 10.
[22] Kleinhans, MM; Macdonald, RA 'What is a Critical Legal Pluralism?' (1997) 12(2) *Canadian Journal of Law and Society* 38.
[23] Diala, AC 'Legal Pluralism and the Future of Indigenous family Laws in Africa' (2021) 35(1) *International Journal of Law, Policy and the Family* 13.

succession. South Africa's intestate law of succession consists, on one hand, the common law of succession (regulated in terms of the Intestate Succession Act and rules of Roman-Dutch law), and, on the other hand, rules of customary law of succession (intestate succession system) regulated in terms of Section 23 of the Black Administration Act[24] and its regulations. Customary law legal framework[25] was influenced by section 23 and its rules. These provisions of customary law were declared to be unconstitutional and invalid. The unconstitutionality of these provisions is discussed further in the next section.

2.4 Indigenous Law

Indigenous law is defined as "pre-colonial norms that emerged in agrarian settings which were observed in their ancient forms".[26] It is a system of customs or norms which governs the daily lives of Africans, particularly the people who live in the rural areas. Indigenous law is based on the custom of the system of past traditions. Indigenous societies possessed their own legal system, described as customs, and which applied to indigenous people. Before colonial rule, indigenous law enjoyed legal dominance.[27]

The South African history of indigenous law is believed to have been neglected and to have limited recognition. Colonial rule limited the application of indigenous law to advance segregation policies and to control the African population.[28] Indigenous law was shunned and Roman-Dutch law and English common law became the South African legal system. The Native Administrative Act[29] created a separate system of courts for Africans. The Act appointed and demoted traditional leaders and regulated the marriages of Africans.

[24] 38 of 1927.
[25] Rautenbach, C 'A Few Comments on the (Possible) Revival of the Customary Law Rule of Male Primogeniture: Can the Common Law Principle of Freedom of Testation Come to its Rescue?' (2014) 1 *Acta Juridica* 134.
[26] Diala (2021) *International Journal of Law, Policy and the Family* 1.
[27] Diala, AC 'A Butterfly that Thinks Itself a Bird: The Identity of Customary Courts in Nigeria' (2019) 51(3) *Journal of Legal Pluralism and Unofficial Law* 384.
[28] Nhlapo, T 'Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously' (1995) 13 *Women's Rights and Traditional Law: A Conflict* 49-53.
[29] Native Administrative Act 38 of 1927.

Section 1 of the Law of Evidence Amendment Act[30] compels the courts to take indigenous law into consideration when the law in question can be readily ascertained and with sufficient certainty; however, the law should not be conflicting to the principles of public policy or natural justice.[31]

Indigenous laws were subjected to the values and principles of state law, diluting its indigenous character.[32] It is believed that the socioeconomic changes caused by colonial rule, religion (Christianity and Islam), slave trade and other factors, have had a significant impact on the loss of identity of indigenous law. Indigenous law has undergone profound changes through different kinds of European culture it was confronted with. The imposed European and Western legal systems and colonisation did not destroy all indigenous laws. The transplanted European law become common law; however, indigenous law was permitted to survive in respect of issues revolving around land and family relationships.

The status of indigenous law changed with the introduction of the interim constitution. The Constitution recognises indigenous law. Such recognition is subject to certain provisions of the Constitution. For example, Section 211 (1) and (2) of the Constitution recognises traditional leaders, who observe a system of indigenous law, but also subjects the application of the system to the Constitution and applicable legislation.[33]

2.5 Customary Law

South Africa has a pluralistic national legal system, like most former European colonies in Africa. South Africa is a former Dutch and later British colony, with Roman-Dutch law coexisting with customary law.[34] African customary law is described as "the various laws observed by indigenous communities and can be found in scholarly textbooks, legislation, judicial decisions and customs".[35]It should be noted that the term "African customary law" is used as a blanket

[30] The Law of Evidence Amendment Act 45 of 1988
[31] Bekker, JC; Maithufi, IP 'The Dichotomy between Official Customary Law and Non-Official Customary Law' (1992) 17(9) *Journal for Juridical Science* 52.
[32] Du Bois, F *Introduction to South African Law: History, Systems and Sources* (2004) 50-54.
[33] Section 211 (1) (2) of the Constitution.
[34] Oppermann, B 'The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States' (2006) 17(1) *Hastings Women's Law Journal* 74-75.
[35] Rautenbach, C 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 144.

description covering various legal systems, and is not referring to a single uniform set of custom prevailing in a given country. Customary law is the indigenous law of the various ethnic groups of Africa.

In most African states, and in South Africa in particular, the precolonial law was customary in character, and its sources were traditions, customs and practices of the people.[36] The customary law system is largely ethnic in origin and operates within an area occupied by the ethnic group. The people of a certain group conducted their activities in accordance with and subject to customary law. The passing of the Native Administrative Act in 1927 marked the recognition of customary law, and specific courts were given discretion to apply customary law in legal suits involving the Africans. The colonial administrators recognised customary law and its institution, but its application was restricted to Africans. Customary law was applicable on following grounds: (1) that it was not repugnant to justice, equality or good morality, and (2), that it should not conflict with any written law. The subjection of customary law to the repugnancy clauses reveal that customary law was inferior to the common law. Native Courts administered customary law and the State exercised discretion in terms of deciding whether customary should be recognised, and to what extent. Customary law has had a great impact in personal law, with regards to matters such as inheritance, marriage, and traditional authority.

There is an argument that the present form of customary law is distorted. Some scholars argue that customary law is the product of adaptive indigenous law.[37] Others hold that customary law is the product of political motivations and social conditions.[38] It is believed to be influenced by the interaction between colonial rule and African custom. Customary law was transformed from a body of customs and norms which were unique to each tribe to a body of law that was officially recognised and applied by government officials. The status of customary law was acknowledged and endorsed by the Constitutional Court in the case of *Alexkor Ltd and Another v Richtersveld Community and Others.* The court stated the following:

> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity

[36] Ndulo, M 'African Customary Law, Customs and Women's Rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 88.
[37] Diala (2021) *International Journal of Law, Policy and the Family* 6-9.
[38] Ndulo (2011) *Indiana Journal of Global Legal Studies* 88, 94.

> on the Constitution. Its validity must now be determined by reference not to common-law, but the Constitution.[39]

The Court further alluded that:

> Although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied.[40]

With the above excerptions, the Constitutional Court further confirmed that customary law is part of the South African law.

Constitutional changes have brought the recognition of customary law by the Constitution of the Republic of South Africa. Section 211 (3) of the Constitution provides that the courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[41] Prior to the constitutional transformation of 1994, State laws were taken as the only true laws and customary normative orders were not recognised.[42]

In South Africa, customary law is categorised into official version and living version. These are discussed below.

2.5.1 Official customary law

Official customary law is described as the body of rules created by the state and legal profession.[43] Official customary law consists of rigid rules, embedded in statutes and judicial decisions. It includes enactments, such as the KwaZulu-Natal Codes; the Native Administration Act of 1927; Black Administration Act; Court precedents such as Black Appeal Court; academic writings, and State codes. Scholars hold that, official customary law is the version captured in State codes, court

[39] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 5 SA 460 (CC).
[40] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004.
[41] Section 211 (3) of the Constitution of the Republic of South Africa, 1996.
[42] Bennett, TW 'Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform' (2011) 25 *Emory International Law Review* 1040.
[43] Claassens, A; Cousins, B *Land, Power and Customs: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 138-139.

judgments, academic writings, and legislation.[44] Others argue that official customary is "the product of colonial and postcolonial efforts to pigeon-hole customary law into Western systems of law" and that it emerged from the European legal system, which was later administered by administrators who subordinated indigenous laws to foreign laws. Official customary law was created in the context of the specific historical circumstances of the colonial encounter in Southern Africa.

2.5.2. Living customary law

Living customary law refers to the law observed by the people who created it. It is what is observed by society or community with sense of obligation, and it is continuously adapted by people in their everyday life.[45] Some scholars refer to living customary law as the norms that regulate people in their daily lives and it is more flexible than official customary law. Other scholars refer to living customary law as "norms that emerge from people's adaptation of customs to socioeconomic changes".[46]

It is believed that the Constitution of the Republic of South Africa recognises living customary law. This argument is reflected in the case of *Mabena v Letsoalo*[47] where the appellant challenged the validity of marriage in which the father of the bride had not consented to the union and was absent during the lobolo negotiations. The High Court held that the women's acceptance of lobolo reflect living customary law and the object, spirit and the purpose of the Bill of Rights, thushighlighting living law as a transformative tool.[48]

2.5.3 Clashes between customary law and human rights

In the wave of constitutional reform, South Africa has embraced the international human rights call and its universality. The Constitution of the Republic of South Africa contains provisions

[44] Diala (2021) *International Journal of Law, Policy and the Family* 6.
[45] Claassens; Cousins (2008) 138-139.
[46] Diala (2021) *International Journal of Law, Policy and the Family* 6.
[47] *Mabena v Letsoalo* 1998 (2) SA 1068 (T).
[48] Ozoemena, R 'Living Customary Law: A Truly Transformative Tool?' (2014) 6 *Constitutional Court Review* 147-163.

guaranteeing equality[49], human dignity[50] and prohibiting discrimination based on gender. Post-apartheid South Africa, like many African States, is compelled on one hand to affirm and protect customary laws and on the other to uphold the international human rights standards, such as equality and non-discrimination.[51] The case in which the Constitutional Court recognised the existence, and showed willingness to give preference to, the living customary law, is the *Bhe v Magistrate, Khayelitsha*.[52] This means that customary law is protected and subjected to the Constitution in its own right. The recognition of customary law indicates the fight in protecting and affirming the cultural practices and knowledge systems of the people of South Africa. This serves as a medium through which the people can express their national identity and be distinguished from former colonial predecessors.

There are clashes between customary law norms and international human rights norms. The debate on the recognition of customary law within the human rights dispensation is based on the idea that customary law is in conflict with the Constitution.[53] The clash is two-fold: "the operation of customary law practices in a society where equality and non-discrimination are guaranteed rights and the recognition of cultural diversity itself as a protected value in the Constitution".[54] Practices and rules that contradict the equality clause, may also take a strong claim of protection under the right to culture clause of the Constitution. The Constitution offers no remedy and guidance as to the resolution of these clashes or conflict. Scholars argue that when there is a conflict between culture and the equality principle, the latter should prevail.[55] The argument is that the Constitution is founded on the principle of equality and that the equality principle should override culture. An opposing argument of the traditionalist calls for the final constitution where customary law will operate outside the Bill of Rights. Other scholars argue that:

[49] Section 9 of the Constitution of the Republic of South Africa, 1996.
[50] Section 10 of the Constitution of the Republic of South Africa, 1996.
[51] Cotton, SR; Diala, AC 'Silences in Marriage Laws in Commonwealth Africa: Women's Position in Polygynous Customary Marriages' (2018) 32 (1) *Speculum Juris* 18-19.
[52] *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (2) SA 544 (CC).
[53] Herbst, M; Du Plessis, W 'Customary Law v Common Law Marriages: A Hybrid Approach in South Africa' (2008) 12 *Electronic Journal of Comparative Law* 3.
[54] Nhlapo, T 'Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously' (1995) 13 *Women's Rights and Traditional Law: A Conflict* 60.
[55] Murray, C; Kaganas, F 'The Contest between Culture and Gender Equality under South Africa's Interim Constitution' (1994) *Journal of Law and Society* 409-431.

> By implicitly recognizing customary law, and at the same time prohibiting gender discrimination, the Constitution has brought about a head-on confrontation between two opposed cultures-admittedly a confrontation that has long been gathering force. Because African culture is pervaded by the principle of patriarchy, the gender equality clause now threatens a thorough going purge of customary law. And it is tempting to dramatize this threat, to portray human rights as the harbinger of western neo-imperialism and to represent customary law as the shield of an endangered indigenous culture.[56]

There are certain norms or applications of customary law which have been criticised. Customary law is believed to have been discriminatory in its application, in areas of inheritance, bride price, appointment to traditional offices, age of majority and exercise of traditional authority. For example, customary law is criticised for discriminating against women, as it tends to see women as inferior to men rather than equals. It has been argued that women continue to suffer in private family domain. There is a debate between human rights activists and traditionalists that is centred on whether customary norms are compatible with human rights norms as contained in the international conventions and the national constitutions. Human rights activists argue that certain norms of customary law undermine the dignity of women as second class citizens, while traditionalists argue that by promoting traditional values, customary law will make a positive contribution to the promotion of human rights.[57] The argument is that human rights and customary law differ; customary law is based on the idea of community, while human rights are based on the idea of individuality.

2.6 Conclusion

Cultural relativism opposes the idea of universal human rights. Cultural relativists' argument is based on the emphasis of the supremacy of a person's culture. It was highlighted above that cultural relativism opposes the universal principles of justice and condemn the interferences of universalist norms with traditional practices. Today, customary law continues to exist alongside national law. The Constitution recognises customary law and this is evidence that customary law is finally

[56] Bennett, TW 'The Equality Clause and Customary Law' (1994) 10 *South African Journal of Human Rights* 122-130.
[57] Herbst (2008) 3-4.

achieving its deserved recognition as the foundation of the South African legal system. However, there is an exception to its application. In the pre-1994 era, customary law was applied to Africans, but subjected to the repugnancy clause. In post-Apartheid South Africa, it is recognised, but again only if the rules are not in conflict with the Bill of Rights in the Constitution. There are still limitations placed on the recognition of customary law. These limitations indicate that the customary law system is still subordinate to the constitutional law, statutory law and common law. The application of culture and indigenous law, like customary law, is recognised, but also subject to the Constitution.

CHAPTER 3: UNIVERSALISM OF HUMAN RIGHTS AND ITS INFLUENCE ON THE CONSTITUTION

3.1 Introduction

International covenants and regional charters have been implemented to further promote human rights at the national level and to make human right part of *jus cogens* and a matter of concern for the international community.[1] National constitutions and constitutional courts have been formed for the purpose of protecting the individual and raising awareness about the importance of the protective function of the State in guaranteeing fundamental human rights. The rapid rise of globalisation has strengthened the global reach of the universalist nature of human rights. The Western model of human rights spread all over the global North countries and eventually to African states, giving rise to the importance of introducing constitutional protection of human rights. Universalism is "an ideology and perspective which believes that there is only one truth and that all people have the same rights regardless of one's gender, race, culture, nationality, religion, age and sexuality".[2] Universalism emphasises shared and cross-national values.[3] Universality "means the recognition of human rights in a world-wide scale".[4] This chapter focuses on the concept of universal human rights and how this has influenced and shaped the Constitution of the Republic of South African.

3.2 The concept of universal human rights

Universalism holds the idea that "there is an underlying human unity which entitles all individuals, regardless of their cultural or regional antecedents to certain basic minimal rights known as human rights'.[5] According to Arnold, there are two dimensions of universalism: horizontal and vertical. A horizontal dimension embraces the idea that human rights protection is accepted and realised by

[1] Arnold, R *The Universalism of Human Rights* (2012).
[2] Christensson T *Universalism versus Cultural Relativism A Study of the Zimbabwean Laws Regulating Child Marriages* (Master in Law-thesis, UMEA UNIVERSITY, 2020)15.
[3] McMahon, E; Ascherio, M 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council (2012) 13 *Global Governance* 231.
[4] Arnold (2012) 1-2.
[5] Zechenter, EM 'In the Name of Culture Cultural Relativism and the Abuse of Individual' (1997) 53(3) *Journal of Anthropological Research* 320.

most states of the international community. This implies the acceptance of human rights in all the geographic parts of the world. Vertical dimension of universalism takes place only when the levels of public power, which are the national, regional and international, offer efficient mechanisms of protection. Universalism is also said to have a functional dimension, where the values expressed by human rights are entirely recognised by all the regions, countries and cultures. If the international community agrees on the core values of human rights, then they are assumed to be absolute. It is relative if uniformity is incomplete through the exceptions reserved by certain cultures. One of the leading scholars, Donnelly, summarises the universalist approach by submitting that "all humans have rights by virtue of their humanity; a person's rights cannot be conditioned by gender, national, or ethnic origin, and human rights exist universally as the highest moral right".[6] No right can therefore be subordinated to an institution or to another person.[7]

Universalists argue that all human beings have basic human rights. Human rights are rights that one has because one is human.[8] Other scholars refer to human rights as "those rights one possesses by virtue of being human".[9] Human rights guarantee the rights of all human beings across the globe, regardless of their geographical or regional location and their social status. The idea appeared at the end of World War II. Its, purpose was to protect people against oppression and abuse following the negative impact of the war, especially the Holocaust. The idea of universalist human rights is believed to have originated in Western Europe, North America and Australia.[10] A series of peace treaties, such as the League of Nations and the International Labour Organization (ILO), laid the foundation for the development of human rights institutions. The ILO is cited as the most successful human rights institution; its purpose was to ensure safe, humane and fair labour standards.[11]

[6] Donnelly (2007) 29 *Human Rights Quarterly* 284
[7] Iyanuolu AE *The Challenge of Culture for the Rights of Women in Africa: A Critical Analysis of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (LLM, University of Cape Town, 2008) 12.
[8] Donnelly, J 'The relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 282.
[9] Mubangizi, JC 'Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context' (1996) 3 *African Human Rights Law Journal* 94.
[10] Dudley, M; Silove, D; Gale, F *Mental Health and Human Rights: Vision, Praxis and courage* (2012) 8.
[11] Renteln, AD *International Human Rights: Universalism versus Relativism* (2013) 5.

On its part, the international human rights movement emerged on the global agenda when the United Nations Charter declared in 1945 that the UN was determined 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".[12] The UN Charter is the leading international instrument arrangement through which most of the countries in the world made their commitment to promote human rights at the national level. The UN Charter later established the Commission on Human Rights.

3.3 The principles of human rights

The promotion and protection of human rights have been a priority for the international community. Human rights are said to be universal, interdependent, interrelated, indivisible and inalienable.[13] The principle of universality of human rights in based on the notion that all human rights apply uniformly and equally throughout the world, irrespective of differences in origin, culture, ethnicity, or religion.[14] The universality of human rights has been challenged, particularly by claims of cultural universality.

The principles of interdependence and interrelatedness of human rights hold that the full and meaningful enjoyment of a particular right is dependent on the possession of all the other rights.[15] The principle of indivisibility of human rights assumes that all humans possesses similar basic characteristics; all human rights are equally important, and there are no certain rights or certain categories that have to be excluded.[16]

The principle of inalienability of human rights is based on the view that inalienable rights are those rights which cannot be taken away; these are rights which cannot be lost in any way.[17] Others argue that the possessor of inalienable rights would not be able to dispose of it voluntarily or involuntarily, nor would any other person, group or institution and inalienable right incorporate a disability and an immunity, as an inalienable right incorporates both a disability and an

[12] Freeman, M *Human Rights* 4th ed (2022).
[13] Vienna Declaration and Programme of Action, 1993.
[14] Dudley; Silove; and Gale (2012) 177.
[15] Mubangizi, JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 5.
[16] Brems, E *Human Rights: Universality and Diversity* (2001) 14.
[17] Simmons, AJ 'Inalienable Rights and Locke's Treaties' (1983) 12 (3) *Philosophy and Public Affairs* 177.

immunity.[18] Inalienable rights are viewed as those rights which cannot be transferred or waived by its possessor. They are claimed by some scholars to include the right to life, right to liberty and right to pursuit of happiness.[19]

3.4 Categories of human rights

Human rights are classified into three generations. The first-generation rights consist of civil and political rights. These are the rights that the individual possess against the State. They further reflect the laissez-faire doctrine of non-interference. The rights are aimed at protecting the citizens against arbitrary actions of the state. First generation rights include right to life, right to liberty, right to security, right to privacy, right to fair trial, right to equality and the right to dignity. They also include freedom from slavery and forced labour, freedom of association, freedom from torture and inhuman treatment, freedom from religion, belief, opinion, freedom of expression, and freedom of movement. Lastly, they include political rights, and they guarantee individuals to participate in their government directly or through elected representatives.[20]

The second-generation rights consist of economic, social, and cultural rights. This category contains rights which are founded on the status of an individual as a member of the society. In this category, the State is required to provide and create conditions that would enable individuals to have access to essential facilities in the modern life. They include, but are not limited to, the right to health care services, right to education, right to social security, right to work, right to collective bargaining, right to fair remuneration, right to property, right to housing, and the right to participate in cultural life of one's choice.[21]

The third-generation rights are also known as solidarity rights. This category of rights is collective in nature and depends upon international co-operation for their achievement. They include the right to development, the right to clean environment, and the right to peace.[22] The achievement of these rights is dependent on collective effort between the people and their government.

[18] Hohfeld, W Fundamental Legal Conceptions as applied in Judicial Reasoning (1964) 16 *Yale Law Journal* 714.
[19] McConnell, T 'The Nature and Basis of Inalienable Rights' (1984) 3 (1) *Law and Philosophy* 25.
[20] Mubangizi (1996) 95.
[21] Mubangizi (1996) 96.
[22] Mubangizi (1996) 96.

The classification of rights is believed to have been helpful in extending the concept of human rights beyond western liberal construction. However, scholars have critiqued the categorisation of human rights stating that such categorisation is limited and inconsistent. One scholar, Mubangizi, calls for a new approach that would be "more conceptually consistent and one that would achieve a broader perspective on human rights".[23]

3.5 International Bill of Rights

The San Francisco conference in 1945 held by the international community led to the adoption of the International Bill of Human Rights. The experience of what the world had passed through during that time, which included the violation of basic human rights by the governments of the "civilised" countries, showed the need for the protection of human rights. The events that took place during and preceding the Second World War set in motion radical change in the content and nature of international law.[24] The most important task of the Commission on Human Rights was to draft an International Bill of Rights for adoption by the General Assembly in 1948. The International Bill emerged, which consists of the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

3.5.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted on the 10th December 1948 by the UN General Assembly. The UDHR is regarded as the cornerstone of the human rights movement. With its adoption, it became possible to interpret the formerly unclear human rights provisions of the UN Charter and substantiated claims of human rights violation. The UDHR entails the authoritative interpretation of the UN Charter's human rights provisions. It is legally binding on the states that have ratified the UDHR. The UDHR norms have become binding as part of international customary law and principles of civilised nations. This makes its standards

[23] Mubangizi (1996) 96.
[24] Humphrey, JP 'The International Bill of Rights: Scope and Implementation' (1976) 17 *William & Mary Law Review* 527.

applicable to all nations regardless of whether they have expressed consent.[25] The Declaration was proclaimed "as a common standard of achievement for all peoples and all nations".[26] It affirms that all human beings are born free and equal in dignity and rights.[27] Article 2 states that "everyone is entitled to all the rights and freedoms, without any distinction of any kind such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status".[28]

The UDHR recognises the following rights: right to equality; right to life, liberty and personal security; freedom from slavery; freedom from torture and degrading treatment or punishment; right to recognition as a person before the law; right to equality before the law; right to remedy by the competent national tribunal for acts violating the fundamental rights granted to him by the constitution or by law; freedom from arbitrary arrest, detention or exile; right to a fair and public hearing by an independent and impartial tribunal; right to be considered innocent until proven guilty; freedom from arbitrary interference with privacy, family, home or correspondence; right to freedom of movement in and out of the country; right to asylum in other countries from persecution; right to a nationality and freedom to change it; right to marriage and family; right to own property; right to freedom of thought, conscience and religion; right to freedom of opinion and expression; right to freedom of peaceful assembly and association; right to participate in government and free elections; right to social security; right to work, to free choice of employment, to just and favourable conditions of work and to join trade unions; right to rest and leisure; right to adequate living standard; right to education; right to participate in the cultural life of community; right to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised; duties to the community to free and full development of personality and freedom from state or personal interference in the above mentioned rights.[29]

The UDHR has had a profound influence on international human rights law. Indeed, the laws of many states drew political, economic, and social influence from the Declaration. The UDHR has been the foundation of many human rights codifications, international legal systems and regional

[25] Renteln (2013) 10.
[26] Universal Declaration of Human Rights, 1948.
[27] Article 1 of the UDHR.
[28] Article 1 of the UDHR.
[29] Articles 1-30 of Universal Declaration of Human Rights.

treaties. For many of the treaties that were adopted post-1945, UDHR had been used as a standard measure. The UDHR has also served as a model of many domestic constitutions, regulations, laws and policies that protect fundamental human rights.[30] It should be noted that the UDHR applies only to states that ratified the Declaration.

However, there has been value conflicts surrounding the UDHR, one is the cultural clashes with regards to norms embodied in it. Cultural relativists argue that the whole idea of "universal" declaration" cannot be valid all over the world since it contains western values. The argument is that:

> The rights of a man cannot be circumscribed by the standards of any single culture or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realisation of the personalities of vast numbers of human beings. [31]

3.5.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 by the United Nations and came into force in 1976. The treaty has universal coverage in terms of protection of human rights. Civil and political rights are classed as first-generation rights and stems from Western liberal philosophies of the seventeenth- and eighteenth-century theories of natural rights.[32] The ICCPR protects civil and political rights, such as the right to life, freedom from arbitrary detention and freedom of expression. It mostly guarantees substantive human rights and places obligation upon State parties to provide domestic remedies for contravening any rights listed in the ICCPR.[33] ICCPR recognises the following rights: the right to self-determination of all people; respect all of all individuals right 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; equal right of men and women to the enjoyment of all civil and political rights; the right to life; the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or

[30] Hannun, H 'The Status of the Universal Declaration of Human Rights in National and International law' (1995) 25 *Journal of International Law and Comparative Law* 289.
[31] Brems (2001) 24.
[32] Joseph, S; Castan, M *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 3 ed (2013) 3-4.
[33] International Covenant on Civil and Political Rights, 1966.

punishment; the right not to be held in slavery, the right to liberty and security; the right to freedom of thought, conscience and religion; the right to freedom of association with others, including the right to form and join trade unions.[34]

The ICCPR has a monitoring and supervisory system in place which records State parties' implementation of its norms and standards. Unlike its sister treaty the ICESCR, a large body of jurisprudence has emerged under the ICCPR and the treaty has been incorporated into the domestic laws of many State parties. The ICCPR contains rights that are similar to UDHR, but it does not have the right to own property, and certain cultural rights for ethnic groupings, religion, and minorities.[35]

3.5.3 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted on 16 December 1966 and it came into force on 3 of January 1976. ICESCR was adopted by the United Nations General Assembly to ensure the protection of economic, social, and cultural rights. The ICESCR protects the following rights: the right to self-determination of all people; the right to non-discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; the equal right of men and women; the right to work; the right to form and join trade union; the right to social security; the right to protection and assistance to the family; the right to an adequate standard of living; the right to health; the right to education and the right to cultural freedom.[36]

Socio-economic rights are classed as second-generation rights, which is derived from socialist thoughts of the late nineteenth century. The ICESCR is used as a standard to assess state compliance with economic, social, and cultural rights.[37] The application of socio-economic rights in domestic legal systems would depend on the influence by the democratic and legal culture of a state.

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[34] Article 1-23 of the International Covenant Civil and Political Rights, 1966.
[35] Winston, C *Human Rights in the World Community: Issues and Action* (1992) 14.
[36] Article 1- 15 of the International Covenant on Economic, Social and Cultural Rights, 1966.
[37] Chapman, AR 'A 'Violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 (1) *Human Rights Quarterly* 1.

3.6 Regional human rights instruments

The enforcement of human rights values and standards did not end at the international level, but it also occurred at the regional level. The adoption of regional human rights instruments was to ensure respect and protection of human rights in the entire world and the realisation of universal norms. The aim was to ensure that human rights were translated into reality within each State jurisdiction.[38] Regional instruments draw inspiration from international law on human and people's rights. It is believed that advocacy at the regional level provides opportunities of direct protection of women's rights that do not necessarily exist at the international level. [39]

3.6.1 Europe

The first regional establishment took place in Europe. The system of protection of human rights in Europe in based on three treaties. First, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) came into force in September 1953[40] and is now ratified by all member states. ECHR recognises basic political rights and civil rights. It did not deviate much from the UDHR and it was adopted mainly to codify existing national practices.[41]

Secondly, the European Social Charter (ESC) was adopted in 1961 and it guarantees social rights and economic rights. It is believed to be the first international human rights treaty to entail binding legal obligation to respect of socio-economic rights. The Charter was adopted to complement the European Convention. ESC contains a set of rights that include the rights to decent working conditions and fair remuneration; the right to organise and engage in collective bargaining; the

[38] Mugwanya, GW 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanism: Reinvigorating the African System' (1999) 10 (1) *Journal of International Law and Comp*arative Law 35.
[39] Weston, BH; Lukes, RA; Hnatt K 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law* 589-590.
[40] Coblentz, WK; 'Warshaw, RS 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1956) 44 (1) *California Law Review* 94.
[41] Huneeus, A; Madsen, MR 'Between Universalism and Regional Law and Politics: A Comparative History of the American, Europe, and African Human Rights Systems' (2018) 16 *International Journal of Constitutional Law* 141.

right to vocational training, the right to health care; the right to social security and social assistance; right to social protection and equality of treatment for migrant workers. [42]

Lastly, the EU Charter of Fundamental Rights was adopted in 2000. The Charter is primarily EU law and a legally binding instrument of the EU institutions and member states which act within the scope EU law.[43] Law is interpreted considering the Charter. Any legislation or national law that is found to be in breach of any provisions of the Charter is said to be void and must be set aside. The Charter is dependent upon for providing grounds of judicial review and it also operates as a source of authority for discovery of general principles of EU law.[44]

3.6.2 America

America's is the second regional human rights system that followed Europe. The system of protection of human rights in America consists of two treaties, namely the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.

The American Convention on Human Rights was adopted in 1969 and operates within the Organization of American States Charter (OAS) frameworks. It provides for international enforcement and monitoring of rights. The American Convention creates a legally binding obligation on the OAS member states that have signed and ratified it. The American Convention on Human Rights guarantees civil and political rights.[45] The Convention recognises the right to life, the right to juridical personality, the right to vote and to be elected, and the right to equal protection of the law. It also protects various basic liberties guaranteed by the United States Bill of Rights, including freedom of speech, freedom of religion, freedom of assembly, freedom from

[42] O'Cinneide, C 'Migrant Rights under the European Social Charter' (2014) *Migrants at Work: Immigration and Vulnerability in Labour Law* 1-2; 290-314.
[43] DE Burca G 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 2 *Journal of European and Comparative Law* 169.
[44] Lenaerts, K 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 376.
[45] Buergenthal, T 'American Convention on Human Rights: Illusions and Hopes' (1971) 21 (1) *University at Buffalo School of Law* 123.

slavery, and the right to fair trial. The Convention is said to have expanded the Inter-American Commission and led to the establishment of an Inter-American Court.[46]

The American Declaration on the Rights and Duties of Man was adopted in 1948, and is known to be the first to declare the fundamental rights of the individual proclaimed by the OAS Charter. American Declaration drafters had the original purpose of designing an instrument that would have the normative status of a convention and that would compel the states adequate application of human rights standards.[47] The American Declaration does not have a legally binding effect, as it is a non-binding instrument. However, it is regarded as the cornerstone of the Inter-American human rights system.[48] Duke J 'United States Ratification of the American Convention on Human Rights' (1992) 2 *Journal of Comparative and International Law* 326.

3.6.3 Africa

The most recent regional human right body is in Africa. In 1981, the Organization of African Unity (OAU) of 1963 adopted the African Charter on Human and People's Rights (ACHPR). The Charter, also known as the Banjul Charter, entered into force in 1986. It is believed to constitute a fundamental effort for the realisation of international human rights norms on the Africa continent. The Charter contains civil rights, political rights, economic rights, social rights, cultural rights and people's rights, also called collective or solidarity rights.[49] The Charter established the African Commission on Human and People's Rights in 1987. The Commission was established in terms of Article 30 of the African Charter, and its mandate is to protect and promote human and people's rights in Africa.[50] In addition, it was created to promote, protect and interpret the African Charter.

Compared to the other two regional human rights instruments of Europe and America, the African Charter is praised for being the most comprehensive instrument that embodies in one document the three dimensions of rights, namely civil and political rights; economic, social and cultural

[46] Duke, J 'United States Ratification of the American Convention on Human Right's (1992) 2 *Journal of Comparative and International Law* 326.
[47] The American Declaration of the Rights and Duties of Man: A Crucible of Latin American Humanism (2019).
[48] Cerna, CM 'Reflection on the Normative Status of the American Declaration of the Rights and Duties of Man' (2008) 30 (4) *Journal of International Law* 1211.
[49] African Charter on Human and People's Rights, 1981.
[50] Bekker, G 'The African Court on Human and People's Rights: Safeguarding the Interests of African States' (2007) 51 (1) *Journal of African Law* 156.

rights, and solidarity rights. This is believed to give effect to the indivisibility and interdependence of human rights. The Charter also includes the individual duties with regards to family, society, state and the international community. It emphasises the rights of people that do not appear in other regional systems of human rights. Furthermore, the Charter provides liberal access to its procedures unlike the other two regional human rights instruments reviewed in this chapter.

However, the African Charter has faced criticism. One is the question of whether the Charter was meant to enforce "universal" human rights norms or to pursue a trend towards "African Culturalism".[51] Some African scholars have argued that the concept of human rights is not new in Africa; it existed in pre-colonial societies.

3.7 Universalism of human rights and culture

Africans possess traditional value systems that also recognise human rights values, such as human dignity and integrity for all individuals. The notion of human dignity entitles respect to all human beings simply by being human.[52] Since the principles of international human rights manifest themselves in traditional communities, one example would be the value of providing protection and security for the members of the family. The protection of such values may not be structured in the same manner as the western human rights framework, but traditional societies have lived in a manner that mimics basic standards of human rights.

It is believed that culture and cultural diversity are protected by the international human rights. Article 27 of the International Covenant on Civil and Political Rights provides that "in those states in which ethnic, religion or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".[53] The Committee of the International Labour Organization has laid out international standards that are to be considered in the application of such standards in light of national conditions. The committee sat to discuss the required approach by evaluating national law practice against international standards

[51] Mutua, M 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *University at Buffalo School of Law* 339-346.
[52] Na'im, AA; Deng, FM *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 331-336.
[53] Article 27 of the International Covenant on Civil and Political Rights.

or conventions to determine whether its requirements are being met. It is believed that these international standards are not derived from or affected by any social or economic systems, but are uniform in the manner of their implementation.[54]

According to the universalism discourse, human rights are universal and cross culturally applicable. However, there is a challenge of achieving balance between upholding human rights norms or standards and ancient cultural traditions existing within a particular State.[55] There are cultural barriers in the implementation of modern human rights norms, particularly in African states. In addressing the conflict between cultural traditions and national human rights aspirations, the African Charter proclaims the right of peoples to their cultural development. The African Charter provides that the individual has a duty to "preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation, and in general to contribute to the promotion of the moral wellbeing of society".[56]

With reference to universalism of human rights and culture in the South African context, it has already been stated above that the South African law recognises customary law alongside state law. Culture is defined as "inherited ideas, belief, values, and knowledge which constitute the shared bases of social action".[57] The Constitution of the Republic of South Africa guarantees the right to culture to all individuals. Section 30 provides that "everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights".[58]

Some scholars argue that in some African States, national human rights provisions have had to a limited influence on constitutional human rights guarantees due to persistent cultural traditions. The national goal of implementing and protecting human rights is believed to be challenged by the

[54] Ramcharan BG 'How Universal Are Human Rights? A Debate about Power rather than Rights' http://library.fes.de (accessed 09-03-2022).
[55] Ibhawoh, B 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 *Human Rights Quarterly* 839.
[56] Article 29 (7) of the African Charter on Human and People's Rights, 1981.
[57] Rakubu M *The Practice of Virginity Testing in South Africa: A Constitutional and Comparative Analysis* (Master of Laws, University of Limpopo, 2019) 14.
[58] Section 30 of the Constitution of the Republic of South Africa.

shortcomings that resulted from ongoing conflict with cultural traditions and practices.[59] This conflict between human rights and cultural practice will be discussed in next chapter.

3.8 Influence of human rights on the Constitution of the Republic of South Africa

The protection and application of human rights are dependent on the national implementation of internationally recognised human rights.[60] The concept of human rights has been embodied in almost all state constitutions, which are recognised as the supreme law of the land. Where it has not been fully incorporated, there is a continuous call for human rights inclusion and for constitutional guarantees of rights. They share the binding force of the constitution which prevails over legislation and other acts. Sovereign states are left with the mandate to enforce the authoritative international human rights norms. States have accepted the idea of human rights; for example, universal condemnation of apartheid in South Africa implied universal acceptance of the idea of rights.[61]

The most critical shift in the South African history is the transition from parliamentary sovereignty to constitutional supremacy. Before the 1994 democratic transition, parliament was supreme; there were no checks on State power and the legislature could pass any law even if it was unjust, and the courts only had procedural function.[62] Apartheid is regarded as the embodiment of repression, racism and inhumanity of the previous white supremacy regime.[63] South Africa had slight regard of international law during the Apartheid years. The Apartheid government considered the United Nations as an enemy. The South African Law Commission in 1989 raised the irrelevance of international law and its inability to have an impact in South Africa. Its views showed defiance to the United Nations norms, declarations and resolutions. The South African Law Commission stated that:

[59] Ibhawoh (2000) 845.
[60] Donnelly (2007) 284.
[61] Henkin, L 'The Universality of the Concept of Human Rights' (1989) 506 *The Annals of the American Academy of Political and Social Science* 13.
[62] Sarkir, J 'The Effects of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' *(*1998) 176 *Journal of Constitutional Law* 177-179.
[63] Hinds, LS 'Apartheid in South Africa and the Universal Declaration of Human Rights' (1985) 24 *Crime and Social Justice* 5.

> It cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part- let alone a significant part-in the decision of the protection of group and individual rights in South Africa. Safety does not lie in the hope that our courts will apply the norms of international law.[64]

South Africa adopted a new Constitution in 1996. The Constitution is based on a universalist conception of human rights. The Constitution of the Republic of South Africa is the supreme law of the Republic, and as such any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[65]

South Africa is a signatory to the Universal Declaration on Human Rights; Convention on the Elimination of all forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and other regional instruments, such as the African Charter on Human and People's Rights. All these international and regional instruments have had influence on the Constitution of the Republic of South Africa for the protection of human rights. When the Constitution was drafted, South Africa followed the international route of borrowing from foreign laws, international instruments, and national constitutions. The Constitution of the Republic of South Africa reflects the international western development of human rights culture and confirms the binding nature of human rights. The Universal Declaration remains as the principal source of human rights standard.[66] International and foreign experience affected the drafting of the Constitution, and the areas of influence include the structure of the court system, the structure of the State, and, mostly, the content and the language of the Bill of Rights.[67] The courts are mandated to apply international law. Section 232 of the Constitution provides that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Acts of Parliament".[68]

The Constitution contains the Bill of Rights, which reflects the values and aspirations of the Universal Declaration. The provisions of the Bill of Rights are guaranteed to all South African citizens. The Bill of Right is the cornerstone of South African democracy and it enshrines the rights

[64] South African Law Commission *Working Paper 25 Project 58 Group and Human Rights* (1989) 182.
[65] Section 2 of the Constitution.
[66] Hannum (1995) *Journal of International Law and Comparative Law* 290.
[67] Sarkir (1998) 177.
[68] Section 232 of the Constitution of the Republic of South Africa, 1996.

of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.[69] It protects the rights to equality; human dignity; life; freedom and the security of the person; slavery, servitude and forced labour; privacy; freedom of religion, belief and opinion; freedom of expression; assembly, demonstration, picket and petition; freedom of association; political rights; citizenship; freedom of movement and residence; freedom of trade, occupation and profession; labour relations; environment; property; housing; health care, food, water and social security; children; education; language and culture; cultural, religious and linguistic communities; access to information; just administrative action; access to courts, and arrested, detained and accused persons.

Some scholars submit that the current Constitution of the Republic of South Africa is "one of the most liberal in the world".[70] The Constitution emphasises human dignity, equality, freedom and individual rights which the former constitution during apartheid years did not recognise. The issue of segregations, which has been an on-going concern, is dealt with in the Constitution. The Constitution extends rights to the previously discriminated groups such as blacks, Indians, Coloureds, women, and children. It deals with discrimination based on 'sexual orientation, gender, sex, pregnancy, marital status, ethnic or social origin, race, colour, age, disability, religion, conscience, belief, culture, language and birth'.[71]

One of the mechanisms used to promote the notion of human rights in South Africa, was the Truth and Reconciliation Commission (TRC). The Commission was tasked with investigating human rights abuses and grants amnesty. This happened when South Africa was transitioning from decades of the unjust system of apartheid that was dominated by racism and racial subjugation. The Commission was given the mandate of building political culture in the country that respects and promotes human rights. This was done through the process of backward-looking, which involved looking at the violation of human rights of the past, also front-looking in trying to prevent future violation of a person's rights. In its final report, the Commission included a section in its recommendation on the "Promotion of Human Rights Culture". [72] It was believed that establishing

[69] Section 7(1) of the Constitution.
[70] Du Toit, C 'Religious Freedom and Human Rights in South Africa after 1996: Responses and Challenges' (2006) 3 *Brigham Young University Law Review* 677.
[71] Section 9 of the Constitution of the Republic of South Africa, 1996.
[72] Gibson, JL 'Truth, Reconciliation, and the Creating of Human Rights Culture in South Africa' (2004) 38 (1) *Law and Society Review* 6.

a culture that respects human rights entails the creation of a set of political values and attitudes favouring human rights. A human rights culture involves a process where people value human rights and are willing to protect them.

As much as the Constitution brought benefits in protecting human rights, there are challenges in the implementation of constitutional provisions in the South African context. One is the clash between human rights and culture. These are discussed in detail in the next chapter.

3.9 Conclusion

The position of universalists is that human rights are universal imperatives that come from an individual's humanity. Thus, the State and governments are bound by universal norms and standards to protect human rights. The International Bill of Rights, which includes the UDHR and the two covenants on civil and political rights and socioeconomic rights, was introduced by the United Nations to compel states to commit to the implementation and protection of human rights. The UN effort in the realisation of human rights reached to various states, not only internationally, but also regionally. The call for the implementation and protection of human rights received attention in Europe, America, and Africa. It is commonly thought that regional human rights mechanisms are more effective in the protection and promotion rights than the UN human rights mechanisms. South Africa is one of the member states in Africa that has signed and ratified various human rights treaties, internationally and regionally. The Universal Declaration of Human Rights is one of the international instruments that became influential in setting the norms and standard of South African human rights mechanisms. The 1996 Constitution drew inspiration from the provisions of the UDHR because the Bill of Rights contains provisions that complement international human rights.

CHAPTER 4: JUDGES' ATTITUDES TO CONFLICT BETWEEN CULTURE AND THE BILL OF RIGHTS

4.1 Introduction

International law was traditionally concerned with regulating relations among states, with the aim of maintaining international peace. The United Nations introduced the notion of human rights into international law.[1] The implementation of human rights by the United Nations is subject to challenges, and one such is the relevance of the human rights concept to cultures of member states. When the international human rights ideals clash with lived realities, the United Nations has been the central institution where such are discussed.

For decades, the culture of African have battled for its survival, first from the era of colonialism and, recently, from the introduction of new constitutions that are influenced by the international human rights discourse.[2] South Africa is one of the countries in Africa that is faced with the dilemma of preserving ancient cultural traditions through adapting and modifying modern standards of human rights. Whenever these conflicts arise, the notions of culture and people's traditional way of life do not stand the test of the human rights imperatives. When states were encouraged to adopt human rights standards, it was submitted that the notion of human rights was coming to complement rather than to limit the existing specific national aspirations. The preference of human rights above cultural traditions and customs in the national legislation has caused conflict. This chapter looks at judges' attitudes and remedies used when conflict between culture and the Bill of Rights arise. This is done by doing a judicial review and analysis of leading cases and judgments delivered post-1994.

4.2 Judicial authority

The application of the human rights framework within the Constitution of the Republic of South Africa is problematic with regards to the unique context of the South African society and culture.

[1] Freeman (2022).
[2] Omotola, JA 'Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture' (2004) 15 (1) *Journal of International Law and Comparative Law* 115.

The Western notion of human rights conflicts with the collective nature and experience of most South Africans as opposed to the individual nature of human rights.[3] Human rights in Africa stem from the collective community and not from the individual. The indigenous laws which underlie traditional people in the African society do not really feature in the Constitution of the Republic of South Africa and its Bill of Rights. Customary law, which indigenous people lived on, has not enjoyed the exclusive existence without being subjected to the provisions of human rights.

There are two main instruments that deal with customary law, namely the Law of Evidence Amendment Act and the Constitution. The Law of Evidence Amendment Act provides that:

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty; provided that indigenous law shall not be opposed to the principles of public policy or natural justice; provided further that it shall not be lawful for any court to declare that the custom of lobolo or bogadi or other similar custom is repugnant to such principles.[4]

This section introduced the obligation of all courts in the Republic to apply customary law. It also removed the provision that the parties must be black to a suit, implying that non-black parties could be subject to customary law also. However, the courts are subjected to three provisions in their power to apply customary law, namely public policy and natural justice; the repugnancy provision of the colonial era, the court's mandate to take judicial notice of customary law only if the law is readily ascertained, and with sufficient certainty.[5]

The judicial authority of the Republic is vested in the courts. The courts are said to be independent and are subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.[6] The courts are obliged by the Constitution, as the supreme law of the country,[7] to give effect to a right outlined in the Bill of Rights when applying a provision of the Bill of Rights to a natural or juristic person.[8] The Constitution stipulates that "the Bill of Rights

[3] Du Toit (2006) *Brigham Young University Law Review* 687.
[4] Section 1(1) Law of Evidence Amendment Act 45 of 1988.
[5] Section 1(2) Law of Evidence Amendment Act 45 of 1988.
[6] Section 165(1) and (2) of the Constitution.
[7] Section 2 of the Constitution.
[8] Section 8(3) (a) of the Constitution.

applies to all law, and binds the legislature, the executive and the judiciary and all organs of state".[9] Courts are obliged to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing customary law.[10]

The courts are now obliged to take judicial notice of customary law and to apply the rules of customary law in cases that involve the application of indigenous cultural practices. Section 211(3) of the Constitution mandates the courts to "apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".[11] The judicial officers have discretion in deciding when to apply customary law, and this is based on the belief that judges decide each case on its own merits.

The judges have taken on the function of expressly completing the human rights protection through the interpretation of law. They are given the mandate to interpret the law and give decisions in the face of conflict between the constitutional human rights standards on one hand and recognition of cultural traditions on the other. The question is how judges strike a balance between the recognition of individual human rights standards guaranteed by the 1996 Constitution and traditional practices of customary law claimed by a traditional person or group. The judicial officers are confronted with this conflict, especially between the recognition of the right to gender equality provided in the Bill of Rights and the traditional status of women in South Africa. Another instance would be the conflict between constitutional recognition of children's rights and the traditional status of children according to cultural norms and practices.

In trying to answer this question, this section looks at some of the leading cases where there was a tension between recognising constitutional human rights standards of State law and upholding traditional cultural norms that are and were practiced by traditional groups or communities. The focus is on the cases of children and women as they are regarded to be the most vulnerable group in society. The reason is that women and children are often at the centre of this conflict when it comes to the challenge of balance between on one hand respecting the constitutional framework, which promotes the values of human rights, and on the other recognising cultural practices.

[9] Section 8 of the Constitution of the Republic of South Africa, 1996.
[10] Section 39(2) of the Constitution.
[11] Section 211(3) of the Constitution.

4.3 Women's human rights

The United Nations General Assembly adopted the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) on 18 December1979 and came into effect on 3 September 1981.[12] CEDAW is regarded the International Bill of Women's Rights and is referred to as the "first right treaty on women". South Africa is one of the African countries that have ratified the treaty. The Convention is the definitive international legal instrument which calls for respect and observance of women's human rights. The Convention calls for women to be afforded rights equal to those of men and that women should be able to enjoy those rights in practice. CEDAW is believed to be the first treaty to address a range of issues related to the position and role of women in society. The Convention has progressed beyond the previous human rights treaties by addressing the pervasive nature of discrimination against women and identifies the need to address all forms of discrimination to confront social causes of women's inequality.[13] The Convention is legally binding on the contracting member states and is universal in reach. CEDAW is believed to be the first instrument embodying social, cultural, civil, and political rights of women. The organisation of the Convention follows that of the International Convention on the Elimination of All Forms of Racial Discrimination.

The African Charter on Human and People's Rights advocates for the elimination of all forms of discrimination against women.[14] Article 2 of the African Charter stipulates that every individual shall be entitled to the enjoyment of rights and freedom without distinction of any based on sex. Article 18(3) obligates State parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in the international declarations and conventions.

The African Union Assembly of Heads of State and Government adopted the Protocol to the African Charter on Human and People's Rights on the Rights of the Women in Africa (African Women's Protocol) on 11 July 2003. The Protocol entered into force on November 2005.[15] It is also referred to as the "Maputo Protocol", referring to the place of its adoption. The Protocol is a

[12] Convention on the Elimination of all forms of Discrimination against Women (CEDAW) on 18 December1979.
[13] Hevener, NK 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective' (1986) 8 *Human Rights Quarterly* 70.
[14] Cook, RJ 'Women's International Human Rights Law: The Way Forward' (1993) 15 *Human Rights Quarterly* 239.
[15] Protocol to the African Charter on Human and People's Rights on the Rights of the Women in Africa, 2003.

legally binding multilateral addition to the African Charter.[16] It reaffirms the prohibition of discrimination against women and calls on State parties to combat all forms of discrimination against women through appropriate legislation, institutional and other measures.[17] The Protocol is said not to have been drafted in response to CEDAW, but as an addition to the African Charter. The Protocol is thought to expand the protective scope of women's rights by addressing issues of concern to realities of African women that were not addressed or included in CEDAW.

4.3.1 Women's rights versus cultural practices in South Africa

South Africa is one of the countries that have taken a leading role in promoting gender rights within SADC in the African continent. South Africa has ratified international treaties on women rights with the aim of promoting women's rights in the country.[18] Amongst other provisions, they include CEDAW and African Women's Protocol[19] to eliminate discrimination against women and to ensure the opportunity to enjoy their human rights. The Constitution of the Republic of South Africa contains Bill of Rights, which serves as a tool for protecting and promoting women's human rights. The Constitution plays a complementary role with the international human rights instruments. As it has been stated above, the Universal Declaration has had a direct influence in our constitution. The recognition and protection of women's human rights in the Constitution and on national legislation highlight the countries' role of uplifting women's rights.

Cultural relativist argument is that the universality of human rights standards for women may not be applicable, as different communities and cultural traditions vary in their knowledge and understanding of what women's status in society and human values are.[20] The conflict between cultural relativism and universality of human rights has been felt in the field and in cases that involve women's human rights. The judicial is often confronted with the challenge of striking the

[16] Viljoen, F 'An Introduction to the Protocol to the African Charter on Human and People's Rights on the Rights of the Women in Africa' (2009) 16 *Washing Lee Journal of Civil Rights and Social Justice* 12.
[17] Article 2 of the Protocol.
[18] Graybill, L 'The Contribution of the Truth and Reconciliation Commission toward the Promotion of Women's Rights in South Africa' (2001) 24(1) *Women's Studies International Forum* 1.
[19] South Africa ratified the protocol in 2004.
[20] Iyanuolu AE *The Challenge of Culture for the Rights of Women in Africa: A Critical Analysis of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (LLM, University of Cape Town, 2008) 20.

balance in cases where traditional practices and cultural rights are inconsistent with women's rights, such as the right to protection from discrimination and the right to equality.

Traditional cultural practices are said to reflect beliefs and values held by members of a particular community from generation to generation. Each social group in the world has specific cultural practices and values beneficial to all members of that group. It is believed that as much as there are beneficial cultural practices, there are also some harmful traditional practices to a particular group in society, such as women. These traditional practices include *ukuthwala*, the primogeniture rule, virginity testing, female genital mutilation, breast sweeping, widows' rituals, and witch hunting.[21]

4.3.2 Women and customary laws of succession

In South Africa, there has been legislative initiatives to develop common law, however, not much was done to make customary law to be in line with the social and economic changes and the human rights regime. The application of customary law of succession used to be regulated by the Black Administration Act. The Intestate Succession Act was applied to the deceased estate, where the customary law is not applicable, whilst the regulations of Section 23 of the Black Administration Act and were applicable to the deceased estate when the deceased was a member of the indigenous community.[22] The main purpose of Section 23 and its provisions was to give effect to the customary law of succession. This legislation determined which property had to devolve in terms of customary law of succession and would be allocated to a wife who is party to a customary marriage.[23] The rules of succession differ from community to community and are mostly uncodified. There is official and living customary intestate succession laws.

The rights of women to own and dispose of property has been an ongoing human rights issue in South Africa, just like in many African countries. Some scholars argue that for decades African courts took a passive role and static view of customary law when it came to discriminatory

[21] Maluleke (2012) *PER* 2.
[22] Rauterbach, C 'Mixing South African Common Law and Customary Law of Intestate Succession: "Potjiekos" in the Making' (2010) *JCL Studies in Comparative Law: Mixed Legal Systems at New Frontiers* 228-229.
[23] Rautenbach, C 'A Few Comments on the (Possible) Revival of the Customary Law Rule of Male Primogeniture: Can the Common Law Principle of Freedom of Testation come to its Rescue?' (2014) 1 *Acta Juridica* 135.

customary law practices and norms that discriminated against women.[24] This was also done in South Africa where the State constitution recognises the applicability of customary law without resolving the conflict between customary law and human rights provisions. It is believed that judges were permitted to interpret the applicable provisions of customary law and they failed to consider the discriminatory effect of customary law against women. The judges were said to be ignorant in terms of considering that customary law is dynamic and continually evolving owing to economic and social developments. In South Africa, courts are showing the need to respond to social and economic developments, but there is a question of how they strike a balance in cases of conflict between customary law practices and human rights.

There are three cases that were brought and heard together before the High court, for the confirmation of orders of invalidity of certain provisions of the Black Administration Act and regulations made in terms of the Act that governs intestate succession that applies to black estates. The first case was the matter of *Bhe and Others v Magistrate, Khayelitsha and Others*[25] which concerns an application for the confirmation of an order of the Cape Town High Court. The application was made by Nontupheko Maretha Bhe (Ms Bhe) on behalf of her two minor daughters. The two children are the deceased's biological children. The deceased (Mr. Vuyo Ellius Mgolombane) died intestate in October 2002. There was no marriage or customary marriage that took place between Ms. Bhe and the deceased. Ms Bhe, and the deceased, and one of the daughters lived in a temporary informal shelter in Khayelitsha, Cape Town. The estate of the deceased comprised the temporal informal shelter, the property on which it stood and some movable property that Ms Bhe and the deceased had acquired jointly over the years, including the building materials with which they were intending to build a house.

The first respondent in the above matter was the Magistrate of Khayelitsha who appointed Mr. Maboyisi Nelson Mgolombane, who is the father of the deceased, as the representative and the sole heir of the deceased estate in accordance with Section 23 of the Act and regulations. The deceased father wanted to sell the immovable property to defray expenses incurred during the funeral of the deceased. It is in this instance that Ms Bhe approached the High Court for two interdicts, one to prevent the father of the deceased from selling the immovable property, which

[24] Ndulo, M 'African Customary Law, Customs and Women's Rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 102, 109.
[25] 2004 2 SA 544 (CC).

would leave Ms Bhe and the children homeless, and, two, an interdict to prevent harassment of Ms Bhe by the father of the deceased. The Applicant challenged the appointment of the deceased's father as the heir and representative of the estate in the High Court.

There were two issues that were brought before the Court, namely the question of the constitutional validity of section 23 of the Black Administration Act,[26] and the constitutional validity of the principle of primogeniture in the context of the customary law of succession.

Justice Langa concluded that the legislative provision (Section 23(10) (a), (c) and (e) of the Black Administration Act, regulation 2(e) of the regulations of the Administration and Distribution of the Estates of Deceased Blacks) that were being challenged and on which the father of the deceased had relied were invalid since they were inconsistent with the Constitution. It was also declared that Section 1 of the Intestate Succession Act is invalid.[27] The Court declared that Ms Bhe and her children were the only heirs to the deceased estate. Judge Langa pointed out that the customary law of succession 'was designed to preserve the cohesion and stability of the extended family unit and ultimately, the entire community".[28]

The second case is an application for the confirmation of the order of the Pretoria High Court. In the *Shibi v Sithole and Others*[29] matter, the applicant, Ms Shibi (Charlotte Shibi), is the sister to the deceased, Daniel Solomon Sithole. The applicant's brother died intestate in 1995. The deceased was not married, and neither had a civil nor a customary wife. He had no children and did not have surviving parents or grandparents. His two male cousins Mantabeni Sithole and Jerry Sithole were his nearest male relatives.

Since the deceased was an African, his intestate estate was administered under the provisions of Section 23 (10) of the Black Administration Act and regulation 2(e), requiring devolution of an African's estate to be made according to custom. The Magistrate appointed Mantabeni Sithole as the representative of the deceased estate. His appointment was withdrawn when the Court received complaints that Mr. Sithole was misappropriating the estate funds. Then, an attorney was appointed who was to administer the estate according to customary law. During the liquidation

[26] Black Administration Act 38 of 1927.
[27] Intestate Succession Act 81 of 1987.
[28] *Bhe and Others v Magistrate, Khayelitsha and Others* para 75.
[29] *Shibi v Sithole and Others* 2005 1 SA 580 (CC).

and distribution, the remaining assets of the deceased estate in the amount of R11, 468.02 was given to Jerry Sithole. The estate was then wound up and finalised.

Since the distribution of the deceased estate falls under the provisions of Section 23 of the Act and, in particular, regulation 2(e), Ms Shibi was precluded from being the heir to the intestate estate of her deceased brother. Ms Shibi then challenged the decision of the Magistrate in the High Court and sought an order declaring her the sole heir of her deceased brother's estate. She further claimed for damages and relief from the first and second respondent and against the Minister. The High Court set aside the magistrate's decision and declared Ms Shibi the sole heir. The Court issued an order that was similar to that of the Cape High Court in the *Bhe* case and awarded the damages against the deceased's two cousins.

The third case of the *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*[30] involved an application for direct access to the Court by the South African Human Rights Commission and the Women's Legal Centre Trust. The Women's Legal Centre Trust was acting in the interests of a group of people as the Commission. The applicants in this matter claimed that Section 23 of the Act, in particular subsection (1), (2) and (6) are to be declared unconstitutional and invalid as they are inconsistent with constitutional provisions Section 9 of the Constitution on the right to equality; Section 10 on the right to human dignity and the rights of children in terms of Section 28.

The Court granted the Applicant direct access on the grounds of the interest of justice. The Court concluded that Section 23 of the Act and its regulations are inconsistent with sections 9 and 10 of the Constitution because of their discrimination on the ground of race, colour and ethnic origin. The judge further stated that there was need to purge the statute book to remove harmful and hurtful provisions. It was acknowledged by the Court that the Act was conceived and drafted to fit in with notions and exclusions of Africans from the European descent. The Act was part of the system of administration imposed on Africans, which comprised elements of division, oppression and conflict among the South African people.

[30] *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC)

4.3.3 Primogeniture

The rule of primogeniture is one of the rules in the customary law of succession that have been in existence for several years. The primogeniture rule allows only males to inherit the property of the person that died intestate.[31] The rule has undergone serious criticism on the ground of discrimination against women since the rule favours the eldest son of the deceased to become an heir to his estate. The primogeniture rule excludes younger and extra-marital sons and females from inheriting the deceased estate.[32]

The rule of primogeniture came into discussion in the matter of *Mthembu v Letsela and Another.*[33] This is an appeal against the judgment of Mynhardt J in the Transvaal Provincial Division. This case involved a mother of a girl named Tembi who claimed that she had been married according to customary law to her husband, the deceased Tebalo Watson Letsela. The deceased died intestate on 13 August 1993. At the time of his death he was a holder of a 99-year leasehold title in respect of a fixed property situated at Vosloorus in Boksburg. The deceased lived on the property with the appellant and her two minor daughters, and one of them, Tembi Mthembu, was a result of an intimate relationship between the appellant and the deceased. The deceased was survived by his father, who was the first respondent in this matter, mother and three sisters. The deceased's parents shared the same house with the appellant and her two daughters on the property.

The appellant alleged that she and the deceased had entered a customary union at Brakpan where the deceased paid an instalment in the sum of R900 towards the sum of R2000 for *Lobola*. The Appellant provided receipts annexed to her founding affidavit. The balance was to be paid afterwards; however, the deceased died before he could pay the remaining amount. The Boksburg Magistrate made an order for the deceased estate to devolve in terms of regulation 4(1) of the regulations made in terms of the Black Administration Act 38 of 1927. It was said that the deceased estate was to devolve in accordance to Black law and custom.

The first respondent who is the father of the deceased denied the existence of the customary marriage between the deceased and the appellant. He claimed that he had inherited the estate based

[31] Omotola (2004) *Journal of International Law and Comparative Law* 115.
[32] Rautenbach (2014) *Acta Juridica* 136.
[33] *Mthembu v Letsela and Another* 2000 3 SA 867 (SCA).

on customary law rules of intestate succession. He claimed that the applicant's daughter had no claim to the estate of the deceased under the male primogeniture rule of customary law.

The applicant approached the High Court for an order declaring the customary law rule of primogeniture and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks made in terms of 23(10) of the Act to be invalid on the grounds of being inconsistent with the Constitution. This changed the customary law rule that prevented Tembi from inheriting her father's estate due to her gender.

This case concerned the challenge to the constitutional validity of the customary law rule of primogeniture and Section 23 of the Act. The Court was hesitant to declare the rule of primogeniture as unconstitutional because of the male heir's related maintenance duty. This matter was first brought before Justice Le Roux in the High Court and the judge was unable resolve the factual dispute relating to the existence of a customary marriage between the appellant and the deceased. Regarding the constitutionality of the customary law rule of primogeniture, Le Roux said the following:

> If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture (a feature which has been called 'one of the most hallowed principles of customary law') I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in S 8 of the Constitution. In view of the manifest acknowledgment of customary law as a system existing parallel to common law by the Constitution (vide ss 33(3) and 181(1)) and the freedom granted to persons to choose this system as governing their relationships (as implied in s31), I cannot accept the submission that the succession rule in necessarily in conflict with section 8. It follows that even if this rule is prima facie discriminatory on grounds of sex or gender and the presumption contained in section 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support.[34]

The matter latter came before Judge Mynhardt at the second High Court trial and it was upheld that there had been no marriage between the parties, and thus, it was unnecessary to discuss the rule because Tembi was illegitimate and would not be eligible to inherit even if she was male. The

[34] *Mthembu v Letsela and Another* 1997 2 SA 936, 945 (at 400).

judge dismissed the application with costs, but granted the appellant leave to appeal the matter, which was also dismissed.

On appeal, the Supreme Court of Appeal said in its judgment that:

> The customary law of succession is based on the principle of male primogeniture. It follows that in terms of this system of succession, whether or not Tembi is the deceased's legitimate child, being female, she does not qualify as heir to the deceased's estate. Women generally do not inherit in customary law.[35]

In this matter, the rule of primogeniture was saved on the grounds of the concomitant duty of support.

However, in 2005 the customary law rule of male primogeniture was struck down by the Constitutional Court as being unconstitutional in the case of *Bhe*. This customary rule of succession was found to be out of pace with the changing notions and values of equality. The customary law rule of male primogeniture was declared invalid and unconstitutional and common law succession provisions have been made to provide for the devolution of estates, which were previously regulated by the customary law of succession.

A scholar argues that this judgment may be seen as a unification of laws and as an indirect intervention of judges'**.**[36] Others contend that the primogeniture rule was not a customary law rule in the first place, but an imperial and colonial construct imposed on Africans.[37] The argument is that the rule was imposed on Africans and the traditional African males accepted it as their customary law principle since it benefited and favoured them.

The principles of primogeniture also discriminated against women from attaining leadership positions. The case of *Shilubana v Nwamitwa* [38] involved a dispute about the right to succeed as Hosi (Chief) of the Valoyi traditional community. Hosi Fofoza died on 24 February 1986 without a male heir. During that era, the principle of male primogeniture governed succession. In the first place, Hosi Fofoza had succeeded his father because his elder sister was not eligible to succeed

[35] Mthembu (3) SA at 876. See also Omotola (2004) *Journal of International Law and Comparative Law* 115.
[36] Rautenbach (2010) *JCL Studies in Comparative Law: Mixed Legal Systems at New Frontiers* 229.
[37] Maluleke (2012) *PER* 15.
[38] *Shilubana and Others v Nwamitwa* 2007 5 SA 620 (CC).

him as Hosi. Therefore, Ms Shilubana, who is the first applicant in this matter was not considered for the Hosi position after Hosi Fofoza died. Mr Richard Nwamitwa, who is Hosi Fofoza's younger brother succeeded him as the Hosi of the Valoyi.

The matter was an application to appeal against the decision of the Supreme Court of Appeal confirming the decision of the High Court to appoint Shilubana to the chieftainship position for which the applicant was disqualified by virtue of her gender. The Constitutional Court was called to address the issue of whether the traditional community has the authority to develop their customs and traditions to promote gender equality in the succession of traditional leadership in accordance with the Constitution. The court was to decide whether the community has the authority to restore the position of traditional leadership to the house from which it was removed on the grounds of gender discrimination. The court granted Ms Shilubana the chieftaincy position.

The appointment of Ms. Shilubana as Hosi is viewed as the development of customary law. The court pointed out that it is important to respect the rights of the communities that observe the system of customary law to develop their system of law.[39]

4.4 Cultural legitimacy of children's rights

The fundamental purpose underlying the International Bill of Rights is to afford inherent integrity and dignity of every human being, including children. Children are mentioned in these instruments with the emphasis on the obligation on the State to provide care and protection to children.

4.4.1 UN Declaration on the Rights of the Child

The most significant instrument for children's rights during the post-war period came with the adoption of the Declaration on the Rights of the Child. The Declaration on the Rights of the Child was adopted by the UN General Assembly on 20 November 1959. The Declaration gave a significant endorsement to the concept of children's rights. However, it did not include civil, political, and traditional rights for children. Its focus was more on the protection of children against

[39] *Shilubana and Others v Nwamitwa* para 45.

discrimination and on the welfare of children with regards to protection and not so much on the empowerment of children.[40]

4.4.2 The Convention on the Rights of the Child

On the thirtieth anniversary of the Declaration, the Convention on the Rights of the Child was drafted. The Convention on the Rights of the Child was adopted on 20 November 1989 by the UN General Assembly and it entered into force on 2 September 1990. It is regarded as the most widely ratified treaty, and it provides catalogue of rights for children. Its effect can be seen in the contents of national institutions, national constitutions, judicial decision making, policy development, law reform, service delivery, and research concerning children in different disciplines. The UN Convention on the Rights of the Child (CRC) affirms the recognition of universality of children's rights and urges the world community to support and accept the need to protect and promote children's rights.[41] According to the Convention, a child means "every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier".[42] CRC recognises political, civil, economic, social, health, and cultural rights of children.

4.4.3 African Charter on the Rights and Welfare of the Child

Following closely after the Convention, the African Charter on the Rights and Welfare of the Child (the Charter) was adopted in July 1990 by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU). The Charter entered in force in November 1999. The Convention was critiqued for having missed economic, social and cultural realities of the African experience. However, it should be noted that the Charter does not compete against the Convention, but complements it and provides a children's rights framework according to African realities. The Charter emphasises the need for African cultural distinctiveness in matters of particular concern to rights of children.[43] The Convention speaks of children as independent subjects, while the Charter speaks of the need to include African cultural values in issues concerning rights of the

[40] Tobin, J *The UN Convention on the Right of the Child: A Commentary* (2019) 4.
[41] Kaime, T 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections' (2005) 5 *African Human Rights Law Journal* 222.
[42] Convention on the Rights of the Child, 1989.
[43] Sloth-Nielsen, J *Children's Rights in Africa: A Legal Perspective* (2016) 23.

child in Africa.[44] The Charter provides for the following protections: non-discrimination; best interest of the child; survival and development; name and nationality; freedom of expression; freedom of association; freedom of thought, conscience and religion; protection of privacy; right to education; leisure, recreation and cultural activities; handicapped children; health and health services; child labour; protection against child abuse and torture; administration of juvenile justice; protection of the family; parental care and protection; parental responsibilities; protection against harmful social and cultural practices; armed conflicts; refugee children; adoption, separation from parents; protection against apartheid and discrimination; sexual exploitation; drug abuse; sale, trafficking and abduction; children of imprisoned mothers, and responsibility of the child.[45]

The core principles of the Charter include non-discrimination; best interests of the child; right to life, and survival and development. As the regional treaty, the Charter has been commended for being "the most progressive of the treaties on the rights of the child".[46] The Charter progressively advanced the position of socio-economic rights which are considered to be attainable only by progressive realisation. One of the limitations of the Charter is said to be the lack of protection of the right of an unborn child. The Charter is criticised for being restrictive in advancing the right to freedom of expression and freedom of association of a child.[47]

4.4.4 Children's rights versus cultural practices in South Africa

The African states were distinctively called to implement children's rights in their cultural practices and values in the manner that would be culturally appropriate within the particular group or society. South Africa is thought to be one of the active leaders in the recognition of children's rights in the international community.[48] The UN Convention was the first treaty to be signed and ratified in South Africa on children's rights. The South African government ratified the

[44] Olowu, D 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127-128.
[45] Article 2-32 of the African Charter on the Rights and Welfare of the Child, 1990.
[46] Van Bueren, G *The International Law on the Rights of the Child* (1995) 33.
[47] Olowu (2002) *The International Journal of Children's Rights* 130.
[48] Binford, W 'The Constitutionalization of Children's Rights in South Africa' (2016) 60 *New York Law School Law Review* 334.

Convention on 16 June 1995. The African Charter on the Rights and Welfare of the Child was ratified in South Africa on 7 January 2000.

The degrading and inhuman system of apartheid did not only have a negative impact on adults, but children also suffered severe unequal treatment and discrimination. The constitutional transformation of 1996 brought about a radical change and provided protection for children against discrimination. The Constitution expressly prohibits discrimination on the grounds of age.[49] The Constitution recognises the need for children's right and provides for a provision that specifically applies to children. The word "child" means a person under the age of 18 years.[50] The Constitution of the Republic of South Africa holds that the child's best interests are of paramount importance in every matter concerning the child. All children have a right to a name and to nationality from birth; right to family care and parental care; right to basic nutrition, shelter, healthcare services and social services; right to be protected from maltreatment, neglect, abuse and degradation; and to be protected from exploitative labour practices.[51]

The challenge in South Africa has been implementing and protecting children's rights in a way that is compatible with standards of human rights on one hand and preserving the legitimacy of cultural traditions and values on the other hand. This section looks at how the courts protect the indigenous cultural practices that apply to children, while protecting the universalist human rights standards contained in the Bill of Rights. This is done by looking at how the customary practices of *ukuthwala*, and virginity testing have been practiced on children from the ancient days. The section also looks at succession according to customary law.

4.4.5 *Ukuthwala*

Ukuthwala is described as the "practice of carrying off a girl for the purpose of entering into a customary marriage".[52] The practice is believed to have originated from the Xhosa culture in the Eastern Cape.[53] *Ukuthwala* is a recognised customary law practice in South Africa that allows child marriage. The practice of *ukuthwala* is targeted at girls who are considered to have reached a

[49] Section 9(3) of the Constitution of the Republic of South Africa, 1996.
[50] Section 28 of the Constitution of the Republic of South Africa, 1996.
[51] Section 28 (1)
[52] Mwambene and Kruuse (2017) *South African Journal on Human Rights* 1.
[53] Choma, H 'Ukuthwala Custom in South Africa: A Constitutional Test' (2011) 8 *China Law Review* 874.

marriageable age. According to customary law, there was no specific age requirement for marriage, as puberty and initiation ceremonies were viewed as the requirement for adulthood. Puberty was the minimum prerequisite for marriage because reproduction was regarded as the goal of marriage.[54]

Some scholars have distinguished three forms of *ukuthwala.* The first is where the girl is aware of the abduction being planned by her suitor; the second form takes place when both families have met and agreed on the anticipated marriage, and the last occurs against the will of the girl in question. This is when she is taken forcefully to the man's family home.[55] The first two forms of *ukuthwala* are regarded as the acceptable ancient African cultural practice. The third form is viewed as the violation a girl's dignity and bodily integrity.

The courts have been given a mandate to apply the Bill of Rights to a natural person. Regarding the practice of *ukuthwala*, the court recognises the Constitutional children's rights and it must consider the child's best interests in matters concerning the child over family and cultural tradition. In the case of *Jezile v The State,*[56] Jezile left his residence and returned to his village in Engcobo with the intention to find a girl to marry in accordance to his custom. In 2010 he identified a 14-year-old girl from the neighbouring village as a girl he desired to be his wife. His family and the family of the girl initiated and concluded marriage negotiations. R8000 was paid to the girl's grandmother whom the girl had been living with. The girl was informed by the members of the two families that she was to be married and was taken to Jezile to become his customary wife. The girl was unhappy and ran away. She was later found by the members of her family and they returned her Jezile's family home. Jezile and the girl left for Cape Town. Whilst in Cape Town, the girl refused to have sex with Jezile. Jezile forcibly proceeded to have sex with her without consent. Shortly after, the girl managed to run away and reported the matter to the police. Jezile was charged and convicted on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm and one count of common assault.

[54] Van der Waltt, M' Ovens, M 'Contextualizing the Practice of Ukuthwala within South Africa' (2012) 13(1) *Child Abuse Research in South Africa* 12.
[55] Mwambene, L; Sloth-Nielson, J 'Benign Accommodation? Ukuthwala, Forced Marriage and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 6-7.
[56] *Jezile v The State* 2015 3 ALL SA 201 (WCC).

Jezile cited customary law in his defence, he said that his actions were justified according to customary practice. The court took judicial notice of a public debate on the customs of *ukuthwala* and invited experts from several institutions and organisations on *ukuthwala* and customary law to assist as amici curiae.[57] The court regarded the practice as a cloak for the commission of violence, rape and abduction of children by older men. The Court considered the following legal framework: Section 211 (3) of the Constitution which requires the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[58] The second is Section 28 of the Constitution, which provides protection of the child from maltreatment, abuse, degradation, and the best interests of the child are of paramount importance in every matter concerning the child.

The court referred to the Children's Act, particularly Section 1 on the definition of trafficking in relation to a child; Section 12 (1), which provides that every child has the right not to be subjected to cultural practices which are detrimental to a child's well-being. Section 12 further provides that a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement, and a child above the minimum age may not be given in marriage or engagement without his or her consent.[59] Furthermore, Section 284(1) prohibits child trafficking.

The court also referred to the provisions of Criminal Law Sexual Offences and Related Matters Amendment Act on rape and, to Section 56(1), which stipulates that it is not a defence to the charge of rape to rely on a marital or existing relationship.[60]

The court further referred to the Recognition of Customary Marriages Act (RCMA), which provides the requirements for the valid customary marriage. Section 3(1) provides that "for a customary marriage to be valid, (a) the prospective spouses must both be above the age of 18 years and must both consent to be married to each other under customary law; and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law".[61]

Finally, the court also reviewed international human rights treaties and South Africa's obligation with regards to these. Section 12 of the UN CRC obligates states to prevent discrimination based

[57] Mwambene and Kruuse (2017) *South African Journal on Human Rights* 5.
[58] Section 211 (3).
[59] Section 12(1) (a) (b) of the Children's Act 38 of 2005.
[60] Section 56(1) Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.
[61] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998.

on the sex of the child. Section 24(3) imposes the obligation on the State to abolish traditional practices that are harmful to the child. The African Charter on the Rights and Welfare of the Child prohibits marriages involving children and betrothal. Article 21 provides that:

> (1) "state parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the ground of sex or other status.
>
> (2) Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory".[62]

The case of Jezile highlights the clash between communities' lived realities in their right to practice one's culture and the constitutional obligations to uphold the right to equality and dignity of girl children in the context of *ukuthwala*. The court raised that the version or form of *ukuthwala* in this matter was harmful as it contravened several provisions of the Constitution. The court also pointed out that the requirement of consent and age according to RCMA was not met during the process of *ukuthwala*. The court held that Jezile could not rely on the traditional practice of *ukuthwala* to justify his criminal conduct.[63] The ruling of this case indicates the court balance of its duty to, on one hand, uphold and give effect to customary law exercised by an individual and, on the other hand, to respect and promote individuals' human rights according to the Constitution of the Republic of South Africa.

4.4.6 Virginity testing

Virginity testing is the cultural practice that is commonly exercised by the Zulu tribe in the provinces of Kwa-Zulu Natal and Eastern Cape, South Africa. It is the cultural practice that existed since the pre-colonial era. Girls and young women from the ages of 7 to 26 undergo this traditional practice annually. Virginity testing involves the examination of the female reproductive organ to

[62] Article 21 of the African Charter on the Rights and Welfare of the Child, 1990.
[63] *Jezile v The State* 2015 3 ALL SA 201 (WCC).

determine whether the hymen is intact.[64] The virginity testing ceremony is carried out in a public traditional ceremony in the form of pageantry mainly in the rural areas. The examination is normally conducted by an elderly woman of the community. The original idea behind the practice was to ascertain the chastity of a bride, and it was done to assist the family of the bride in ascertaining the number of cows to be paid by the prospective suitor. It is the practice that is celebrated by the girl before marriage, should she have been found to be a virgin. Those girls who were found to have lost their virginity were then exposed to public ridicule and shame. Supporters of this practice submit that it is not only intended to ascertain the chastity of the girl, but to also maintain the moral values of a society. The argument is that virginity testing keeps the girls from engaging in pre-marital sex. The practice is seen as a form of abstinence for girls. Some argue that it is also a way of reducing the spread and the risk of contracting HIV and other sexually transmitted infections.

Regarding the human rights implications of virginity testing, the proponents of the practice rely on Section 30 of the Constitution that recognises a person's rights to practice and enjoy their culture. Other scholars argue that the practice of virginity testing violates girls and women's human rights. It is believed that the practice violates basic human rights enshrined in the Constitution, such as the right to equality,[65] the right to dignity,[66] the right to bodily and psychological integrity,[67] and the right to privacy.[68] Children who undergo the practice are often in danger of sexual violation since it is believed that having sexual intercourse with a virgin cures HIV and AIDS.

The Children's Act provides for the protection of children with regards to the practice of virginity testing. Section 12 of the Children's Act stipulates that every child has the right not to be subjected to cultural practices that are detrimental to the child's well-being. Section 12(4) prohibits virginity testing of children under the age of 16. The Act provides that virginity testing of children older

[64] Durojaye, E 'The Human Rights Implications of Virginity Testing in South Africa' (2016) 16(4) *International Journal of Discrimination and the Law* 1.
[65] Section 9 of the Constitution.
[66] Section 10 of the Constitution.
[67] Section 12(2) of the Constitution
[68] Section 14 of the Constitution.

than the age of 16 may only be performed: (a) if the child has given consent to the testing in the prescribed manner; (b) after proper counselling of the child, and (c) in the manner prescribed.[69]

4.4.7 Succession and children born of unmarried parents

Historically in South Africa, children born of parents that were not married to each other at the time when they were conceived or born were discriminated against, especially those whose families were governed by customary law. The implication of this was that the extra-marital child was not recognised as having a true and legal relationship with his or her father. The child born outside marriage is taken to belong to the mother and the mother's family. The child would then follow the customs of her mother and take her surname. The child also inherited only from his or her mother and not from the father. The father had no parental obligations or rights with respect to the child.[70] Extra-marital children were not entitled to inherit their father's estate in customary law.[71] Inheritance was reserved for children born of a valid marriage.

According to Section 33 of the Black Administration Act (Act 38 of 1927) and regulation 2(e) of the Administration and Distribution of the Estate of Blacks, children born out of wedlock are not entitled to inherit from their' father's estate. The *Mthembu* case dealt with the issue if illegitimacy. The presiding judge rejected the appellant's claim of having been party to a customary union. Judge Mynhardt went further and said that:

> Because no evidence has been tendered from either side, the [appellant] accepts that the matter is to be decided on the basis that there was indeed no such marriage between the parties.

It was held that Tembi was an illegitimate child because there was no customary marriage between her mother and the deceased.[72]

The factual dispute before the Cape Town High Court in the case of *Bhe and Others v Magistrate, Khayelitsha and Others*, was whether Nonkululeko and Anelisa (Ms. Bhe's minor children) are

[69] Section 12(5) (a) (b) (c) of Children's Act.
[70] Paras 57.
[71] Paras 79.
[72] *Mthembu v Letsela and Another* 2000 3 ALL SA 219 (A) para 3, *Mthembu v Letsela and Another* 1998 2 SA 675, 679 (T).

extra-marital children. The deceased's father insisted that the deceased had not paid lobola for Ms Bhe, and Ms Bhe denied this assertion. The High Court then approached the issue on the basis that lobolo had been paid and that Ms Bhe's children were accordingly not extra-marital children. According to Section 23 of the system of intestate succession and Section 2(e) of the regulations, the two minor children did not qualify to be heir of their deceased father's intestate estate. The estate of the deceased was to be distributed according to Black law and customs. The State devolved to the deceased's father who was named the sole heir and successor. Among other sections, Section 23(2) and regulation 2(e) were challenged in the High Court and both sections were ruled unconstitutional.

The judicial decision in the *Bhe* case shows the positive effort of the judicial to treat children equally, irrespective of their parents' marital status. The court adopted the human rights culture of prohibiting discrimination on the ground of illegitimacy and sex. The Court identified two prohibited grounds of discrimination in the *Bhe* case. The first related to discrimination on the grounds of sex, and the Court referred to Section 21 of the African Charter on the Rights of the Child that obligates the State to take appropriate measures in eliminating harmful social and cultural practices that affect the welfare, dignity, and normal growth and development of the child.[73]

The second relates to the prohibition based on unfair discrimination on the ground of birth as enshrined in Section 9(3) of the Constitution. The Court in this instance made references to the human rights treaties to which South Africa is a signatory to protect children's rights. The Court interpreted Section 28 and the other rights in the Constitution with provisions of human rights international law. It referred to Article 2 of the Convention that obligates signatories to the Convention to ensure that the rights set forth shall be enjoyed regardless of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".[74]

The Court further made reference to the European Court on Human Rights, which holds that "treating extra-marital children differently to those born within marriage constitute a ground of

[73] Section 21(1) (b) of the African Charter on the Rights of the Child.
[74] Article 2 of the UN Convention on the Rights of the Child.

differentiation in terms of article 4 of the Charter",[75] and to the United States Supreme Court, which holds that discrimination based on the grounds of illegitimacy is unjust and illogical.[76] The court concluded that "the prohibition of unfair discrimination on the ground of birth in section 9 (3) of the Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born".[77]

In summary, the judicial seems to bend towards the protection of individual constitutional rights based on universalist human rights as compared to cultural rights. In the *Bhe* and *Shibi* case, the Court emphasised that the rights violated, which are the right to equality and dignity, are important rights in the South African context because of our history of discrimination and inequality. Some of the sections that were banned by the Court, including Section 23 of Black Administration Act and its provisions were believed to be enacted to give effect to customary law, but in essence was enacted to give effect to racial divisions and subordination. It was openly justified as the statute of customary law. The striking down of Section 23 of the Act by Justice Langa did not render customary law inapplicable, although it could be queried as to why the court decided to strike down that provision of the customary law instead of developing it in accordance with the rights and values of the Constitution. However, customary law is still relevant and applicable when it is appropriate. In trying to strike a balance between universalist human rights notions of quality and one's right to practice his indigenous cultural customs, the court acknowledged the fact that there were still several people whose lives were still governed by customary law and whose affairs needed to be regulated according to certain customary norms. The court took the following remedies:

> (a) to simply strike down the impugned provisions (section 23, its regulations and the customary rule of male primogeniture) and to leave it to the legislature to deal with the gap; (b) to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) to develop the customary rules of succession in accordance with the Bill of

[75] Marckx v Belgium [1979] ECHR 2 at paras 38-39; Inze v Austria [1987] ECHR 28 at para 41.
[76] See Weber v Aetna Casualty and Surety Co 406 US 164 (1972) 175.
[77] Paras 59.

Rights; (d) to replace the impugned provisions with a modified Intestate Succession Act governing all intestate estates (including those of Polygynous unions) in South Africa.[78]

The Court adopted the last remedy and decided to modify the Intestate Succession Act, regardless of the skin colour of the deceased.

It therefore can be said that in trying to strike a balance with regards to the concurrent recognition of human rights and culture, the courts are given authoritarian remedy of developing customary law[79] in the same manner it developed the common law.[80] The courts are said to develop customary law by adapting it to changing socio-economic circumstances of the modern day and bringing it to align with the Bill of Rights of the Constitution.[81] In the case of *Carmichele v Minister of Safety and Security and Another,*[82] the Constitution imposed an obligation on the courts to shape common law and customary law in a way that it will adhere to the principles of the Constitution of the Republic of South Africa.

In the case of *Shilubana v Nwamitwa,* Judge Van Der Westhuizen listed four guidelines on how to approach the reformed customary law, namely the traditions of the community concerned; the need to allow communities to exercise their rights to amend and repeal their own customs; the courts' need to be aware that customary law regulates the lives of people, and, thus, the need to be flexible and imperative to facilitate development that is balanced against the values of legal certainty, respect for vested rights and the protection of constitutional rights, and, lastly, a court engaged in adjudication of a customary law must be mindful of its constitutional obligations stated under Section 39(2) of the Constitution. [83]

This implies that when there is a conflict between human rights and culture, the African customary law, which gives effect to the right to culture, must be harmonised with the human rights protected by the Constitution. The decision made by courts in one of the leading cases discussed above (the *Bhe* case), which abolished some cultural practices to give effect to the rights in the Constitution, is said to have shortcomings in respect of persons who are living according to customary law. The

[78] Rauterbach (2010) *JCL Studies in Comparative Law: Mixed Legal Systems at New Frontiers* 232.
[79] Section 39(2).
[80] Section 8(3) (a) and 173 of the Constitution.
[81] Nhlapo, T 'Customary Law in Post-apartheid South Africa: Constitutional Confrontations in culture, Gender and Living Law' (2017) 33 *South African Journal on Human Rights* 1.
[82] *Carmichele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC).
[83] *Shilubana* at paras 44-5, 47.

group of people whose lives and reality are governed by the principles of customary law will not benefit from the decision taken by the court, particularly women and girls that are still observing these customary law practices in the rural areas of South Africa. The argument is that some concepts of 'human rights' are really not natural concepts to some parts of the South African culture.

The courts are obliged to allow traditional authorities that observe a system of customary law to perform the functions to amend, or repeal legislation or customs subject of course to any applicable legislation and custom.[84] In the case of *Shilubana,*[85] Judge Van Der Westhuizen pointed out that the Constitution gives the community, including the traditional authorities, the right to amend and repeal their own customs. The judicial has been emphasising that the system of customary law is constantly evolving, and communities are given the opportunity to develop their own laws to meet the needs of the changing society.[86] It must be noted, however, that the exercise of developing customary law by the communities is different from that of the courts.[87] The court is urged to be mindful of its constitutional obligation to promote the spirit, purport and objects of the Bill of Rights when it is engaging and adjudicating on matters of customary law.[88] The judge in the case of *Richtersveld* held that the "content of customary law must be determined with reference to both the history and the usage of the community concerned".[89] A court must consider both traditions and the present practices of the community where there is a legal dispute under customary law.[90]

4.5 Recommendations

The remedy of developing culture to adapt to the western notion of human rights often clashes with African indigenous cultural values and practices. In seeking to promote human rights, the constructive way for judges to address the issue of conflict is to address elements of conflict in a way that is consistent with the integrity of the cultural practice in question. The introduction of

[84] Section 211(2) of the Constitution.
[85] *Shilubana* at paras 45.
[86] See *Bhe* at paras 82-7; Richtersveld at paras 52-53; *Mabuza v Mbatha* 2003 4 SA 218 (C); *Mabena v Letsoalo* 1998 2 SA 1068 (T).
[87] *Shilubana* at paras 48.
[88] Section 39(2) of the Constitution.
[89] *Richtersveld* at paras 56-7.
[90] *Shilubana* at paras 49.

human rights as a national standard should be against the background of the dominant culture in that society. Accordingly, it should be done with respect to traditional norms and cultural values of the particular group in society. In seeking to strike the balance, South African courts should defer to local norms and values of the custom in issue, rather than to defer to international norms and standards in disputes involving indigenous South Africans. The judges must first consider the present cultural traditions observed in the community whenever there is a dispute over the legal position of customary law.

4.6 Conclusion

When interpreting the Bill of Rights, the courts are mandated to consider international law, which advocates for human rights. The Constitution of the Republic of South Africa is described as modern, striving to act in accordance with international human rights treaties and guarantee human rights to all. However, this becomes problematic as the majority of South Africans, who are particularly traditional, are not fully embraced and the Constitution, with its Bill of Rights, does not necessarily reflect the day to day realities of South Africans. Some of the decisions reached by the courts in defining and enforcing human rights have been criticised and are contrary to public realities and desires. What has stood out from the discussion is that when conflicts arise between human rights and culture, the judiciary usually opts to compel culture to adapt to changing social and economic circumstances. Their remedy is for culture to develop according to international human rights norms. Unfortunately, this tendency is to the detriment of the enjoyment of one's right to celebrate his or her culture in its full and original form.

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