

**THE IMPACT OF CULTURAL PRACTICES ON THE ADVANCEMENT OF  
WOMEN IN AFRICA: A STUDY OF SWAZILAND AND SOUTH AFRICA**

**Submitted in partial fulfilment of the requirements of the degree LLM  
(Human Rights and Democratisation in Africa)**

**By Sizakele Thembisile Hlatshwayo**

**Student Numbers: 2269772**

**University of the Western Cape**

**UNIVERSITY of the  
WESTERN CAPE**

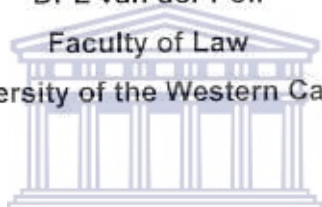
**Prepared under the supervision of Doctor Letetia van der Poll at the Faculty  
of Law, University of the Western Cape, South Africa.**

**31 October 2002**

## CERTIFICATION

I, Letetia van der Poll, hereby certify that this study titled *The Impact of Cultural Practices on the Advancement of Women in Africa: A study of Swaziland and South Africa* is the result of original research carried out by Sizakele T Hlatshwayo under my supervision at the Faculty of Law, University of the Western Cape.

.....  
Dr L van der Poll  
Faculty of Law  
University of the Western Cape.



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## DEDICATIONS

To My mother,

Mrs Lucia M Hlatshwayo who has been a source of inspiration in my life.



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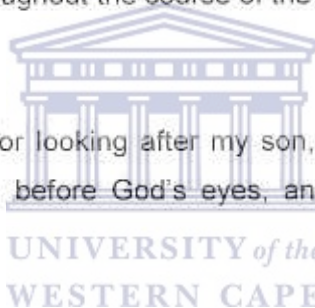
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And above all, All the Glory, All the Honour, Power and Majesty be to God the Lord Almighty who has enabled me strength and wisdom throughout the year and restoring hope when there was no hope-Lord I can not thank you enough.

## ABBREVIATIONS

AFCHPR	African Charter On Human And Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRC	Constitutional Review Commission
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
ILO	International Labour Organisation
UNDP	United Nations Development Programme
UNICEF	United Nation's Children Fund
WLSA	Women and Law in Southern Africa Research Trust
WDSAA	Women in Development Southern Africa Awareness
SARDC	Southern African Research and Documentation Centre
SWAGAA	Swaziland Action Group Against Abuse
UDHR	Universal Declaration on Human and Peoples Rights
UN	United Nations
LPR	Land Policy Reform
LRADP	Land Agricultural Development Programme
NGO's	Non-governmental Organisations.
TDL	Title Deed Land
SNL	Swazi Nation Land

## TABLE OF CONTENTS

Certification		(i)
Dedications		(iii)
Acknowledgements		(iii)
Abbreviations		(iv)
Table of contents		(v)
<b>CHAPTER 1: INTRODUCTION</b>		<b>1</b>
1.1	Background to the Study	1
1.2	The Problem	1
1.3	Objectives	2
1.4	Research Methodology and Literature Review	3
1.5	Overview of Chapters	3
<b>CHAPTER 2: CONCEPTUALISING CULTURE AND CULTURAL PRACTICES</b>		<b>5</b>
2.1	Definition of Culture	5
2.2	Universality versus cultural relativism	6
2.2.1	Universality of human rights	6
2.2.2	Cultural relativism	6
2.3	Legal and Feminist theories on the debate	8
2.4	Beyond the debate on universality and relativism	11
2.5	Conceptualising cultural practices	12
2.5.1	Marriage	12
2.5.2	Landownership	13
2.5.3	Widowhood	14

<b>CHAPTER 3: IMPACT OF CULTURAL PRACTICES ON WOMEN'S RIGHTS</b>	<b>15</b>
3.1 Introduction	15
3.2 Swaziland	15
3.2.1 Consequences of marriage	16
3.2.1.1 Marriage under civil law	16
3.2.1.1.1 Marriage in community of property	16
3.2.1.1.2 Marriage out of community of property	16
3.2.1.1.2.1 Marriage out of community with the marital power	16
3.2.1.1.2.2 Marriage out of community without the marital power	17
3.2.1.2 Marriage under customary law	17
3.2.1.2.1 The bride price ( <i>emalobolo</i> )	18
3.2.2 Landownership	19
3.2.3 Widowhood	20
3.3 South Africa	22
3.3.1 Marriage in South Africa	22
3.3.1.1 Background	22
3.3.1.2 The Black Administration Act 38 of 1927	23
3.3.1.3 The Matrimonial Property Act 88 of 1984	24
3.3.1.4 Provisions of the Recognition of Customary Marriages Act 120 of 1998	25
3.3.2 Landownership	26
3.3.3 Widowhood in South Africa	27
3.4 An analysis	27
<b>CHAPTER 4: AN ASESMENT OF THE COMPATIBILITY OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS ON CULTURAL PRACTICES: WHICH WAY FOR SWAZILAND?</b>	<b>30</b>
4.1 Introduction	30
4.2 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW): The Women's Hope of Refuge	30
4.2.1 Conflicting provisions between CEDAW and Swaziland's cultural practices	33

4.2.1.1	Equality in Marriage	33
4.2.1.2	Equality before the law	34
4.2.1.3	The right to dignity versus inhuman, humiliating and degrading treatment	35
4.2	The African Charter On Human And Peoples' Rights	36
4.4	Striking A Balance Between Culture and International Human Rights	37
4.5	Drafting a bill of rights or a bill of wrongs? : The Constitutional Review Commission (CRC) report 2001 and women's rights	39
4.6	A way forward: Lessons from South Africa	42
<b>CHAPTER 5: CONCLUSION AND RECOMMENDATIONS</b>		<b>45</b>
5.1	Concluding Remarks	45
5.2	Recommendations	46
<b>BIBLIOGRAPHY</b>		<b>50</b>





# CHAPTER 1

## INTRODUCTION

### 1.1 Background to the Study

In 1996 the King of Swaziland, Mswati III, commissioned the Constitutional Review Commission (CRC) to embark on a constitutional exercise whereby people would make submissions about the constitution drafting process. The submissions would then be used as a base for the drafting of a new constitution. When the CRC published its Report in August 2001, human rights activists and women were devastated by the fact that the report did not engage with the protection of human rights in a comprehensive manner. The Report firstly states that international human rights instruments will be subject to the laws and customs of the country. Secondly, it reinstated the position that women cannot pass their citizenship onto children born from foreign fathers, whereas their male counterparts can pass citizenship even to children born outside Swaziland.<sup>1</sup> These two provisions, if entrenched in the new constitution, will have a great impact on the advancement of women's rights in Swaziland, as Swazi law and custom regard women as minors for all intents and purposes.

### 1.2 The Problem

Swaziland is a patriarchal society which means that social, legal and political power is vested in men. This means that men are dominant in all spheres of life, including the family where they are given status as heads of households and decision-makers. Women, on the other hand, hold a minority status to that of men. This has implications for women's autonomy as decisions are made on their behalf and they are perpetually under the guardianship of males. Marwick rightly observes that the legal position of women among the Swazi is one of perpetual guardianship: as a child, a girl is under the guardianship of her father and upon marriage, the husband assumes authority over her life.<sup>2</sup> Swaziland prioritises cultural values. These traditional values serve to entrench patriarchy through stringent cultural practices that are accepted and observed by society. Patriarchal relations promote inequalities between men and women. There are certain cultural practices which impede the advancement of women's human rights. Such practices are associated with marriage. Marriage compounds the problem in the sense that it carries with itself the cultural practices that perpetuate

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<sup>1</sup> The Constitutional Review Commission Report (CRC) (2001) 79.

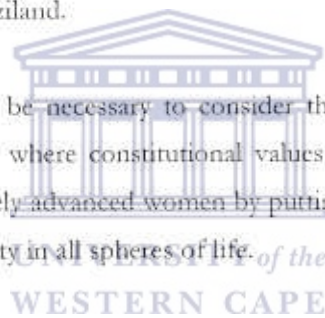
<sup>2</sup> BA Marwick (1966) 66.

the stereotypical roles of women in society. By virtue of such practices women have unequal rights in respect to property, inheritance, marriage, divorce, children and the household.

Swaziland has a dual legal system. This allows for the general law (Roman Dutch Common Law and Statutory Law) to co-exist with the customary law (Swazi traditions and customs). Patriarchy is therefore institutionalised through both customary law and general law. This has serious implications for women's independence as they exist in the shadow of the men who restrict their freedom of movement and choice.

The fact that Swaziland has not ratified the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>3</sup> compounds the problem for women, as they are left with no tool for legal redress should their rights be violated. Lobbying and advocating for the ratification of this instrument has not reaped fruitful results in Swaziland. The foregoing begs a question to be answered: How can women's rights be advanced given these particular constraints? The objective of this is to provide probable solutions for the advancement, recognition and realization of women's rights in Swaziland.

To achieve this objective, it would be necessary to consider the experiences of countries where women's rights are entrenched and where constitutional values are incorporated into legislation. South Africa has, for example, actively advanced women by putting (legal) measures in place for the protection of their dignity and equality in all spheres of life.



### 1.3 Objectives

The purpose of the mini thesis is to examine a number of cultural practices that impact negatively on women's rights. It will be shown that cultural practices constitute core obstacle for the realization of women's rights in Swaziland. Most of these traditional practices are linked to marriage or marital status. The marital status of a woman largely determines the extent to which she can enjoy her rights as an individual. Closely linked to marriage is the land ownership problem whereby women are deprived of owning property because of their female gender. Finally, the rituals performed when husbands die will also be examined as these too violate the rights of a woman as a human being.

This mini thesis will therefore attempt to address the issue of how cultural practices can be made compatible with human rights. The assumption is that this is indeed possible. It will be argued that as

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<sup>3</sup> Convention on the Elimination on All forms of Discrimination Against Women (CEDAW) adopted by the UN General Assembly on 18 December 1979, entered into force on 3 September 1981.

long as these cultural practices exist, women in Swaziland will never enjoy equal citizenship status. The proposed recommendations that will follow will proceed from this basic premise.

Three cultural practices have been selected for this purpose: They include:

Marriage;

Landownership; and

Widowhood.

#### **1.4 Research Methodology and Literature Review**

The research will be based on available literature on traditional African practices and their impact on women's rights. In conceptualising culture and cultural practices, feminist theories will be employed to appreciate the ongoing debate on cultural universality and relativism. This approach will highlight the problems that women face in realizing their rights as individuals in relation to their culture and society and will show how traditional societal values contribute to the disadvantaged position of women hold society.

Scholars, particularly those who have contributed to the debate on women's rights and customary law in Africa, will be examined. The research will use a multi-prone approach and will therefore benefit from writings of legal scholars, anthropological feminists, human rights activists, women's rights studies and articles from websites and journals. The experiences of scholars who have first hand experience of Swazi and South African society will be utilized. Jurisprudence on this subject will be consulted and international human rights law dealing with the protection of women's rights will also be considered.

The proposed research will comprise of a comparative analysis between Swaziland and South Africa. To this end, relevant legislation from both countries will be reviewed with a view to address the particular shortcomings in Swazi law.

#### **1.5 Overview of Chapters**

The first chapter serves as an introduction to the present study. To this end, the chapter will provide the background to the study, outlining the problem, objectives, methodology and literature to be reviewed. The second chapter provides a conceptual framework of culture and cultural practices in Africa in general. Chapter 3 consists of an analysis of the identified cultural practices both in Swaziland and South Africa. The aim of this chapter is to show how culture impacts on the

advancement of women's rights. Chapter 4 is the core chapter of this mini thesis, as it seeks to illustrate the tension between human rights law and cultural practices. It is in this chapter that a balanced approach between cultural practices and international human to will be examined with a view to determine to what degree Swaziland can ratify CEDAW while maintaining positive cultural values. For a way forward, the Constitutional Review Commission (CRC) Report <sup>4</sup> will be examined. To this end, the legal and constitutional route taken by South Africa will be examined. Conclusions and recommendations will follow in the final chapter.



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<sup>4</sup> Constitutional Review Commission (CRC) Report August 2001.

## CHAPTER 2

### CONCEPTUALIZING CULTURE AND CULTURAL PRACTICES

#### 2.1 Definition Of Culture

According to A An-Na'im, culture is the source of the individual and communal worldview; it provides both the individual and the community with the values and interests to be pursued in life as well as the legitimate means for pursuing them.<sup>5</sup> It stipulates the norms and values that contribute to people's perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and societies. As such, culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experiences of the community.<sup>6</sup>

Culture is the source of our identity, it provides the context that defines acceptable behaviour in a society. Special bonds of community form between persons sharing a common cultural heritage.<sup>7</sup> These ties can be very beneficial especially to women, as they find a support system and share burdens within their particular cultural community. Cultural traditions can serve as devices designed to protect those at risk in society, including women, minorities, the elderly, the disadvantaged and children. Unfortunately, many practices originally intended to protect women and the girl-child instead become an obstacle to their empowerment and in the most extreme cases, threaten their health and survival. A Rao articulates this dilemma as follows:

No social group has suffered greater violation of its human rights in the name of culture than women. Regardless of the particular forms it takes in different societies, the concept of culture in the modern state circumstances women's lives in deeply symbolic as well as immediately real ways.<sup>8</sup>

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<sup>5</sup> A An-Na'im (ed) (1991) *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* 23.

<sup>6</sup> As above.

<sup>7</sup> C Cerna & J Wallace in Askin & Koeng (eds) (1999) *Women International Human Rights Law* 623.

<sup>8</sup> A Rao in Peters & Weber (eds) (1995) *Women's Rights, Human rights: International Feminist Perspective* 167-169.

## 2. 2 Universality Versus Cultural Relativism

### 2. 2.1 Universality Of Human Rights

The universality of human rights has been established under international law. The Vienna Declaration and Program of Action provides that human rights are indivisible, interdependent and inter-related. It further states that states have a duty to promote and protect all human rights regardless of cultural or historical or religious background.<sup>9</sup>

The Universal Declaration on Human Rights (UDHR) is the backbone of the universal notion of human rights. It confirms that everyone is entitled to human rights without discrimination of any kind. This means that human rights are for all human beings, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status. Non-discrimination protects individuals and groups against the denial and violation of their human rights regardless of cultural considerations.<sup>10</sup>

Universal human rights do not impose one cultural standard, but rather one legal standard of minimum protection as a precondition for human dignity. As a legal standard adopted through the United Nations, universal human rights represent the hard-won consensus of the international community, not the cultural imperialism of any particular region or set of traditions.<sup>11</sup> It is flexible so as to be relevant to diverse cultures. Although the Vienna Declaration provides for the recognition of culture in the promotion of human rights, it does not, however, discharge the obligation of states to protect human rights.

### 2. 2. 2. Cultural Relativism

Proponents of cultural relativism argue that the principles of human rights enshrined in the Universal Declaration reflect Western values rather than their own.<sup>12</sup> They contend that the validity of any practice must be determined by the specific culture within which it occurs. Therefore, culture is the primary determinative factor to decide whether or not a practice is acceptable.

<sup>9</sup> Vienna Declaration and Program of Action 1995 Part II par 3.

<sup>10</sup> D. Ayton-Shenker "The Challenge of Human Rights and Cultural Diversity" (1995) Published by the United Nations Department of Public Information DPI/1627/HR--March 1995  
<<http://www.un.org/rights/dpi1627e.ht>> [accessed on 15 May 2002].

<sup>11</sup> As above.

<sup>12</sup> C Cerna (1994) 16 *Human Rights Quarterly* 740.

At the UN World Conference on Human Rights held in Vienna in 1993, three regions namely Africa, Latin American/the Caribbean and Asia adopted a declaration which emphasized that although human rights are universal in nature, however they must be considered in the context of historical, cultural and religious backgrounds.<sup>13</sup>

Cultural relativists argue that human rights as understood in the West are not necessarily applicable to the developing world or other non-Western societies on the grounds that their philosophical bases differ. African societies, for example, are not based on individualism but on communitarianism and hence economic and social rights are prioritised. Conversely, the Western conceptions of human rights are based on the notion of individual autonomy and more emphasis is placed on civil and political rights.<sup>14</sup>

Cultural relativism, therefore, is based on the assertion that human values, far from being universal, vary across different cultural perspectives. As such, human rights could be interpreted differently within distinct cultural, ethnic and religious traditions.<sup>15</sup> Accordingly, relativism would only be subject to the state's discretion, rather than to any international legal imperative. The proponents of relativism further assert that the different values held by different cultures are equally valid and none can claim to be superior.<sup>16</sup>

One of the proponents of relativism, J Donnelly, has divided the doctrine of cultural relativism into "strong" and "weak" strands. A strong strand is where culture is a determining factor for the validity of a moral code or social norm.<sup>17</sup> Weak cultural relativism means that human rights are essentially universal, but concedes that culture is an important source of exception in the interpretation of human rights. Donnelly argues for weak cultural relativism in which culture is an important ingredient, but without neglecting or ignoring the universality of human rights. It thus becomes possible to speak of some basic universal standards of human rights.<sup>18</sup> M Ennaji, a feminist writer, opts for an intermediate attitude. She argues for the universality of human rights that is acknowledged at least in relation to the basic principles of human rights, in particular those rights that are relevant to or prioritise human dignity. The author therefore recognizes that cultural variation is crucial and that human rights principles must be adapted to the historical and social

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<sup>13</sup> As above.

<sup>14</sup> M Ennaji "Cultural Relativism and Human Rights: Evidence from North Africa" <<http://www.bgu.ac.il/humphrey/seminar/moha.htm>> [accessed on 25 July 2002].

<sup>15</sup> Ayton-Shenker (n 10 above).

<sup>16</sup> Nathan "Cultural Values and Relativism: The example of women" [www.aasianst.or/viewpoints/Nathan.htm](http://www.aasianst.or/viewpoints/Nathan.htm) [accessed on 10 August 2002].

<sup>17</sup> J Donnelly in Ennaji (n 14 above).

<sup>18</sup> As above.

context of a given society.<sup>19</sup>

However, the assertion that human rights vary across societies could be said to impede on women's rights. Cultural relativism undermines the universality of human rights and the various definitions of rights relative to different societies, histories cultures and religions. It is being used to justify the lack of rights, exploitation and repression. By rejecting or disregarding their legal obligation to promote and protect human rights, states advocating cultural relativism could therefore raise their own cultural norms and particularities above international human rights standards.

While concerns of cultural relativism arise with respect to human rights generally, it is striking that culture is much more frequently invoked in the context of women's rights than in any other area of law. This could be attributed to the fact that women's rights are often defined in relation to their roles in the family. Therefore, the quest for women's rights threatens patriarchy which, in a nutshell, perpetuates the inferiority status of women in society. To that end, the debate is centred on the rights of women which are seen as a threat to cultural and societal values.<sup>20</sup>

### 2. 3 Legal and Feminist theories on the debate

According to D Fox, relativism denotes culture to be static and rigid as opposed to fluid, shifting, emergent, contradictory and processual.<sup>21</sup> This, according to Fox, is a false notion which can only be achieved through political coercion and cultural nationalism. She contends that even in relatively isolated and/or egalitarian groups, variations in values and the existence of power dynamics should challenge us not to accept too easily the ethical relativist perspective. She argues that ethical relativism is, therefore, always an expression of a conservative or hegemonic position.<sup>22</sup>

Feminist anthropology supports the view that context is critical for any given situation. However, the context should be understood as a part of a much deeper and complex totality within which a particular context is necessary subsumed. In doing so, significance should be given to the three generations of human rights. This is because third generation rights are treated as less important than first and second generation of rights, thus calling into question the universal validity of human rights.<sup>23</sup> This view is supported by R Cook who questions how universal human rights can be legitimised in radically different societies without succumbing to either homogenizing universalism or

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<sup>19</sup> Ennaji (n 14 above).

<sup>20</sup> J Oloka-Onyango & S Temale (1995) 17 *Human Rights Quarterly* 715.

<sup>21</sup> D Fox in Magnarella (ed) (1998) 2 *African Studies Quarterly*.

<sup>22</sup> As above.

<sup>23</sup> As above.



the paralysis of relativism.<sup>24</sup> Fox 's contention is that universality and specificity are not necessarily intrinsically oppositional forces, nor that they are mutually exclusive either conceptually or practically.<sup>25</sup> In short, Fox argues that universality and relativism should be made compatible in the quest for women's rights.

Two African feminists writers, J Oloka-Onyango and S Temale,<sup>26</sup> argue that we should move beyond the debate on relativism and universality toward an alternative approach to women's rights. They suggest that one possible remedy would be an "intra-cultural and cross cultural dialogue which recognizes that the personal is political but the political is extremely rich and diverse."<sup>27</sup> This approach, they argue, will enable anthropologists to recognize cultural assets and limitations on all sides and take cognisance of the dialectic between the personal and the political.<sup>28</sup>

M Mutua, an African legal scholar, argues that the notion of individual rights must always be applied in a specific social milieu.<sup>29</sup> She motivates for a thorough understanding of the meaning of human rights and the complicated processes through which they are protected and realized.<sup>30</sup> Such an understanding would link inextricably the concepts of human rights, peoples' rights and the duties of individuals. Individual rights cannot make sense in a social and political vacuum devoid of the duties assumed by individuals. This appears to be truer in Africa than anywhere else.<sup>31</sup> Mutua is of the view that the relationship between individuals and society in Africa is different from that in Western societies. It follows that by concentrating exclusively on the individualistic approach of the West or the communitarian approach of Africa, the degree of personal autonomy of individuals in society will be undermined.

RT Nhlapo, a South African legal scholar, states that patriarchy is a major point of friction between customary law and practices on one hand and individual rights on the other hand.<sup>32</sup> He argues that most of the customary practices which impact on women's rights are related to marriage. Nhlapo accordingly proposes a two-pronged approach to accommodate culture in an open and democratic society. The first approach refers to the need of cultures to adapt to changing imperatives; the second

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<sup>24</sup> R Cook (ed) (1994) *Human Rights of women: National and International Perspectives*.

<sup>25</sup> Fox (n 21 above).

<sup>26</sup> Oloka-Onyango & Temale (n 20 above) 713.

<sup>27</sup> As above.

<sup>28</sup> As above.

<sup>29</sup> Mutua (1995) 35:39 *Virginia Journal of International Law* 340-341.

<sup>30</sup> As above.

<sup>31</sup> As above.

<sup>32</sup> RT Nhlapo "Democratisation and Women in South African Constitution: The Challenge of African Customary Law" < [http://www.unesco.org/culture/world\\_report](http://www.unesco.org/culture/world_report) > [accessed on 15 May 2002].

refers to judicial and legislative methods intended to realize the goals of a constitution that attempts to entrench cultural rights against the background of strong individual entitlements.<sup>33</sup>

Nhlapo's approach thus requires an evaluation of cultural practices in relation to the current socio-economic conditions, to ensure that cultural heritages are not preserved at the expense of women's rights.<sup>34</sup> A commitment to human rights should be as genuine as the commitment to cultural diversity. To achieve this, the competing world views of Western and African societies should proceed as notional equals.

Like some of the scholars analysed above, Nhlapo sees the solution towards achieving human rights to be situated in the "balance up" approach, which he agrees would constitute a challenge.<sup>35</sup> According to this approach, a cultural practice cannot simply be ousted without careful consideration of whether or not it constitutes a violation of the constitution. This consideration should not, however, be based on individual opinion.

One would tend to agree with Nhlapo's theory in the sense that a balanced approach may well accommodate society as a whole. An approach that favours one section of society above the other is not viable in a democratic society that seeks to protect women's rights. A balanced approach implies that those cultural practices which do not infringe upon any rights are maintained. Such an approach would enable all to be accommodated without alienating or enforcing any belief systems.

N Vilakati, a Swazi feminist writer, argues forcefully against the use of culture as a basis for a bill of rights in the draft Swazi Constitution. She contends that culture is not a unifying force in societies and it cannot, therefore, be an exclusive yardstick for the carving of a bill of human rights.<sup>36</sup> That is because it is not necessarily the majority that dictates what culture should be but the dominant view instead. The majority of African societies are patriarchal and thus prioritise male privilege and male dominance. Culture is therefore defined in terms of patriarchy. As a consequence, African culture contains elements that could be said to violate the human dignity of women and lead to self-denigration.<sup>37</sup>

Vilakati therefore argues against the use of culture as a means to promote human rights. She seems to align herself with the theory of universalism. She believes that human rights are free of unnecessary

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<sup>33</sup> As above.

<sup>34</sup> As above.

<sup>35</sup> As above.

<sup>36</sup> Vilakati (2001) 4

<sup>37</sup> As above.

proscriptions which tend to render human rights non-absolute. For her the concept of *human* is important, and therefore human rights denote universality which is in direct contrast to the absolute relativism of culture. A bill of rights can therefore only be based on universal values rather than on culture which is confined to and differ from society to society. Vilakati seems to concede that the balanced approach may embrace a more practical solution. To this end, she argues that the best that can be achieved using Swazi culture as a determining factor for formulating human rights standards is to assume an interrogative stance towards it, for not all of cultural practices promote what is good, just and desirable in Swazi society.<sup>38</sup>

## 2.4 Beyond The Debate On Universality And Relativism

It is therefore imperative when crafting a solution for women's rights, particularly in Africa, to move beyond the debate on universality and relativism. The debate that rights are relative rather than universal, or vice versa, should be a springboard towards a viable solution. For women to enjoy human rights, the universal nature of human rights must be recognized. Such rights should be implemented in cognisance of societal values. However, that which is at the crux of the debate must be pointed out, namely that women's rights in the context of African societies are a threat to certain cultural practices that could be said to violate women's rights.<sup>39</sup> The balanced approach proposed by Nhlapo may well be fundamental to addressing this inherent conflict.<sup>40</sup>

Every human being has the right to participate in, enjoy and develop cultural life and identity.<sup>41</sup> Cultural rights are not, however, absolute. The right to culture is limited at the point at which it infringes upon another fundamental right. In accordance with international law, no right can be used at the expense or destruction of another. This means that cultural rights cannot be invoked or interpreted in such a way as to justify any act leading to the denial or violation of other human rights and fundamental freedoms. As such, claiming cultural relativism as a means to justify a violation of human rights constitutes an abuse of the right to culture. Justification for any violation of rights on the basis of culture has no validity under international law. Cultural rights do not presupposes a violation of human rights under the guise of culture, but all cultural rights should be enjoyed cognisant of advancing the dignity of women.<sup>42</sup>

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<sup>38</sup> As above.

<sup>39</sup> R Coomaraswamy in Cook (ed) (1994) *Human Rights of Women: National and International Perspective* 52-53.

<sup>40</sup> Nhlapo (n 32 above).

<sup>41</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the UN General Assembly on 16 December 1966, entered into force on 3 January 1976.

<sup>42</sup> Ayton-Shenker (n10 above)

Traditional culture is not, therefore, a substitute for human rights. However, it provides the context within which rights are enjoyed. Greater understanding of the ways in which traditional cultures protect the well-being of people would illuminate the common foundation of human dignity on which the promotion and protection of human rights are based. The recognition and appreciation of a particular cultural context would serve to facilitate, rather than reduce, the respect and observance of human rights.<sup>43</sup>

## 2.5 Conceptualising Cultural Practices

In conceptualising cultural practices, three traditional practices have been identified as crucial to the advancement of women's rights. These are:

- Marriage;
- Land ownership; and
- Widowhood.

### 2.5.1 Marriage

The concept of marriage in African societies entails the joining together of two families. Marriage therefore goes beyond the individuals by involving society at large. Marriage is conceptualised as the joining together of a relationship between a man and women, thus including both polygamous and monogamous marriages. Marriage in African societies is a lifetime commitment to such a degree that even the death of one party does not terminate the relationship between the two families.<sup>44</sup> To sustain this relationship, certain cultural practices are observed such as *kungena* (levirate) and *inhlanti* (sororate) which perpetuated the relationship beyond the life of either party. The payment of *emalobolo* (bride price) is another practice closely associated with the eternal unification of the family. Where *emalobolo* is paid for a woman, she belongs to her in-laws for all intents and purposes. Should she die, her family must take a sororate as a replacement. In the event that the husband dies, the wife remains with her in-laws who will provide a levirate to replace the deceased husband. Another practice is that of *kwendziswa* (forced marriage) whereby the father of the girl would choose a husband for her whilst she is still young. In some instances the girls would be married off to elderly men to settle debts of their fathers.<sup>45</sup>

Traditionally, a marriage relationship in African societies was intended to serve three major functions: the continuation of the lineage group through natural reproduction, the provision of domestic labour

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<sup>43</sup> As above.

<sup>44</sup> Armstrong (1983) WLSA Working Paper 7.

<sup>45</sup> RT Nhlapo (1990) 138-139

by the wife and as a means through which wider political and economic alliances were established between the families of the wife and that of the husband.<sup>46</sup>

Women's lack of equality in marriage is associated with patrilineality and patrilocal residence, the custom according to which a married woman resides on her husband's land to produce children for his lineage. In many African societies bride wealth or bride price (*lobola*)<sup>47</sup> is effectively the purchase price of her productivity and fertility. *Lobola* constitutes the merger between two families.<sup>48</sup> In most instances women depend on marriage to gain access to land. The consequences of marriage under customary law have far reaching implications for women as the marriage accords women minority status for all intents and purposes. They cannot make decisions about issues affecting their very lives. It could be argued that these processes violate Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>49</sup> This research assumes that it is the minority status of African women that gives rise to all the violations against women within the family structure. It will be argued that the failure of women to acquire land in their own right is a direct consequence of their minority status. Furthermore, when their husbands die, widows suffer distinct humiliation.<sup>50</sup>

## 2.5.2 Landownership

Landownership in African societies is associated with power and status. The more land you own, the higher your status in society. As indicated above,<sup>51</sup> women hold a minority status and as such are not considered for the allocation of land. To that end, female landowners are unheard of. Every aspect of power is associated with men. For that reason women can only *access* (but not own) land through their male relatives or husbands. Although married women can access land through their husbands, marital power (that transcends even to the extended family) can lead to the deprivation of such land. In instances where the relationship turns sour, women bear the consequences as they are evicted from their husband's land. However, since culture dictates permanency in a marital relationship, the wife's family would always return her to her marital home, thus refusing to give her any land. Such women become victims of circumstances and, by extension, their children suffer as well.

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<sup>46</sup> As above.

<sup>47</sup> It must be noted that the Siswati word *emalobolo* (bride price) will be used instead of *lobola* for this mini thesis.

<sup>48</sup> M Owen (1996) 53.

<sup>49</sup> Articles 16 (1) and (2) provides for equality in marriage between men and women when entering into marriage and upon dissolution during and after marriage.

<sup>50</sup> See par 2.5.3 and accompanying footnotes.

<sup>51</sup> Par 2.5.1.

### 2.5.3 Widowhood

Widowhood is a concept that signifies the mourning for a spouse. The idea behind this notion is the showing of respect to the deceased by observance of rituals, lest a bad omen is brought to society at large. This culture is practiced differently by different societies. What is striking, however, is that widowhood tends to impact far more traumatically upon women than men. Only widows are subjected to restrictions and endure the humiliating rituals in relation to dress code, food, hygiene and sexual activity. Societies attach significance to these rules, a violation would render the perpetrator liable for punishment.<sup>52</sup> In Lesotho and Zambia, for example, a widow is placed under a blanket until the burial of her husband proceeds.<sup>53</sup> The behaviour in relation to mourning is inherently gendered; there is neither any stigma attached to a widower nor any strict rules that he should observe. A widower is allowed to marry as soon as he wishes. This practice is essentially justified on the grounds that as a man, the widower requires someone to take care of both him and his needs. Yet this does not equally hold true for women.

Death of a husband for women has extra significance than simply a loss of a partner, protector and a breadwinner; it heralds a radical change in her social status and lifestyle.<sup>54</sup> Widows often endure cruel and institutionalised social ostracisation. A widow's inferior status is underscored by the dictates of traditional mores associated with the mourning and funeral rites, by discrimination under both modern customary and religious laws, and by the engrained attitudes of government officials and community leaders.<sup>55</sup> In some societies, tradition or custom are commonly advanced by the husband's family as justification for driving widows from their homes, seizing property and forcing them into widow inheritance or levirate arrangement.<sup>56</sup>

For one to appreciate the extent to which human rights are violated through cultural practices, the impact of cultural practices on women's rights must be examined. Such an examination will illuminate why some of the theorists (as analysed above) <sup>57</sup> contend that relativism or universality alone is not a solution to the problems encountered by women in Africa, but that a comprehensive approach is necessary. The next chapter will examine the impact of marriage, landownership and widowhood practices on women as observed in Swaziland and South Africa respectively.

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<sup>52</sup> Owen (n 48 above).

<sup>53</sup> M Owen in Askin & Koenig (eds) (2001) 3 *Women International Human Rights Law* 10.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> For example the Ibo tribe in Nigeria (Owen n 48above).

<sup>57</sup> See paragraph 2.3 above.

## CHAPTER 3

### THE IMPACT OF CULTURAL PRACTICES IN SWAZILAND AND SOUTH AFRICA

#### 3.1 Introduction

Swaziland and South Africa, similar to other African states, have incorporated a dual legal system after independence. These two countries have incorporated both common law and customary law.<sup>58</sup> The fact that customary law and common law operate simultaneously is a source of confusion and women, more often than not, fall victim to the dual application. Although South Africa is a culturally diverse society, it has strong customary practices that are still practiced by ethnic tribes.<sup>59</sup>

The impact of cultural practices is more apparent within the family because women's status is defined by their roles within the family structure.<sup>60</sup> The land rights of a woman and the treatment she is subjected to during widowhood are directly linked to her marital status. Marriage therefore becomes a point of departure when examining women's rights in a given culture or society. Marriage can be concluded under civil law or customary law. However, it will be shown that marriage under civil law for Swazi and South African (black) women does not necessarily remove women from the impact of customary marriages.<sup>61</sup> Consequently, regardless of whether a marriage is concluded under civil or customary law, it is still influenced by cultural practices. Therefore, it would be necessary to consider the consequences of marriage in Swaziland and South Africa with a view to illuminate its impact on women's rights. It will be submitted that an appreciation of the manner in which culture encroaches upon common law would lead to an understanding of the intricacies faced by women in the exercise and enjoyment of their rights.

#### 3.2 Swaziland

Marriage in Swaziland can be contracted under both civil and customary law. The Marriage Act<sup>62</sup> sets out the procedures and regulations of marriage contracted under civil law. Marriage under civil law is monogamous, and can take three forms: in community of property, out of community of property

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<sup>58</sup> It must be noted that South Africa legal system also incorporated English Common Law.

<sup>59</sup> For example the Zulus and Xhosas have similar cultural practices to those of Swazis.

<sup>60</sup> See Chapter 2 para 2.5.1.1 above.

<sup>61</sup> See para 3.2.1 and 3.3.1.2.

<sup>62</sup> Act No.47 of 1964.

with marital power and out of community of property without marital power.<sup>63</sup> Marriage entered into under customary law, on the other hand, is guided by the customs and practices of Swazi society. These marriages are polygamous without any restriction on the number of wives.<sup>64</sup>

### 3. 2.1 Consequences of Marriage

#### 3. 2.1.1 Marriage under civil law

All marriage concluded under civil law are monogamous. Bigamy is whereby a spouse married under civil concludes more than one marriage at the same time, is therefore illegal.<sup>65</sup> However, dual marriage is legal, although for Swazi women this has proven to be problematic. Marriage contracted under Swazi law and custom and civil law have different consequences.<sup>66</sup> This leaves women in dual marriages in a precarious position as those rights which may be recognized under civil marriage may not necessarily be recognized under customary marriage.<sup>67</sup>

##### 3.2.1.1.1 Marriage in community of property

In the cases of marriage in community of property, both parties own property accumulated before and during marriage jointly. The husband becomes the administrator of the joint estate and can therefore donate, sell or mortgage joint property without the consent of the wife.<sup>68</sup> The wife's legal status is reduced to that of a minor who is dependant on her husband's assistance for all legal transactions. She cannot, therefore, access credit or register any property or business in her own name.<sup>69</sup>

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##### 3.2.1.1.2 Marriage out of community of property

There are two types of marriages that can be concluded out of community of property, namely with the marital power and that without the marital power.

##### 3.2.1.1.2.1 Marriage out of community of property with marital power

In marriage out of community of property with marital power both parties own their properties separately. However, with the marital power, the husband becomes the administrator of both his property and that of his wife.<sup>70</sup> This would appear to be an instance where a woman gains

<sup>63</sup> The Marriage Act 47 of 1964.

<sup>64</sup> Nhlapo (n 45 above) 105.

<sup>65</sup> Act 47 of 1964 sections 24 & 25.

<sup>66</sup> RT Nhlapo in J Stewart & A Armstrong (eds) (1990) 108.

<sup>67</sup> "A dual marriage is a union in which the wife usually finds herself chasing shadows" see Nhlapo (n 45 above) 112.

<sup>68</sup> Nhlapo (n45 above).

<sup>69</sup> As above.

<sup>70</sup> WLSA (1998) 163.



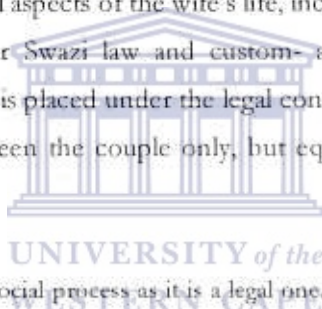
independence on the one hand and yet relinquishes her independence by virtue of the marital power.<sup>71</sup>

#### 3.2.1.1.2.2 Marriage out of community of property without marital power

Where the marital power has been excluded through an ante nuptial contract, the husband and the wife own property acquired before and during marriage separately. The wife retains her legal status and she can, therefore, sue and be sued. She can also enter into legal contracts on her own accord without the assistance of her husband. However, her mobility can be limited in instances where customary practices were followed in the conclusion of the marriage. Payment of *emalobolo*, for instance, limits the independence of a woman, she becomes the property to her in-laws through this practice.

#### 3.2.1.2 Marriage under customary law

In marriage under Swazi customary law, the husband has absolute and undefined marital power over the wife. This all encompassing power extends to his family as well. The marital power of the husband over the wife extends to all aspects of the wife's life, including her movements. A woman is therefore a perpetual minor under Swazi law and custom- as a girl she is under her father's guardianship and after marriage she is placed under the legal control of her husband and his family.<sup>72</sup> Marriage is not a relationship between the couple only, but equally involves the two families. RT Nhlapo explains as follows:



Swazi marriage is as much a social process as it is a legal one. It seeks to create a strong relationship between two groups of kin and is characterized by the involvement of both families in negotiations leading up to the wedding itself, in the life of the spouses during the subsistence of the marriage, and its dissolution.<sup>73</sup>

Customary marriage is concluded out of community of property automatically. This means that the wife and the husband own property separately. However, because of the vast marital power of the husband, it becomes difficult for a woman to assert her rights. It has been argued that the out of community of proprietary rites do not further women's rights as in most instances women do not have tangible property over which to exert ownership in any event.<sup>74</sup>

<sup>71</sup> Nhlapo (n 45 above).

<sup>72</sup> A Armstrong & RT Nhlapo (1985).

<sup>73</sup> RT Nhlapo in Armstrong & Neube (eds) (1992) 44.

<sup>74</sup> H Kuper (1986).

Another feature of this type of marriage is that it is polygamous thus allowing the man to have an unrestricted number of wives. This is made possible by the fact that a woman does not give consent to a customary marriage. The practice of *kutekwa* (traditional marriage ceremony) is a clear violation of women's rights.<sup>75</sup> The woman is never informed of the date of her marriage ceremony, but is taken by surprise or forced to go through the process should she refuse. Some girls are abducted and married against their will.<sup>76</sup> This custom confirms that women do not have decision-making powers under Swazi law and custom, even over fundamental matters that affect their daily lives.<sup>77</sup>

Moreover, there exists no age restriction for marriage under Swazi law and custom. The only requirement for marriage is puberty. This is contrary to the definition of a child as conceptualised in the Convention of the Rights of the Child.<sup>78</sup> The absence of the age restriction has serious implications for the girl-child's right to education as she may be forced out of school due to early marriage.

#### 3.2.1.2.1 The Bride Price (*Emalobolo*)

The payment of the bride price or *emalobolo* has far reaching implications for a woman's relationship with her husband and her in-laws. The rationale behind *emalobolo* is the cementing of the relations between the families of the bride and the groom. Furthermore, *emalobolo* serves as compensation to the woman's family for the loss of a daughter. It is also important to note that *emalobolo* also buys a woman's reproductive capacity.<sup>79</sup> Women are forced, therefore, to comply with certain acts and practices as they are duly acquired property.<sup>80</sup> Men justify acts such as battery as a way of dealing with their property.<sup>81</sup> They can always return wives to their families if they are displeased with them for a refund of the *emalobolo* or demand a sororate (*inhlanti*).<sup>82</sup> As long as women are regarded as property acquired through *emalobolo*, it stands to reason that it would be difficult to advance their rights.

Women married under civil law do not escape the consequences of being treated as property in instances where *emalobolo* was paid. Even though *emalobolo* is not required under civil law, most families in Swaziland insist on the payment of the *emalobolo*. This has now become an accepted practice for civil law marriages. This poses problems for women, as *emalobolo* ties them to the customary expectation of sexual productivity which, according to custom is the purpose of *emalobolo* and thus infringing her reproductive rights.

<sup>75</sup> See WLSA (2000) 77.

<sup>76</sup> As above 76.

<sup>77</sup> Hlanze (1998) 30.

<sup>78</sup> Article 1.

<sup>79</sup> Nhlapo (n 73 above) 48.

<sup>80</sup> see WLSA (2001) 80.

<sup>81</sup> Hlanze (n 77 above).

<sup>82</sup> See WLSA (n 70 above).

As mentioned in the previous chapter<sup>83</sup> marriage under customary law serves to facilitate procreation. *Emalobolo* is therefore paid as the price for acquiring a woman's procreative capacity as she is under an obligation to produce children for her husband. The husband has the power to control her sexuality.<sup>84</sup> She cannot, therefore, give consent to sexual intercourse or decide on the number and spacing of children.<sup>85</sup> This has implications for the spread of HIV/AIDS as well as the reproductive health of a woman because she cannot even negotiate for safer sex to protect herself against a promiscuous husband. This clearly illustrates that the payment of *emalobolo* both creates and perpetuates an imbalance of power between men and women.<sup>86</sup>

### 3. 2. 2 Landownership

There are two land tenure systems in Swaziland: Swazi Nation Land and Title Deed Land. Swazi Nation Land (SNL) is land that is freely accessible, regulated by customary law and acquired through *kekibontá* system.<sup>87</sup> A woman cannot access SNL (*kbontá*) in her own right. In order to gain access to land, a woman will always need the assistance of a male relative, usually the husband, son or uncle.<sup>88</sup> It could be argued that an unmarried man cannot acquire land under SNL.<sup>89</sup> The point to be made is, however, that once the land is allocated in marriage, the man acquires power over the land, not the woman. The husband can always expel the wife from the land. A woman, regardless of whether married or not, is therefore never given an opportunity to own land.

Despite the fact that women are largely agricultural producers and have the responsibility of looking after the economic welfare of their families, they continue to have limited access to and control over land. Under Swazi customary law, a woman is given a field called *liphakelo* which she tenders for agricultural purposes upon joining the husband's family.<sup>90</sup> However, it is the husband or his family who decide how that field is to be utilized.

Land is a major natural resource for development or economic empowerment. The fact that women cannot own land in their own name deprives them of opportunities for economic empowerment. Women who are involved in income generating community projects do not fully enjoy their proceeds as the land they tend do not belong to them but registered under the man. The husband by contrast receives the proceeds and decides whether or not to transmit the payments to his wife.

<sup>83</sup> See Chapter 2 par 2.5.1

<sup>84</sup> As above.

<sup>85</sup> See WLSA (n 70 above) 182.

<sup>86</sup> See WLSA (n 70 above) 81.

<sup>87</sup> WLSA (n 70 above).

<sup>88</sup> WLSA (n 70 above) 189.

<sup>89</sup> WLSA (n 70 above).

<sup>90</sup> As above.

Acquiring Title Deed Land (TDL) on the other hand is open for purchase to anyone and regulated by the Deeds Registry Act.<sup>91</sup> Apart from women married under civil law in community of property who cannot register land in their own names, women are free to acquire this land.<sup>92</sup> However, only a minority of women can afford to buy TDL. The majority of Swazi women are uneducated poor and unemployed thus they do not have the required resources to acquire Title deed land.<sup>93</sup> This situation renders Swazi women virtually powerless to access land.

### 3. 2. 3 Widowhood

The cultural practice of widowhood in Swaziland is deeply entrenched and valued by society in both urban and rural areas. Widowhood is associated with bad luck or denotes an ill omen.<sup>94</sup> A widow consequently has to abide by certain rules, least she brings a bad omen to society. The inequality inherent to this custom is eminent in that only women are thus stigmatised. Men face no similar or comparable humiliation or cultural dictates. The family of the husband determines the traditional practices that accompany funerals and the burial of husbands.

There are a number of practices in Swaziland relating to burial and the mourning period that are humiliating and degrading to women. Practices such as the shaving of the head, the bathing in cold water, confinement to the house and denial of personal hygiene violate the personal and bodily integrity of a woman. Her diet is at times restricted as she is not allowed to drink water for a certain period. Since she is the bearer of bad luck, a widow is not supposed to associate with people. At social gatherings, in particular she may not sit in front of people. A widow is forbidden from standing in the front of a line, speaking unless spoken to and running to, for example, board a bus. She may be prohibited from practicing her profession and must at all times remain seated on the floor during the official mourning period.<sup>95</sup> Men, on the other hand, are customarily required to mourn for a month.<sup>96</sup>

Widows are also prescribed to what they should wear. A widow is expected to wear a black mourning gown (*inziho*) for a period of two years and that mourning gown is accompanied by a myriad of

<sup>91</sup> The Deeds Registry Act 3 of 1938.

<sup>92</sup> As above.

<sup>93</sup> Hlanze (n 77 above).

<sup>94</sup> As above 30-31

<sup>95</sup> J Barret "Culture: Codification of Customs in Swaziland"

<[http://www.oneworld.org/ips2/nov98/10\\_13\\_021.html](http://www.oneworld.org/ips2/nov98/10_13_021.html)> [accessed on 10 September 2002]

<sup>96</sup> As above.

mythological social etiquette to be observed by the widow and also stigmatises her in society.<sup>97</sup> *Inzilo* is accompanied by innumerable taboos that exacerbate, rather than abate, her emotional pain and can thus not serve a therapeutic purpose for the widow. It has little to do with the grief of a widow, as some women who lived separately from their husbands at the time of death were expected to wear it. Vilakati rightly observes that *inzilo* is evidently a ritualisation of the extensive perpetual male power over women, a way of branding the woman to indicate that she belongs to a particular man who is not quite dead, but merely physically absent.<sup>98</sup>

According to Swazi law and custom, a widow cannot decide whom to marry after the death of her husband.<sup>99</sup> She is given a substitute among the brothers of the deceased, the so-called levirate. The payment of *emalobolo* dictates that a woman stays with her in-laws as she and her children were paid for. Umoren sees this custom as the most abhorrent treatment of the African woman that robs her of her dignity and forces her to raise children to immortalise the deceased husband's name.<sup>100</sup>

The cultural practices that exist in respect of the mourning period and widowhood in general have far reaching consequences for the rights of women. Said consequences range from the emotional to the economical. As the widow is confined to the house for a month, the husband's family uses this period to rob the woman of any property she owned jointly with her husband or was left as an inheritance.<sup>101</sup> By the time that the restrictions on her movement are lifted, she may be left destitute.

Since Swazi society at large sees widows as bearers of bad luck, widows could at times lose their jobs and homes in instances where they are employed in royal places or in other areas such as the Royal palaces, Swazi National (royal) schools or the King's residence.<sup>102</sup> The same practice does not apply to a widower. Widows may even lose their jobs where employers cannot accept a one-month absence from work. Children by extension also suffer in the process as their mothers are either evicted from their homestead or lose their income. Some children are forced to leave school under these harsh conditions.<sup>103</sup>

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<sup>97</sup> N Vilakati "Inzilo: Time for redaction or optionally" in The Nation Magazine 2001 see also < <http://www.thenation.co.sz/october/analysis03.htm> > [accessed on 19 July 2002].

<sup>98</sup> As above.

<sup>99</sup> A Armstrong & RT Nhlapo (1985).

<sup>100</sup> E U Umoren "Enculturation and Inculturation: the gospel of Liberation of African Womanhood" <<http://www.serdos.org.English/umoren.htm>> (accessed 23 September 2002).

<sup>101</sup> WLSA (1992) 47.

<sup>102</sup> A widow wearing a black-gown in Swaziland is not allowed near palaces or any royal places as she may bring bad-omen to the king and royal family.

<sup>103</sup> UNICEF/WLSA study (2000) 42

Widowhood in Swaziland, therefore, is one cultural practice that significantly reduces the status of women through humiliating rituals practices and property grabbing. This is a manifestation of the patriarchal system that regards men as significantly more important than women. It is beyond the confines of this research to analyse the inheritance processes under Swazi law and custom, but suffice it to say that women are likewise discriminated against as the patrilineal lineage is followed in respect of intestate succession.<sup>104</sup>

### 3.3 South Africa

#### 3.3.1 Marriage in South Africa

##### 3.3.1.1 Background

South Africa, like Swaziland, is a decidedly patriarchal state that embodies diverse cultural practices. This position emanates from the homeland system introduced after 1910 whereby all black ethnic groups were designated to rural areas where they were given powers to rule and govern themselves. To this end, the Xhosas were relegated to the Eastern Cape, the Zulus to Natal and the Sothos to the northern region. In that system, government maintained power over all these areas.<sup>105</sup> It will be shown in the course of this discussion how South African legislation regarding women's rights underwent various stages of development.

Traditionally the institutions of customary law have not benefited women in South Africa. Women bear the brunt of most of the discriminatory cultural practices, especially within the context of family law. In general, customary practices are patriarchal and consequently discriminatory as they keep women in a status of perpetual minority.<sup>106</sup> Customary law has rarely, if ever, afforded women equal decision-making powers within marriage. Women lack control over marital property; their rights to custody and guardianship of their children are limited; they are often not able to enter into a marriage and choose a spouse freely; and their rights that flow from divorce or the dissolution of marriage are limited. These problems are further compounded by the fact that customary marriages have not enjoyed legal recognition, thus denying women recourse to the formal legal system.<sup>107</sup>

<sup>104</sup> Inheritance matters are handled by the Master of the High court and regulated by the Administration of Estate Act 28 of 1902.

<sup>105</sup> F Mhago "A Gender Analysis of recent South African Land reform  
<<http://www.undp.org/unifem/public/landrights>> February 1998 [accessed on 23 September 2002].

<sup>106</sup> The Commission on Gender Equality: Recognition of customary Marriages Bill submission to the Justice Portfolio Committee, 22 September 1998.

<sup>107</sup> As above .

In South Africa, marriages are contracted under customary law, Christian law, civil law and Muslim or religious laws. The Marriage Act of 1961<sup>108</sup> did not recognize any other marriage apart from marriage contracted under civil law. The adoption of the Interim Constitution<sup>109</sup> paved the way for the recognition of cultural, religious and customary norms and practices. Section 15(3) of the final Constitution of the Republic of South Africa<sup>110</sup> gives recognition to marriages concluded under any tradition, or a system of religious, personal or family law.<sup>111</sup>

In an effort to implement the constitutional provisions giving equal status to women, the Recognition of Customary Marriages Act<sup>112</sup> was enacted. Before then, customary marriages were not recognized as valid marriages as far as the common law of South Africa was concerned.<sup>113</sup> Such marriages were only recognized in the court of traditional leaders.<sup>114</sup> Customary marriages were regulated under the Black Administration Act of 1927<sup>115</sup> and were referred to as unions. The reason for this was two-fold: on the one hand these marriages were not in compliance with the Marriage Act;<sup>116</sup> on the other hand they were polygamous which was deemed contrary to the *boni mores* of society.<sup>117</sup>

### 3. 3.1. 2 The Black Administration Act 38 of 1927

Customary marriages were regulated in accordance to customary law as embodied in the Black Administration Act and the Zulu Codes of Law.<sup>118</sup> Section 11(3)(b) of the Black Administration Act provided that a black woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian. She was accorded a lower status than the husband and was placed under his marital power.<sup>119</sup> The legal consequences of a customary marriage for women therefore, were that she could not own property; she could not acquire credit; she had limited contractual capacity and she could not sue or be sued.<sup>120</sup>

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<sup>108</sup> Act 25 of 1961.

<sup>109</sup> Act 200 of 1993.

<sup>110</sup> Article 5(i) Act 108 of 1996

<sup>111</sup> Article 15(ii) as above.

<sup>112</sup> Act 120 of 1998.

<sup>113</sup> Mhago (n 105 above).

<sup>114</sup> As above.

<sup>115</sup> Act 38 of 1927.

<sup>116</sup> Act 25 of 1961.

<sup>117</sup> J M Pienaar "Equality in Marriage: The case of African Customary Wives in South Africa" <<http://www.jus.uio.no/ifp/isfl/pienaar.pdf>> [accessed on 23 September 2002].

<sup>118</sup> As above.

<sup>119</sup> Section 11(3) of the Black Administration Act 38 of 127 and section 27(3) of the KwaZulu Act on the Code of Zulu Law and the Natal Code of Zulu Law 16 of 1985.

<sup>120</sup> Pienaar (n 117 above) 5.

Section 14 the KwaZulu Act on the code of Zulu law<sup>121</sup> provided that women living in KwaZulu-Natal attained majority at the age of 21, however, section 27(3) stated that married women were subject to the marital power of her husband. A married woman was therefore relegated to the status of a minor on the basis of her husband's marital power. Section 22 extended the marital power to the extended family.

The Transkei Marriage Act<sup>122</sup> recognized both civil and customary marriages and unlike the Black Administration Act which only extended the minority status of women to customary marriages. It entrenched the marital power as part and parcel of all marriages whether concluded in or out of community of property. The Marital power with regard to civil marriages was abolished in 1999 on the basis of human rights considerations.<sup>123</sup>

Except for the Transkei, a woman who had concluded a civil marriage was therefore the only category of African women that enjoyed equal status to her husband. The South African legislative landscape thus entrenched a patriarchal principle, effectively enshrining the exercise of control by senior men over the lives and property of women.<sup>124</sup>

### 3. 3.1. 3 The Matrimonial Property Act 88 of 1984

The Matrimonial Property Act<sup>125</sup> (as amended by the Marriage and Matrimonial Property Act)<sup>126</sup> appeared to endorse the view that marriage is a partnership of equals. Major changes were introduced in South African law with a view to improve the status and position of married women.<sup>127</sup> However the latter Act did not apply to women married before 1 November 1988 if white, coloured and Asian or before 2 December 1988 if black. Consequently, only women who were married *after* the aforementioned dates stand to benefit.<sup>128</sup> A marriage contracted after the said date without an ante nuptial contract is automatically in community of property. Of particular significance is the abolishment of marital power. A partnership of equals was created instead and the marital power of the husband was abolished. Both spouses have legal status to act independently. Consent is required, however, when dealing with joint property.<sup>129</sup>

<sup>121</sup> Act 16 of 1985.

<sup>122</sup> Act 21 of 1978.

<sup>123</sup> See *Prior v Battle* 1998 (8) BCLR 1013 (TK)

<sup>124</sup> Pienaar (n 117 above) 6.

<sup>125</sup> Act 88 of 1984.

<sup>126</sup> Act 3 of 1988.

<sup>127</sup> V Golberg in M Lessing (1994) 239.

<sup>128</sup> As above.

<sup>129</sup> Golberg (n 127 above).



Blacks married under civil law were governed by the Black Administration Order of 1927 which provided that such marriages were automatically out of community of property with the marital power of the husband entrenched. This Act did not assist black married women. Consequently, women married under customary law remained minors, unable to own property in their own name and not deemed partners to their husbands after the inception of the Act. This position resulted in women advocates and activist groups lobbying against the Act.<sup>130</sup> The Recognition of Customary Marriages Act<sup>131</sup> was consequently enacted to address the concerns for women married under customary law in South Africa.

### 3.3.1.4 Provisions of the Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act of 1998 only entered into force on 15 November 2000. It was passed to implement section 15(3)(a) of the Constitution.<sup>132</sup>

The Act, by giving recognition to marriages entered into in accordance with customary law or traditional rites, brought the majority of women and children of South Africa into the protective realm of the Constitution. This renders customary law compatible with the Constitution. Section 6 of the Recognition to Marriage Act provides that:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.<sup>133</sup>

Section 7 of the Act makes provision for three possible matrimonial systems: a) in community of property, b) out of community of property with accrual system and c) out of community of property without the accrual system.<sup>134</sup>

Conversely, the Act is not without flaws. The fact that the Act is not retrospective is a major hindrance to women married under customary law before 2 December 2000. Because the 1988 amending legislation was not retrospective, discarded spouses of customary marriages that had been dissolved before 2 December 1988 continue to be governed by section 22(7) of the Black

<sup>130</sup> The Legal Resource Centre, see The South African Law Commission (Project 90) Harmonisation of Common Law and indigenous Law-Customary Marriages (1997).

<sup>131</sup> Act 120 of 1998.

<sup>132</sup> Section 15(3) (a) This section does not prevent legislation recognising-  
(i) Marriages concluded under any tradition, or a system of religious, personal or  
(ii) Family law or  
(iii) Systems of personal and family law under any tradition, or adhered to by persons professing a particular religion

<sup>133</sup> Section 6.

<sup>134</sup> Section 7(2).

Administration Act. That includes those married under civil law before the said date and those who did not change their matrimonial regime.

### 3.3.2 Land Ownership

In South Africa, as in Swaziland, customary law sometimes excludes women from accessing land and the right to inherit land. Under customary law in rural areas, the adult sons inherit all property when the father dies. If the children are minors, the family of the husband will repossess all the deceased's property. The impact of this is that women who have the responsibility of taking care of their families become increasingly more impoverished.<sup>135</sup>

However, in South Africa the post-apartheid government implemented a land redistribution programme in 1996. The land reform programme focused on three areas:

- 1) Tenure Reform - this embraces the restitution of land to people dispossessed by racially discriminatory laws or practices and land redistribution to the poor.
- 2) Redistribution - it aims to provide the poor, labour tenants, farm workers, women and emerging farmers with access to land for settlement and productive purposes.
- 3) Restitution - the process whereby persons or communities dispossessed of property after 19 June 1913, as a result of past racial discriminatory laws and practices, are restored to such property or receive just and equitable redress.<sup>136</sup>

The South African the government soon realized that it was difficult to implement the envisaged policy and a new programme was introduced in 2001 called the Land Redistribution for Agricultural Development Programme (LRAD).<sup>137</sup>

Despite all these efforts many people from the rural communities struggle to gain access to land. Even though both men and women do not have access to land, the majority of victims are women. This is attributed to the unconstitutional discriminatory practices they face within communities. Rural black women are denied access to land by community leaders because of customary laws which are part of the entrenched system of patriarchy.<sup>138</sup>

Although women face these distinct problems within their communities, South Africa has made provision for the protection of women's land rights in and through the Constitution. Section 25(1) of

<sup>135</sup> Economic Justice Update (2002) 6 (1) *Fair share Publication* 3.

<sup>136</sup> Land Policy Reform of 1996.

<sup>137</sup> The Land Redistribution for Agricultural Development Programme (LRADP) 2001.

<sup>138</sup> See n 135 above.

the Constitution makes provision for equal access to land and property without any discrimination.<sup>139</sup> The Recognition of Customary Marriage Act, in turn, recognizes that women have equal rights pertaining to marital property.<sup>140</sup> This magnitude of the problem in Swaziland is therefore incomparable to that of South Africa. In Swaziland there exist neither a bill of rights nor legislation as a means to protect women's basic rights and freedoms. A South African woman who has been arbitrarily deprived of land can always approach the court for redress. All customary practices in South Africa are subject to the Constitution and can always be challenged. By contrast, in Swaziland the practice that a woman cannot own land in her own right cannot be challenged under any higher law such as a supreme constitution with a justiciable bill of rights.

### 3.3.3 Widowhood In South Africa

In South Africa black widows in rural communities are subjected to inhuman and degrading treatment at the hands of their in-laws and society. Widows in South Africa, like in Swaziland are also subjected to practices such as house confinement, wearing of a mourning garment (which may not necessarily be black in the case of South Africa); property grabbing, ostracisation from society, stigmatisation, levirate practice and deprivation of rights over her children.<sup>141</sup> To this end it suffices to say that widowhood in South Africa impacts almost similar to Swaziland.<sup>142</sup>

Many of these practices are illegal and unconstitutional, yet many women often have no access to legal recourse. Poverty and lack of information are obstacles to women who wish to exercise rights. Without knowledge, women tend to succumb to violations of their rights as though these were lawful acts. For those who are informed of their rights, taking legal action becomes impossible, as they cannot afford the often-exorbitant legal fees required by attorneys in such instances.

### 3. 4 An Analysis

Women in Africa generally have not been favoured by the cultural practices which dictate that a woman should hold an inferior position in society. After independence, most African countries adopted constitutions that were influenced by customary practices. However, customary law itself was born through a process of manipulation of customs and traditions by rulers and family heads to

<sup>139</sup> Section 25 (1) "No one may be deprived of property except in terms of general application, and no law may permit arbitrary deprivation of property".

<sup>140</sup> Article 6 (n 1.33 above).

<sup>141</sup> SAPA "Talks focus on black Widows" 15 August issue  
<<http://www.dispatch.co.za/2000/08/15/southafrica/WIDOWS.HTM>> (2000) [accessed on 29 September 2002.]

<sup>142</sup> See para 3.2.3 above.

bargain for power with colonial state. Women were not, therefore, part of the formulation of customary law since they did not hold leadership positions.<sup>143</sup>

After independence, many African states entrenched customary law practices in their Constitutions and through legislations.<sup>144</sup> The colonial system had taught leaders how to manipulate the system to serve their interests. Hence we encounter laws after independence that entrench the marital power of husbands as a means to serve the interest of men.

Although a majority of African states adopted gender-biased laws and practices at independence, these have been modified over the years through constitutional development. South Africa's apartheid regime was abolished in 1994 when a democratic government came into power. The new government took cognisance of the fact that women were disadvantaged in a number of ways during the apartheid years. Since 1994 measures have been implemented to ensure that women enjoy the same status as men in all spheres. In doing so, the South African government did not lose sight of the fact that culture is also important in ensuring a democratic society. To this end, section 15 of the Constitution provides for the protection of cultural practices as long as they are not in conflict with the rights entrenched in the Constitution. This ensures that cultural practices are exercised within the confines of the Bill of Rights of the South African Constitution.

In Swaziland, on the other hand, culture seems to have gained momentum.<sup>145</sup> Swazi culture is deeply entrenched and permeates all spheres of life. The obvious drawback of this position is that certain cultural practices, as indicated in this chapter, place women at a distinct disadvantage.<sup>146</sup> The impact of the various cultural practices analysed in this chapter shows, however, that the obstacles hindering the enjoyment of women's rights are not unique to Swaziland. The protection of women's rights in the context of culture and cultural practices is a challenge faced by most African countries. The question therefore arises whether Swaziland is justified in using culture as a basis for drafting its own bill of rights.

Constitutional developments in Swaziland show that the country has not followed the lead of most African countries that have sought to prioritise the protection of human rights. It was only in 1996 since the independence constitution was repealed in 1973, that a Constitutional Review Commission (CRC) was established to lay the groundwork towards the drafting of a constitution. The CRC

<sup>143</sup> RT Nhlapo in S Liebenberg (1995) 161-162.

<sup>144</sup> For example In Lesotho married the minority status for women married under civil law is enshrined in legislation.

<sup>145</sup> Nhlapo remarks that actually it is a unique system in the sense that while other customary systems were fading it seemed to be gaining more strength. See Nhlapo (n 66 above).

<sup>146</sup> See Chapter 2 par 2.5

published their Report in August 2001<sup>147</sup> and has been criticized by internal and external human rights activists alike. The report stated that a future bill of rights will be subject to Swazi law and custom. Moreover the report of the CRC is silent on gender equality or women's rights and thus appears to exacerbate the already disadvantaged position of Swazi women. Women view the report as a means to retain political status quo in the new constitutional dispensation and are justifiably worried that other reforms (such as gender equality) will be stunted.<sup>148</sup>

The Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW) comprehensively provides for the protection of women's rights. As Swaziland is in the process of drafting a new constitution, it is important to examine international human rights instruments to ascertain how they seek to protect women's rights against cultural practices. In the next chapter, CEDAW will be analysed for this purposes with reference to the African Charter on Human and Peoples' Rights. To that end, a critical analysis of whether Swazi cultural practices are compatible with the provisions of these two instruments will be made. With a view to facilitate suitable recommendations, a brief review of the CRC Report will be undertaken.



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<sup>147</sup> See Chapter 1 par 1.1

<sup>148</sup> J. Hall "Swaziland Traditions Prevents Gender Equality" <[www.irinnews.org/frontpage](http://www.irinnews.org/frontpage)> [accessed on 30 June 2002].

## CHAPTER 4

### AN ASSESSMENT OF THE COMPATIBILITY OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS ON CULTURAL PRACTICES: WHICH WAY FORWARD FOR SWAZILAND?

#### 4.1 Introduction

Under international law, the foundation for the protection of women's rights emanates from the Universal Declaration on Human Rights (UDHR). Article 2 makes provision for the enjoyment of human rights without distinction of any kind.<sup>149</sup> Article 16(1) provides for equality between men and women including "equal rights to marriage, during and at its dissolution." In terms of article 16(2) marriage shall be entered into only with the free consent of the entering spouses.<sup>150</sup> A scant reference to women's rights is contained in the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>151</sup> The most important document for the protection of women's rights is the Convention on the Elimination of All Form of Discrimination Against Women (CEDAW).<sup>152</sup> CEDAW will therefore be examined in this chapter with reference to regional instruments like the African Charter on Human and Peoples' Rights to ascertain the degree of tension between international human rights law and Swazi cultural practices. By juxtaposing this with the constitutional review process, a way forward will be proposed for the advancement of women's rights in Swaziland.

#### 4.2 Convention On The Elimination Of All Form Of Discrimination Against Women (CEDAW): The Women's Hope Of Refuge

CEDAW is the most comprehensive and detailed international agreement in the history of women's rights. It incorporates all gender provisions from past documents into one definitive international legal instrument. Yet CEDAW also goes one step beyond earlier human rights conventions by exposing the specific inequalities that plague women's lives.<sup>153</sup> In doing so, it explicitly acknowledges what previous international mechanisms have ineffectively expressed, namely that women's rights as

<sup>149</sup> Article 2. Universal Declaration of Human Rights adopted UN General Assembly Resolution 217 A (III) of 10 December 1948.

<sup>150</sup> UDHR articles 16 (1) and (2).

<sup>151</sup> See n 41 above

<sup>152</sup> See n 3 above

<sup>153</sup> C Greene "The Role of CEDAW in Human Rights Discourse"  
< <http://site.nweb.co.zw/wildaf/news3.htm> > [accessed on 10 October 2002]

*human rights* must be respected and observed.<sup>154</sup> It is the first international treaty to comprehensively address the fundamental rights of women in politics, health care, education, economics, employment, law, property and marriage and family relations.<sup>155</sup>

The power of CEDAW stems primarily from the fact that it defines discrimination against women for the first time in international human rights discourse. It defines discrimination against women as follows:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>156</sup>

Moreover, it recognizes for the first time that violations against women do not only occur in the political and legal realm, but are also often entrenched in religion, culture and tradition.<sup>157</sup> It follows that while violations such as widow ostracisation, family violence and sexual mutilation have been historically dismissed as private matters, CEDAW exposes discrimination in all its forms.<sup>158</sup>

The Convention is regarded as the bill of rights for women. It broke new ground by bringing together different categories of rights affecting the status of women. CEDAW has nevertheless been criticized for being couched in general terms without containing a set of guidelines for social change. Some scholars contend that the broad sweep of wording has prevented some states from ratifying the Convention out of fear that it may conflict with domestic law.<sup>159</sup> At the same time, the general nature of the Convention enables other nations to ratify it with reservations,<sup>160</sup> thereby diluting the strength of the Convention.<sup>161</sup> Of the 161 countries ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (upon adoption) about 44 entered reservations to certain provisions of the convention on the grounds that national law, tradition, religion or culture, are not congruent with Convention principles.<sup>162</sup>

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<sup>154</sup> As above

<sup>155</sup> Human Rights Watch "CEDAW Women's Treaty" article 7, article 12, article 10, article 13, article 11, article 15 and article 16 <<http://www.hrw.org/campaigns/ccdaw>> [accessed on 11 October 2002].

<sup>156</sup> Article I.

<sup>157</sup> Greene (n153 above).

<sup>158</sup> As above.

<sup>159</sup> Kim (1993) 25 (49) *Columbia Rights Law Review* 81.

<sup>160</sup> CEDAW articles 28 and 29.

<sup>161</sup> Oloka-Onyango & Temale (n 20 above).

<sup>162</sup> "Women: Reservation Grow over UN Women's Treaty" <<http://www.oneworld.org/ips2/mar98/unwomen.html>> [accessed on 13 October 2002].

It has also been criticised for having the weakest implementation and enforcement mechanism of any human rights convention.<sup>163</sup> Nevertheless, it is clear that these limitations exist principally because of the subject matter being addressed, namely women. Yet without CEDAW it is apparent that women rights would not have taken prominence in international human rights discourse.<sup>164</sup>

Article 5 of CEDAW provides specifically for the removal of social and cultural practices that are based on the idea of inferiority or superiority of either of the sexes or on stereotypical roles for men and women. This article further recognises that even if women's legal equality is guaranteed and special measures are taken to promote their *de facto* equality, another level of change is necessary for women. States should strive to remove the social, cultural and traditional patterns which perpetuate gender stereotypes and which are mostly prevalent in the traditional concept of women's role in the domestic sphere.<sup>165</sup>

Article 16 of CEDAW specifically addresses the problem of discrimination against women in the private sphere, including discrimination in the area of family law. Long-standing cultural or religious practices are the basis of discrimination against women in the private sphere and in family law and these are the most difficult areas to penetrate and the most resistant to change. In order to bring about change, States Parties have been called upon to firstly take appropriate measures to amend or eliminate existing laws relating to marriage and the family which discriminate against women. State Parties must also take steps to actively ensure that women are able to exercise the same rights as men, including the right to freely enter into a marriage and choose a spouse.<sup>166</sup>

About 24 State Parties have entered reservations on article 16, again a core article in that it guarantees equality between women and men in marriage and family life. Some countries entered reservations on article 2, which outlines legal steps to eliminate gender discrimination.<sup>167</sup> Reasons cited for these reservations relate to the fact that these steps are in conflict with religious, customary law or Islamic Sharia law on matters pertaining to the family and status of women.<sup>168</sup>

<sup>163</sup> Oloka-Onyango & Temale (n 20 above).

<sup>164</sup> As above 716.

<sup>165</sup> Article 5.

<sup>166</sup> Article 16.

<sup>167</sup> "Division for the Advancement of Women"

< <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> > [accessed on 13 October 2002].

<sup>168</sup> Women Progress and Disparity "A Bill of Rights for women, but with Reservations"

< <http://www.unicef.org/pon97/p49a.htm> [accessed on 13 October 2002].



## 4.2.1 Conflicting Provisions Between CEDAW And Swaziland's Cultural Practices

CEDAW emanates from the premises of equality. It states that men and women are equal and as such should be treated as equals by the general laws of a country and society at large. This means, therefore, that all states including, Swaziland, should uphold the notion of equality in laws and customs relating to women.

### 4.2.1.1 Equality in Marriage

Article 16 of CEDAW provides protection for women within the family and marriage. Article 16(1)(a) states that men and women have the same rights to enter into marriage, therefore no one has lesser rights to enter into marriage and should not be taken as objects of marriage. Article 16(1)(b) protects women from being forced into marriage and being deprived of the right to choose their life partners. It has been explained earlier that the Swazi customary marriage does not require consent from the woman.<sup>169</sup> This encourages a situation whereby girls find themselves married to men they would never have chosen or a marriage that they would not have consented to. An unmarried woman is an embarrassment to society in general and her family in particular. Hence if a man marries her, she should be grateful to the man who saves her from social harassment.

The same applies to the practice of levirate which deprives a woman of her right to choose a spouse when her husband dies as well as the practice of sororate whereby a girl is forced to marry her sister's husband so that she could bear children on behalf of her barren sister. These practices are clearly in conflict with the article 16 which sees consent as fundamental to marriage.

As a woman enters into marriage in a disadvantaged position, it stands to reason that during marriage women hold an inferior position to men. Article 16(1)(c) <sup>170</sup> seeks to change that position by providing that men and women should have the same rights and responsibilities during marriage and upon its dissolution. Under Swazi law and custom, children born out of a union do not belong to the wife or mother but to the husband or father, thus following the paternal lineage. As *emalobolo* is paid to buy the sexuality of the woman and her reproductive capacity, the husband and in-laws have absolute power over matters of reproduction. Article 16(10)(e) seeks to protect women's reproductive rights, including the right to decide when to have children spacing and the number of children. Furthermore, article 16(1)(d) grants women the same powers as men in respect of children,

<sup>169</sup> Chapter 3 par 3.2. 2

<sup>170</sup> Article 16 ( c )“ states... shall ... ensure on a basis of equality of men and women “the same rights and responsibilities during marriage and at its dissolution.”

which again stands in conflict with the Swazi tradition that children belong to the father's family for all intents and purposes.

Article 16(1)(h) aims at providing equality to married women in terms of property rights. They can therefore own, acquire, manage, administer enjoy or dispose property under their own name. It has been discussed in this mini thesis how single and married women in Swaziland are deprived of the right to own property.<sup>171</sup> Research conducted on the family in Swaziland show that women are evicted from their own homes in instances where the husband has sold the house without their knowledge or consent.<sup>172</sup> This is because the Swazi law allows husbands to have absolute control over the exercise of property rights.<sup>173</sup>

Article 16(2) of CEDAW nullifies child marriages and calls upon States Parties to specify in legislation the minimum age for marriage and to make the registration of marriages in an official registry compulsory. In Swaziland, there exists no minimum age for a girl to be married. Once a girl has reached puberty, she is eligible for marriage. This practice contributes to child marriages and school going children consequently drop-out from school which, in turn, violate their right to education. CEDAW stipulates that State Parties should take appropriate measures to reduce female student drop-out rates.<sup>174</sup> Such measures will have to include a statutory minimum age of marriage.

The registration of customary marriages becomes crucial in respect of the cultural practices surrounding widowhood. Without a valid proof of marriage, a widow may be deprived of her right to inherit in terms of her deceased husband's estate. In an attempt to facilitate property grabbing, the in-laws after performing a posthumous marriage may decide to register the posthumous wife as the only surviving wife to the deceased. The registration of customary marriages will, therefore, protect the estate of the deceased and will ensure that the surviving spouse and children receive their share of the inheritance without any prejudice.

#### 4.2.1.2 Equality before the law

Article 15 of CEDAW provides that States Parties shall accord to women equality with men before the law. This means that women should be allowed to enter into contracts, to appear in their own right in civil matters, to register and own property such as land in their names and to access loans on their own without the assistance of their husbands. *Lomkhosi Tsela v The King*<sup>175</sup> is a case in point. In

<sup>171</sup> Chapter 3 para 2.2. 3

<sup>172</sup> WLSA (n 70 above) 166.

<sup>173</sup> See the Marriage Act 47 of 1964.

<sup>174</sup> See article 10(f)

<sup>175</sup> *Lomkhosi Tsela v The King* (unreported judgement).

this instance, the plaintiff, Lomkhosi Tsela had successfully claimed Motor Vehicle Act (MVA) (third party claim in South Africa) insurance after having being involved in a bus accident. However, since she did not have full legal status under Swazi law, her cheque was issued in the name of her husband with whom she was estranged. The plaintiff challenged this before the court and was unsuccessful as the law stipulates that she cannot enter into civil matters. As a result, the plaintiff was deprived of her insurance benefits in favour of her estranged husband. Article 15 therefore envisaged such cases and seeks to avert women's predicament by granting them full legal status in all civil matters.

The practice that women in Swaziland cannot own land in their own name therefore stands in direct opposition to article 1 of the Convention. It conflicts with the spirit of equality contained in of the Convention which proscribes discrimination on the ground of sex. The principle of equality calls for women to be allocated land, a right which is freely available to men. Upon marriage, the Convention grants spouses equal rights in dealing with joint property. Further the inequality before the law is more apparent in the extensive marital power accorded a husband by Swazi customary marriage. Even though the marriage is out of community of property the husband remains the overall administer of the wife's personal life and property. Such a diminished status has far reaching implications for advancement of women's rights.

#### **4.2.1.3 The right to dignity versus inhuman, humiliating and degrading treatment**

The cultural practices regarding widowhood are in conflict with various articles in CEDAW. Article 1 is a case in point. Here discrimination is defined as any distinction, exclusion, and restriction made on the basis of sex, resulting in the inferiority status of women in society. Article 5(a) calls upon states to modify social and cultural patterns of conduct of men and women, eliminating prejudices and all practices which are based on the inferiority or superiority of either of the sexes or on stereotyped roles for men and women. In Swaziland widows are subjected to humiliating and degrading treatment such as house confinement for one month, shaving of the head, eating, talking and walking etiquettes, ostracization and liverate, funeral rituals and mourning period. Such practices violate the right to dignity of women and curtail their fundamental rights, yet in Swaziland they have been granted the sanctuary of customary practice.<sup>176</sup> Often skewed customary interpretations are invoked to render the marginalisation of widows acceptable.

The African Charter on Human and People's Rights embodies a similar sentiment. Article 5 provides that

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<sup>176</sup> Vilakati (n 97 above).

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.<sup>177</sup>

The Draft Protocol to the African Charter on Women's Rights stipulates that widows shall not be subjected to any inhuman, humiliation and degrading treatment,<sup>178</sup> that widows shall become guardians of their children after the death of their husbands,<sup>179</sup> and that widows shall have a right to marry a person of their choice.<sup>180</sup> Ironically, it is only the African Charter, apart from the Universal Declaration on Human Rights,<sup>181</sup> that refers to the right to dignity as an individual right. This could be attributed to the fact that widows in Africa are in general subjected to degrading and inhuman treatment to a greater degree than their Western counterparts.

If Swaziland were to ratify CEDAW, it would have to abolish all the aforementioned practices, as these appear to stand in direct conflict with the provisions of the Convention. It will be shown in Paragraph 4.5 below how a balance can be struck between the cultural practices and human rights principles.

#### 4.2 The African Charter On Human And Peoples' Rights

At the regional level, the African Charter on Human and Peoples' Rights calls upon states to eliminate discrimination against women. Article 18 (3) provides that:

The state shall ensure the elimination of every discrimination against women and also the protection of the rights of the woman and the child as stipulated in international declarations and convention.<sup>182</sup>

The African Charter does not, however, provide comprehensively for the protection of women's rights, save for stipulating that states shall ensure the elimination of every discrimination against women and the protection of their rights. The Charter does, however, require that the protection should be as stipulated in international declarations and conventions.<sup>183</sup> Umozunike is doubtful whether the stipulation by itself makes treaties like CEDAW applicable without separate ratification or accession. This is because a treaty is not binding to a state unless that state has ratified the

<sup>177</sup> Article 5 African Charter on Human and People's Rights (1986)

<sup>178</sup> Article 20 (a) Draft Protocol to the African Charter on Human and Peoples' Rights on The Rights of women.

<sup>179</sup> As above article 20(b).

<sup>180</sup> As above article 20(c).

<sup>181</sup> As above article 5.

<sup>182</sup> Article 18 (3).

<sup>183</sup> As above.

treaty.<sup>184</sup> It could, however, be argued that the African Charter envisages that the State Parties to the Charter would be guided by the principles and basic obligations of the international instruments like CEDAW as per international customary law and *jus cogens*.<sup>185</sup>

Swaziland has ratified the African Charter.<sup>186</sup> The traditions and cultural practices analysed in the previous chapter support discrimination against women in such areas as consent for marriage, legal status and humiliating widowhood. Swaziland is therefore under an obligation to eliminate all discrimination against women as stipulated in the African Charter.

It could, however be argued that compliance with the African Charter alone would not suffice. Swaziland also has to ratify CEDAW and further incorporate this instrument into its domestic legislation. The need exists for a constitution that will fortify the application of human rights instruments. Swaziland is in the process of drafting a constitution and a bill of rights. The Report of the Constitutional Review Commission has not, however, been favourably received. The Report is criticised for its scant recognition of the fundamental rights of Swazi citizens which, in turn, predicts dire implications for the protection of women's rights.

#### 4.4 Striking A Balance Between Culture And International Human Rights

The difficulty of striking a balance between cultural practices and international human rights is illustrated in *Magaya v Magaya*.<sup>187</sup> In this case the main issue of contention was whether a woman could inherit land if her father died intestate. This was a clear instance whereby the court used patriarchal values to justify discrimination against women. The court held that in patriarchal customary society men hold a senior position.<sup>188</sup> Women are accorded the status of a junior male, irrespective of their age.<sup>189</sup> By circumventing international human rights law, the court argued that domestic provisions which discriminate against women are to be deemed "exceptions". These provisions would effectively override international instruments that further the protection and recognition of women's rights.<sup>190</sup>

Even though the court dismissed Venia Magaya's application, the case is important in that it illustrates the conflict between international law and customary law. This case accentuates the resilience of patriarchy discrimination and the considerable obstacles that stand in the way of the

<sup>184</sup> UO Umozurike (1997) 57.

<sup>185</sup> As above.

<sup>186</sup> On 15 September 1995 see "Chart of ratifications: OAU Human Rights Treaties -as at 07 July 2002" < [http://www.up.ac.za/chr/hrilas/hrilas\\_two.html](http://www.up.ac.za/chr/hrilas/hrilas_two.html)> [accessed 10 October 2002].

<sup>187</sup> Judgement No.S.C.210/98/civil Appeal No.635/92 of the Supreme Court of Zimbabwe (unreported).

<sup>188</sup> See Justice A Muechechere's judgement para 5.

<sup>189</sup> As above para 10.

<sup>190</sup> As above.

struggle to achieve gender parity and greater respect for women's human rights on the African continent.<sup>191</sup> Determinations of individual and group rights result in directly competing claims and irreconcilable differences.<sup>192</sup>

It is therefore apparent that tension exists between international law and customary practices in relation to women's rights. Most of the conflict emanates from the fact that women are relegated to a minority status. In the shadow of men, women are treated as second class-citizens. For a solution in this conflict Oloka-Onyango proposes that we should interrogate the interests that underpin the continued support for the cultural practice in question:

[t]hat is who is supporting the practice? Why are they doing so? What are the consequences for the particular individual and for the class or group of persons that the practice is being directed against?<sup>193</sup>

In the case of Swaziland, men are custodians of culture and as such cultural practices serve their interests. For example, *emalobolo* gives men control over women, including their sexuality and reproductive capacity. This has led men to justify wife battery as chastisement of their "children"<sup>194</sup> The ownership of the wife by her husband through the practice of *emalobolo* transcends into the personal life of a woman and strips her of the rights accorded to all human beings. Article 16(1) of CEDAW provides for equality to personal rights of a wife and a husband. If women were to enjoy full status as human beings, they would be in a position to exercise decisions about their lives, rather than being dictated to by their husbands.

*Emalobolo* strips a woman of her reproductive rights, as it constitutes the purchase of the sexual rights and reproductive capacity. This practice perpetuates the disadvantaged position of women as they cannot negotiate for safer sex with their husbands and thus remains susceptible to HIV/AIDS.

The long established practice that a girl cannot give consent to marriage has in fact no cultural foundation. According to Swazi law and custom a girl's acceptance of a man (*kugana*) does not necessarily mean consent to marriage. Her frequent visits to her boyfriend's home are, however, taken as consent. There is accordingly no real cultural value attached to this practice.

<sup>191</sup> Oloka-Onyango (2000) 9 *Review of the African Commission on Human and People's Rights* 17.

<sup>192</sup> D M Bigge & A von Briesen (2000) 13 *Harvard Human Rights Journal* 297.

<sup>193</sup> Oloka-Onyango (n 191 above) 18.

<sup>194</sup> A woman is treated as a child of the husband who requires "straightening up" from the husband. See WLSA (2001) 81.

The practice of allocating land only to families discriminates against women in that after the allocation of the land, the husband is deemed the owner of that land. Moreover, marriage as criteria for the allocation of land is discriminatory against women as women may well be forced to marry in order to access land. This practice has, however, fallen into disuse since the "family" need not be a married couple, single parents or individuals form the "family" and need to be considered for land allocation on their own right.

Mourning the death of a loved one is of physiological and mental importance. It assists the mourner to come to terms with the loss and to adjust. However, it could be argued that the rituals surrounding widowhood in Swazi cultural society merely serve to subject a widow to more trauma of humiliation. Although the concept of mourning is important, a widow should be protected against any harassment, coercion or humiliation.

It stands to reason that men may feel threatened by the proposed legal reform. Yet Swaziland must heed the warning of Vilakati that if the constitution drafting process is informed by cultural practices, "only those for whom Swazi culture works well can expect favourable protection."<sup>195</sup> The report of the Swazi Constitutional review Committee will be examined next.

#### 4.5 Drafting A Bill Of Rights Or A Bill Of Wrongs? : The Report Of The Constitutional Review Commission



In August 2001, the King made public the Report of the Constitutional Review Commission (CRC) that was appointed in 1996. The Report recommended, among other things, extending the executive powers of the King and maintaining the ban on political parties. It also recommended that the supremacy of Swazi "customs and traditions" be upheld, even in instances where they conflicted with international human rights standards.<sup>196</sup> The Constitution Drafting Committee appointed by King Mswati III in December 2001 has not yet completed its work.<sup>197</sup> The King declared in public that the future Swazi constitution would be based on the recommendations of the CRC.<sup>198</sup>

The international community cautioned the Swazi government against embracing culture at all costs. The United States Ambassador to Swaziland, for example, has warned that.<sup>199</sup>

<sup>195</sup> N Vilakati (n 36 above)

<sup>196</sup> Swaziland annual Report <<http://web.amnesty.org/web/ar2002.nsf/afr/swaziland> Open document> [accessed 10 October 2002].

<sup>197</sup> SADC policing campaign: "Take Action Swaziland" <[http://www.amnesty.org.nz/Publicdo.nsf/open\\_document](http://www.amnesty.org.nz/Publicdo.nsf/open_document)> [Accessed on 10 October 2002].

<sup>198</sup> The King stated when accepting the Constitutional Review Committee Report in August 2001.

<sup>199</sup> For example the James McGee United States ambassadors and David Reader British

[t]he aspirations and basic rights of all Swazi citizens must be guaranteed. While the maintenance of a people's customs and traditions is often admirable, they should be modified or changed when they impeded the natural aspirations of the people for liberty and freedom. Custom and tradition can no longer be used to defend blatant abuse of human rights or to tip the scales of natural justice to the detriment of those it is supposed to protect. Many of us will testify that Swaziland has, in fact, suffered more in the name of customs and traditions than from any other single cause.<sup>200</sup>

The British Ambassador to Swaziland, D Reader, also challenged the government to produce a constitution that honoured human rights, laid the groundwork for democracy and that was consistent with international human rights norms.<sup>201</sup>

Women's rights under Swazi law and customs are already curtailed by the existence of cultural practices. If Swazi customs and traditions are used as a parameter for constructing a bill of rights, prospects for full recognition of all the rights of Swazi citizens are minimal. Only those whose interests are already served by custom stand to benefit. Disadvantaged groups, like women, whose rights are compromised by specific customary practices are exposed to an even greater risk. There is very little basis for optimism regarding the entrenchment of women's rights and freedoms in a future constitution.<sup>202</sup> The CRC Report envisages a cultural community where culture is the foundational as well as ultimate canon by which thought patterns and actions of the community are measured. Anything that does not conform to the cultural yardstick is rejected and dismissed as deviant and/or undesirable.<sup>203</sup>

It could be argued, therefore, that the current constitutional drafting process does not yield any hope for the advancement of women's rights in Swaziland. The Report furthermore re-instates the position that children born from foreign fathers will not be granted citizenship unless they have applied successfully before the King.<sup>204</sup> This recommendation renders children stateless and violates the right of women to pass citizenship onto their children.<sup>205</sup> The same does not apply to men, as their children are accorded Swazi citizenship even if born outside Swaziland. To deny citizenship to children born from foreign fathers constitutes a clear discrimination against Swazi women. The

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ambassadors *see* "Swaziland: Concern over proposed new constitution"  
<[www.irinnews.org/report](http://www.irinnews.org/report)> [accessed on 10 October 2002].

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As above.

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Bigge & von Briesen (n 192 above).

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Vilakati (n 97 above).

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As Above.

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*see* the CRC Report (2001) 79.

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CEDAW Article 9 (2) states that states parties shall grant women equal rights with men with respect to the nationality of their children.



African Charter expressly prohibits *any* discrimination against women.<sup>206</sup>

In the case of *Unity Dow v Attorney General*,<sup>207</sup> the High Court of Botswana deliberated on the issue of citizenship. Under the Botswana law, a woman cannot pass citizenship to her children born from foreign fathers. Unity Dow was married to a citizen of the United States of America, applied for an order declaring section 4 of the Citizenship Act *ultra vires* the Constitution of Botswana since it violated her fundamental rights to pass her citizenship on to her children. She alleged that the said provision discriminated against her in that, unlike male citizens of Botswana married to foreigners, she could not pass her citizenship to her children.<sup>208</sup> Thus she was discriminated against on the basis of sex.

At the time of marriage she already had a child out of wedlock in 1979 and according to the Constitution of Botswana anyone born in Botswana on or after September 30 1966 was a Botswana citizen. In 1984 a citizenship act was enacted which challenged section 21 of the Constitution. Unity had two children were born from her marriage in 1985 and 1987.<sup>209</sup> The two children born in 1985 and 1987 were therefore not citizens of Botswana because their father was not a citizen of Botswana.

The Court of Appeal held that Unity Dow had been denied her rights to equal treatment and freedom to movement. The court based its decision on the Bill of Rights of the Constitution of Botswana and the African Charter in order to override traditional customs relating to the unequal treatment of women in respect of citizenship. The court held that section 15 of the Botswana Constitution should be interpreted to prohibit discrimination on the basis of sex and consequently struck down the appeal by the Attorney General.<sup>210</sup>

The Botswana Court of Appeal followed a progressive approach to challenge a customary practice which was entrenched in statutory law. It furthermore laid down a precedent on the issue of citizenship for the African region.<sup>211</sup> This case is significant in creating a precedent whereby the African Charter was applied without it being incorporated into domestic legislation. The CRC's Report recommendations that Swazi women cannot pass citizenship on to their children thus clearly violates the precedent set by the Botswana Court of Appeal.

<sup>206</sup> See article 18(3).

<sup>207</sup> *Unity Dow v Attorney General*, Certified judgement of the Court of Appeal Civil Appeal, No: 4 of 91 Botswana June 11 1992

<sup>208</sup> Botswana Citizen Act of 1982 (as amended) Section 12 *see also* Botswana: Second class Citizens September v 6 no. 7 (1994) 2.

<sup>209</sup> Botswana Citizenship Act 1984 Section 4(1)

<sup>210</sup> *Unity Dow* case 26-30.

<sup>211</sup> O Tshosa "The Application of Non-Discrimination in Botswana in Light of *Attorney-General of Botswana v. Unity Dow* : *Judicial Approach and Practice*"

<<http://www.uct.ac.za/depts/lrgu/equapaps/tshosa.pdf>> [accessed on 19 October 2002].

The issue of discrimination against women in respect of citizenship was dealt with by the Human Rights Committee in the communication of *Sandra Lovelace v Canada*,<sup>212</sup> where the plaintiff challenged successfully the Indian Act which declared her non-Indian by virtue of her marriage to a non-Indian.

The fact that the CRC Report states that international human rights law will be applied only if not in conflict with the customs and traditions of Swazi society leaves little hope for the recognition of women's rights in a future constitution. Practices which deny women the right to pass citizenship onto their children points to the insignificance of women's rights in Swaziland. Be that as it may, solutions must be sought for the recognition and advancement of women's rights in Swaziland. South Africa as a young democracy has shown great potential and the political will to strike a balance between men and women and people of all races. This occurred through the political will of the democratic government to establish a democratic society based on the value of no-discrimination. The South African experience can therefore be used to great effect by all African countries that are in the process of establishing a free and democratic society.

#### 4.6 A Way Forward: Lessons the From South African Experience

In South Africa, cultural practices of the different ethnic groups likewise discriminated against women. Such discrimination was apparent in a marriage relationship which involved not only the wife and husband but also the two families, lineages (or clans) and the community.<sup>213</sup> Laws and rules that regulate marriage in a patriarchal society are framed in favour of men. Inequality emanates from this position and touches upon the entire welfare of women in society. Procreation comes with a set of rules which culminates in practices such as sororate (if the wife is barren), levirate (if the husband dies), forced marriage or child betrothal. Through the payment of the *lobola* men acquires rights over their wives and children. Women enjoy no similar privileges or rights. Violence against women is justified and widows are sometimes subjected to dehumanising bereavement rituals and mourning taboos.<sup>214</sup>

The challenge facing South Africa was to draft a constitution that would correct the skewed position of women and men in society without disregarding the importance of cultural values. During the negotiation process that forged the Interim Constitution<sup>215</sup> the traditionalist lobby found itself in a

<sup>212</sup> *Sandra Lovelace v. Canada* Communication No. 24 of 1977 (14 August 1979), U.N. Doc. CCPR/C/OP/1 10 (1984).

<sup>213</sup> Nhlapo (n 143 above) 159.

<sup>214</sup> As above 160 (this has already been discussed at length in Chapter 3 para3.3)

<sup>215</sup> As above 156.

relatively powerful position. As such, it was able to win a number of significant concessions. At the same time, the feminist lobby, fighting a rearguard battle, prevented an outright victory by the traditionalist. The fundamental rights that were guaranteed in Chapter 3 of the Interim Constitution represented a strong counterbalance between custom and individual rights.<sup>216</sup> As a result, the Interim Constitution contained language favourable to both traditionalist and feminist tendencies.<sup>217</sup>

To arrive at the Final Constitution,<sup>218</sup> compromises were reached. Through wide consultation with stakeholders, legal scholars and representatives of different groups,<sup>219</sup> Parliament was able to reach an acceptable compromise. Section 9 of the Final Constitution entrenches the right to equality. On the other hand, section 31 provides for the exercise and enjoyment of cultural rights, religion and ethnic language.<sup>220</sup> A problem inherent to the Interim Constitution was that it did not clearly indicate what would happen in the event of a conflict between cultural practices and equality rights. Section 31(2) of the Final Constitution provides, however, that the rights to exercise and enjoy cultural rights may not be exercised in a manner inconsistent with the provisions of the Bill of Rights.<sup>221</sup> This provision was aimed at ensuring that traditionalist would not lose sight of the values that underpin an open and democratic society based on human dignity, freedom and equality.<sup>222</sup>

To implement the equality clause, legislation was promulgated to ensure that women and men enjoy the same rights both within the family and society at large. The Recognition of Customary Marriages Act,<sup>223</sup> which abolished the minority status of women and gave full legal status to women before the law, is a case in point. This Act is applauded for according equality status to both spouses upon entering into marriage, during and at its dissolution. The South African Law Commission rightly recognized that it was necessary to review systems of customary law and remove those aspects that may discriminate against women.<sup>224</sup>

In the case of Swaziland, change will only occur if the required political will exists. It is crucial to have an understanding of the objectives and values that a constitution ought to embody. Such

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<sup>216</sup> Constitution of the Republic of South Africa Act 200 of 1993, hereinafter referred to as the Interim Constitution.

<sup>217</sup> Nhlapo (n 143 above) 157.

<sup>218</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>219</sup> For example women's rights movements, traditionalists, disabled, children, workers

<sup>220</sup> Act 108 1996 section 31(1) "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to a) to enjoy their culture, practise their religion and use their language and b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

<sup>221</sup> Act 108 1996 section 31 (2).

<sup>222</sup> Act 108 1996 Section 7.

<sup>223</sup> Act 120 of 1998.

<sup>224</sup> Commission on Gender Equality (CGE) "Recognition of the Customary Marriages Bill Submission to the Justice Portfolio Committee 22 September 1998.

understanding will inform the steps that are necessary to achieve the desired outcomes. Constitution drafting should not be a mere formality, but a nation building process instead.<sup>225</sup> The CRC Report gives the impression that Swaziland intends to subscribe to custom and tradition as a foundation for its bill of rights. Human rights as set out in the Universal Declaration of Human Rights entails equality and dignity,<sup>226</sup> non-discrimination on the bases of race, colour or sex, liberty and security of the person, freedom from torture or cruel inhuman or degrading treatment or punishment, and equal protection before the law.<sup>227</sup>

It is doubtful whether the traditions and customs of Swaziland can uphold the values as set out in this Declaration: Most Swazi cultural practices do not subscribe to the notion of equality between men and women. This results in a complex set of rules relating to the movement of women in society, governed by restrictions and suppressions throughout the course of women's lives. Swaziland, therefore, needs to learn from the South Africa experience if the objective behind the constitution drafting process is a democratic society. South Africa did not discard the importance of cultural practices or traditional customs, instead these find express recognition in sections 30 and 31 of the Final Constitution. Everyone has the right to exercise his or her cultural or religious rights. However, the law may not lose sight of the values equality, dignity and freedom. The "balanced approach"<sup>228</sup> or "cross-cultural approach"<sup>229</sup>, appear to strike a useful compromise between culture and these fundamental values.

In the final chapter of this mini thesis, recommendations will follow that are intended to secure a compromise between cultural interests and the rights and freedoms of the individual.

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<sup>225</sup> Vilakati (n 36 above) 1.

<sup>226</sup> UDHR articles 1, 2, 3, 5, 6 and 7

<sup>227</sup> UDHR art 6.

<sup>228</sup> Nhlapo (n 32 above).

<sup>229</sup> An-Na'im (n 5 above) 23.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Concluding Remarks

The protection of women's rights is one of the key areas prioritised by international law. The enactment of CEDAW in 1979 comprehensively articulated all spheres of life in which women's rights are violated. The debate between cultural relativism and the universality of human rights is not, therefore about the acknowledgement of the importance of women's rights as human rights, but rather about relationship between women and men. The crux of the debate is situated between those who see societies and cultures as fixed and immutable, and those who see reality as fluid and changing and wish to move it in the direction of greater equality, freedom and justice.<sup>230</sup>

The debate therefore stems from the fact that most of the African countries are patriarchal societies. We have seen in this mini thesis that the contentions on the universality or relativism of human rights arise in the private sphere. Certain societies are unwilling to assume international human rights obligations in the private sphere and argue that their own code of conduct, which is informed by their religious or traditional law, already covers this terrain. The equality principle between men and women advocated by CEDAW, for example, is seen as an encroachment on the private domain and therefore unwelcome.<sup>231</sup> As Ennaji has rightly argued, that it is because those who are benefiting from the *status quo* are threatened by the universality of rights, that they argue for cultural norms to apply in the private domain.<sup>232</sup> The fact of the matter is that women enjoy little protection under a culturally defined traditional system.

This mini thesis does not purport that culture is an unnecessary component of society. Culture is important for the identity of a people and positive cultural practices do exist.<sup>233</sup> But context is crucial. What this mini thesis seeks to do is to advocate for a compromise between cultural practices and human rights principles so as to enable individuals to enjoy the right to dignity, equality before the law and protection against degrading treatment. It is submitted that cultural practices can be enjoyed by society at large without necessitating a violation of women's rights. However, to achieve this

<sup>230</sup> In the Cairo and in Beijing relativists and universalists were people from Middle East, Europe, Americas in Asia and Africa. See M Alkhami in K Askin (2000) 486

<sup>231</sup> C Cerna & J Wallace (n 12 above) 629.

<sup>232</sup> Ennaji (n 14 above).

<sup>233</sup> For example women were protected against battery, her husband would not touch her if hiding in her mother-in law's hut. However, this is no longer practiced.

would be possible only if society acknowledges that “the political is personal or the personal is political.”<sup>234</sup>

As Swaziland has not ratified CEDAW, women’s rights in Swaziland are violated with impunity. Cultural practices in respect of marriage, landownership and widowhood illuminate the extent to which the minority status accorded to women in society impact on women’s rights. There is little hope that the Swazi constitutional drafting process will protect women’s rights, as it will be based on customs and traditional values. This is because culture is by definition prospective when used to differentiate right from wrong.<sup>235</sup> Rights that are derived from culture are privileges afforded to individuals under rules or laws to which the individual is not a signatory. These privileges are however, derivative and although traditional in appearance, they tend to be rationally devised to maintain the integrity to the patriarchal household. This intrinsically means that women do not have rights, but mere privileges accorded by the custodians of culture in society.

In formulating a solution for the protection of women’s rights in Swaziland, the social context should be considered. Culture in Swaziland is deeply rooted and valued. Since the right to culture is acknowledged by the International Covenant on Economic Social and Cultural rights (ICESCR), cultural practices which ascribe to human dignity should be promoted; negative practices should be modified, changed or nullified. The necessary political will is crucial to reach that end. South Africa faced a similar dilemma after 1994. The challenge was to draft a constitution that upholds fundamental values without marginalizing cultural identity. This was important given South Africa’s particular political history. In the end a compromise was reached and the protection of women’s rights was entrenched together with cultural values. Consequently, the constitutional values of equality, dignity and freedom, coupled with legislation such as the Recognition of Customary Marriages Act,<sup>236</sup> present an environment that is conducive to the elimination of all forms of discrimination against women.

## 5.2 Recommendations

The following recommendations are made with a view to facilitate the advancement of women’s rights in Swaziland:

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<sup>234</sup> Oloka-Onyango & Temale 713.

<sup>235</sup> Alkhami (n 230 above) 485-486.

<sup>236</sup> Act 120 of 1998.

A bill of rights is an absolute precondition. It is imperative, therefore, that the constitution drafting process produces a bill of rights that entrenches equality, freedom and the dignity of individuals. Further, the future constitution should be the supreme law of the country and any law that is inconsistent with the constitution should be invalid. Where there is a conflict between cultural norms and human rights principles, the value of the practices should be weighed against value of individual rights. This will amount to what M Freeman calls “reasonable ranking of values” in the constitution.<sup>237</sup> A court of law must determine such matters. The High Court of Swaziland therefore should have jurisdiction in matters relating to individual’s rights. One would hope in this regard that the ongoing high court case on abduction of young girls initiated against the King will yield positive results in empowering the High Court to preside on matters relating to human rights and customs.<sup>238</sup>

CEDAW stands central to the protection of women’s rights. It stands to reason that certain clauses in the Convention will conflict with certain Swazi cultural norms. It is accordingly recommended that Swaziland should ratify the Convention with reservations to provisions that are in conflict with Swazi cultures, subject to article 28(2) of CEDAW. A two-pronged approach is recommended in this regard. It is recommended that soon thereafter a consultative exercise be carried out to solicit views of the Swazi people on the reservations. This would facilitate an appreciation for CEDAW in Swaziland and would facilitate informed recommendations on the reservations.

In the light of the fact that the Constitutional Review Commission (CRC) was criticised for lacking objectivity, it would be imperative for government to call a referendum before finalization of the constitution. Failure to do so would render the new constitutional fundamentally flawed. Different groups representing diverse sectors of Swazi society should be given an opportunity to comment on the new draft. This will be of particular significance given the fact that previous constitution submissions to the CRC were seen as a mere formality rather than a sound commitment to human rights.

A report on the codification on Swazi law and customs which is annexed to the CRC Report, revealed that women are not in agreement on the abolishment of the mourning gown (*inxilo*). It is recommended, therefore, that the mourning gown should not be made compulsory to widows. Widows should be free to decide on a mourning period in cases where they opt for the wearing of the gown. Any degrading treatment, including funeral rituals and stigmatisation such as house

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<sup>237</sup> M Freeman (2000) in J Eeckelaar & P Sarcevic (2000) 49.

<sup>238</sup> *Lnidwe Dlamini v Cethuka and others* 2002 Chief Justice S Sapire ruled that the abducted children should be returned to their various homes.

confinement, shaving of hair, bathing in cold water and ostracisation of any form associated with being a widow, whether or not wearing the gown, should be abolished.

Central to the advancement of women's rights is the notion of equality before the law. The new Swazi constitutional dispensation should embrace the idea of equality before the law. As long as the law regards men and women as unequal, formal equality for women cannot be achieved. It is recommended that any legislation or practice that impact on the legal status of a woman should be repealed or abolished.

Men and women should therefore have equal status before the law in civil matters, in the accessing of credit, registration of property and when entering into legal contracts. It is recommended that the marital power provided for in sections 24 and 25 of the Marriage Act<sup>239</sup> and under customary law be abolished to accord equality for both men and women before the law. That will enable women and men to have equal rights over marital responsibilities, marital property, children, reproductive rights and personal rights. To this end the Deeds Registry Act<sup>240</sup> will have to be amended to allow women married in community of property to register land under their own name. Moreover land allocation in terms of Swazi National Land should take into consideration the diverse unions found in Swaziland such as single parents, cohabiting families, divorced street families and same sex partnership.<sup>241</sup>

Customary marriages do not require any consent and girls and women are married against their will. It is recommended in this regard that consent should be a pre-requisite for all marriages under Swazi law and custom. To this end, marriages concluded without consent should be nullified. All customary marriages should be registered within a reasonable period of time. It is further recommended that the minimum age limit for girls in customary marriages should be 18 years.

*Emalobolo* is a controversial issue, as most Swazis see it as an important cultural practice. However, this practice impacts severely on the rights of women. It is therefore recommended that the objective of *emalobolo* should be re-visited. The strengthening of the relationship through payment of *emalobolo* has in fact fallen into disuse. It is recommended that *emalobolo* should be abolished and replaced by a practice which will be more sensitive to the rights of women. If the practice is retained its objectives and the manner in which it is executed should be amended to suit current socio-economic demands. For example, *emalobolo* could include contributions paid by both the bride and the groom's families

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<sup>239</sup> Act 47 of 1964.

<sup>240</sup> Act 37 of 1938.

<sup>241</sup> see WLSA (1998) 27 para 3.2.



towards the establishment of the new family and/or home. In this way the relationship between the two families would be strengthened and the couple would have an equal say over that property.

Monitoring mechanisms for the respect and protection of human rights in general is crucial for the advancement of women's rights in particular. It is recommended in this regard, following the South African approach, that the government of Swaziland should establish a Gender Commission to monitor gender issues in the country. The fact that there is no fully flagged ministry for gender issues but only a gender desk within the Ministry of Home Affairs means that women's issues are not receiving the necessary attention. There is no full budget allocation to the gender and it therefore has to compete with the other activities of the ministry. As a consequence it would be difficult to assume that gender issues are prioritised within the ministry. The Gender Commission would make a significant contribution to strengthening the work of the gender desk.

It is furthermore recommended that the draft constitution should provide for the setting up of a Human Rights Commission to monitor human rights in Swaziland. Although the establishment of a Human Rights Commission is not an obligation under international law, it has become an acceptable practice to safeguard and promote human rights under both international and national law.



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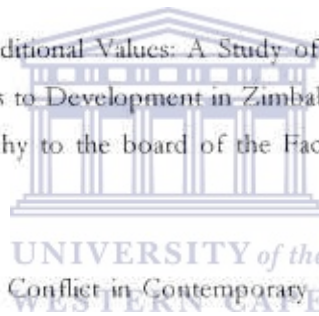
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