

**IMPLICATIONS OF PATRIARCHAL CUSTOMS ON THE ENJOYMENT OF  
HUMAN RIGHTS BY WOMEN AND CHILDREN IN SOUTH AFRICA**

**By**

**MUDZWIRI NDIVHUWO (4282963)**

**MINI DISSERTATION**

**Submitted in partial fulfilment of the requirements for the degree**

**Master of Laws**

**IN THE**

**FACULTY OF LAW**

**AT THE**

**UNIVERSITY OF THE WESTERN CAPE**

**SUPERVISOR: Prof. Anthony C. Diala**

**February 2023**

## **ABSTRACT**

This study argues that in South Africa, women and children lack sufficient knowledge about their human rights, specifically their cultural rights. Human rights are inherent in everyone simply because they are human. Human rights serve as the foundation on which entitlements and minimum standards for every individual are built. The essence of human rights is to protect each person's dignity and promote their welfare, including those of women and children. This study focused on the implications of cultural norms on the rights of women and children in South Africa. It validated the findings of scholars on the implications of cultural practices on human rights. The study further argues that the successful eradication of harmful cultural practices requires not only indepth participation of the affected parties but also the participation of people close to women and children. These include traditional leaders and elders, especially men, since they play an important role in the lives of women and children. The study highlighted the importance of human rights education in finding solutions for the challenge of cultural practices that conflict with the right to human dignity, the right to privacy and the right to life. The findings and recommendations of this study not only require the legislature to review the protection of women and children against harmful practices, they could also play a role in promoting awareness of human rights in rural communities.

## **DEDICATION**

I dedicate this work to my late father, Livhuwani Victor Ramalira. I will forever cherish the lovely memories we had.

## **ACKNOWLEDGEMENTS**

I would like to express my sincere gratitude to Professor A.C Diala for his assistance. From registering my masters to completing my mini-dissertation, it is all due to your assistance that this study became a success. Thank you.

To my supportive fiancée, Kgudiso Mokgale, you motivated me every day and always told me that I can finish this mini-dissertation before the end of the year and here we are.

Special thanks to my mother, and the Mokgale family, you are amazing.

# Table of Contents

ABSTRACT .....	ii
DEDICATION .....	iii
ACKNOWLEDGEMENTS .....	iv
ACRONYMS/ABBREVIATIONS .....	vii
CHAPTER ONE.....	1
INTRODUCTION AND BACKGROUND TO THE STUDY .....	1
1.1 Introduction.....	1
1.2 Problem statement.....	3
1.3 Argument.....	5
1.4 Research aim and objectives .....	7
1.6 Assumption of the study.....	7
1.7 The significance of the study .....	8
1.8 Methodology .....	8
1.9. Literature review .....	9
1.10 Delimitation of the study.....	12
1.11 Definition of concepts .....	12
1.12 Chapter outline or organization of the study .....	13
CHAPTER TWO .....	15
THE PATRIARCHAL NATURE OF CUSTOMARY LAW .....	15
2.1 Conceptualising “patriarchy” .....	15
2.2 Customary law prior to 1994.....	16
2.3 Women and children’s rights in the 1996 Constitution.....	20
2.4 Principles and guidelines recognized in terms of women’s rights in South Africa .....	21
2.5 Promotion of Equality and Prevention of Unfair Discrimination Act.....	23
2.6 Conclusion .....	24
CHAPTER THREE.....	25
ANALYSING THE INTERPLAY BETWEEN CULTURE AND PROTECTION OF RIGHTS.....	25
3.1 Introduction.....	25
3.2 The meaning of culture in constitutional context .....	25
3.3 Cultural practices and traditions that violate human rights.....	27
3.4 Harmful cultural practises in a constitutional state.....	35
3.5 Conclusion .....	37
CHAPTER FOUR.....	38
INTERNATIONAL, REGIONAL, AND NATIONAL LAWS AND POLICIES ON WOMEN AND CHILDREN’S RIGHTS.....	38
4.1 Introduction.....	38
4.2 International human rights instruments .....	39

4.3 Regional human rights instruments .....	44
4.4 National laws .....	47
4.5 National laws on children’s rights.....	48
4.6 Analysis of cases on women and children’s rights.....	49
4.7 Conclusion .....	55
CHAPTER FIVE.....	56
CONCLUSIONS AND RECOMMENDATIONS .....	56
5.1 Introduction.....	56
5.2 Human rights education .....	57
5.3 Conclusion on decided cases .....	58
5.4 Recommendations based on reported cases .....	58
5.5 Dealing with patriarchal customs .....	59
5.6 Individuals’ engagements in eliminating harmful customs .....	61
5.7 Community engagement .....	62
5.8 Access to information.....	62
5.9 Existing challenges of case law .....	63
5.10 Recommendations.....	64
5.11 Conclusion .....	65
BIBLIOGRAPHY.....	67

## **ACRONYMS/ABBREVIATIONS**

BAA	Black Administration Act
CEDAW	Convention on the Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial
ICESOR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights

# CHAPTER ONE

## INTRODUCTION AND BACKGROUND TO THE STUDY

### 1.1 Introduction

South Africa is best described as a rainbow nation that consists of different tribes, clans, and races. It is indeed a beautiful country that has undergone considerable hardships during the apartheid era. It only attained its democracy in 1994, and consequently, a new human-rights-based constitution was enacted.<sup>1</sup> One of the primary goals of the Constitution's enactment was to reform the laws that were discriminatory against women and children.<sup>2</sup> Women played a very important role in fighting against apartheid before the first democratic elections. At the centre of the fight lies the struggle against discriminatory laws that mainly promoted both internal and external inequalities, as they posed a challenge to the attained democracy. Customary law plays a huge role in our African communities and therefore has a discriminatory impact on women as compared to men. Customary law promotes patriarchy through customs that give more privilege to men than women in several areas mainly involving leadership, both within the community as well as in the family.<sup>3</sup> Despite every effort made to remove discriminatory customs against women and children, these two marginal groups are still regarded as being inferior to men.<sup>4</sup> Before 1994 customary law was based on pertinent issues that were discriminatory and had stereotyping tendencies towards women including categorizing children into different classes and prejudiced cultural practices against women and children.<sup>5</sup>

Well, the Constitution brought changes with it that deeply affected how customary law was applied. Nowadays, customary law can be put into practice only if it complies with national, regional, and international laws.<sup>6</sup>

---

<sup>1</sup> Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as "the constitution").

<sup>2</sup> Section 1 of the Constitution.

<sup>3</sup> Mbajorgi G 'The paradox between Customary Law and Human Rights Law in South Africa: The patriarchal nature of Customary Law' (2017) 2 *BJS* 18 (Hereafter referred to as Mbajorgu G).

<sup>4</sup> Mbajorgu G (2017) 2 *BJS* 18.

<sup>5</sup> Ngidi R (ed) *Upholding the best interests of the child in South African Customary Law* (2009) 230.

<sup>6</sup> Section 231-233 of the Constitution.



Furthermore, section 30 of the Constitution states that everyone has the right to speak any language and engage in any culture of their choice, but no one may exercise those rights in a manner that is incompatible with any provision of the Bill of Rights.<sup>7</sup> Section 15 and 31 of the Constitution also protect the right to culture, and traditional institutions are recognized under section 211 and section 181(1)(c) of the Constitution.<sup>8</sup> These provisions uphold cultural rights and make a clear need for the advancement of customary law on an equal footing with other sources of law. Notably, the Recognition of Customary Marriages Act 120 of 1998, the Reform of Customary Law of succession and Regulation of related matters Act 11 of 2009, including the Children's Act 38 of 2005 regulate certain cultural practices, especially those that may have an impact on women and children.<sup>9</sup> It is therefore important that when practicing customary law one must be aware of the legislation given above.

Recently, Minister of Justice and Correctional Services, Ronald Lamola, was tasked with answering the question of whether transformative constitutionalism has advanced equality and other related human rights in customary law.<sup>10</sup> In his answering speech, he placed more emphasis on the determination of the status of women in our societies.<sup>11</sup> He, therefore, submitted that in this modern new society that has been deeply affected by culture and economical colonization, we ought to consistently probe the status of women in our living spaces such as in churches, households, and workspace as well as our economy as it will enable advancement in our society.<sup>12</sup> This is true as very often than not the status of women in our respective societies remains questionable and inconsistent. Most importantly, he recognises that our South African communities abide and conduct their

---

<sup>7</sup> Section 30 of the Constitution.

<sup>8</sup> Section 15, 31, 211 & 181(1)(c) of the Constitution.

<sup>9</sup> See the Recognition of Customary Marriages Act 120 of 1998 (Hereinafter referred to as the Recognition Act); Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (Hereinafter referred to as the Regulations Act) & Section 12 of the Children's Act 38 of 2005.

<sup>10</sup> Ministry of Justice and Correctional Services Speech on *How Transformative Constitutionalism Advanced Equality and other Human Rights in Customary Law* (2021).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

daily activities in accordance with customary law perceived through their cultures.

Diala defines indigenous African laws as the repetitive practices carried on over a long period, which members of the community still observe in their ancient form and are regarded as binding on a specific ethnic group.<sup>13</sup> These practices need to have been passed on from one generation to another. These types of practices are often passed in an oral form. On the other hand, Bennet submits that customary law is a system of law that has been put in place for a very long time, which develops and change every day in a form of practices, rituals, and traditions of the people.<sup>14</sup> As already indicated, a huge percentage of South African communities carry out their activities in accordance with and subject to customary law, these customs are largely patriarchal. Therefore, there is a need to determine the extent to which these patriarchal discriminatory customs are acceptable.<sup>15</sup> Are we in this modern South Africa obliged to continue observing practices and traditions that violate women's rights only because we ought to maintain and preserve our cultural and traditional beliefs? Furthermore, the main issue is the degree of the implementation as well as the enforceability of laws that are aimed at fighting against human rights violation carried out against women and children. These laws are at times not given full recognition within communities as they may either be vague or the members of the communities are not aware of them. Every human being is entitled to the enjoyment of their human rights without being discriminated against.<sup>16</sup>

## **1.2 Problem statement**

Society has already accepted that women are inferior and incapable of performing complex tasks owing to their nature of being mothers and wives. It

---

<sup>13</sup> Diala AC 'Rethinking the interface between customary law and constitutionalism in Sub-Saharan Africa' 2019 *DJLJ* 92.

<sup>14</sup> Bennet TW 'Human Rights and African Customary Law under the South African Constitution' (1995) 63. Also see the case of *Van Breda v Jacobs* 1921 AD 330 where the requirements of custom to qualify as law were set out.

<sup>15</sup> Albertyn C 'The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa' 2009 *CCR* 166 (Hereinafter referred to as *Albertyn C 2009 CCR*).

<sup>16</sup> Section 1(a) of the Constitution.

is quite concerning that other parts of South Africa are still subjecting women and the girl child to inhuman, discriminatory, and/or degrading cultural practices and customs. Among others, these practices are virginity testing, forced marriage by abduction commonly known as *Ukuthwala*, and circumcision. Children are taken to initiation schools as young as the age of five years. This is because societies regard practices such as circumcision as a way of preserving morality.<sup>17</sup> These practices are considered discriminatory, harmful, and degrading under human rights law as they violate the protected fundamental rights of women and children. Rights that are frequently violated include, but are not limited to the right to bodily integrity, the right to privacy, the right to human dignity, and the right to equality.<sup>18</sup> Although these practices have been through constitutional scrutiny, it is no secret that our communities still partake in these discriminatory practices and traditions.

Furthermore, our society is now comfortable with the concept of polygamy, as it is commonly accepted that a man can marry more than one wife. The status is not the same when a woman undertakes to get married to two husbands. This is often referred to as taboo and against the acceptable principles as well as good morals of the community. Women are expected to accept that they need to submit to their husbands but the same is not expected from their husbands. Women are subjected to discrimination in silence occurring at the hands of their men.<sup>19</sup> It is a fact that our 1996 Constitution promotes equality and disregards inequality.<sup>20</sup> This constitutional protection can be seen from the constitutional court judgment such as the judgment of the notorious Bhe case, in which the court explained what equality truly entails and the importance of its promotion.<sup>21</sup> Other cases include the Shilubana case, and

---

<sup>17</sup> Maluleke MJ 'Culture, tradition, custom, law and gender equality' 2012 *PER* 11.

<sup>18</sup> Kaime T 'Convention on the rights of the child and the cultural legitimacy of children's rights in Africa: Some reflections' 2015 *AHRLJ* 221-238.

<sup>19</sup> Statistics have it that the crime of Gender-based violence has been increasing rapidly in South Africa with the higher percentage of victims being women see Minister Bheki Cele, Quarter One Crime Statistics 2022/2023 Available at [Minister Bheki Cele: Quarter One Crime Statistics 2022/2023 | South African Government \(www.gov.za\)](http://www.gov.za) (accessed on 27 July 2022).

<sup>20</sup> Section 9 of the Constitution.

<sup>21</sup> Bhe and Others V Magistrate Khayelitsha and Others; Shibi v Sithole; SAHRC v President RSA 2005 (1) BCLR 1 (CC) (Hereinafter referred to as the Bhe case)

the Gumede case amongst others.<sup>22</sup> Consequently, it is my contention that violation of human rights must not be tolerated.

Several law scholars have submitted that statutory amendments, as well as the abolition of discriminatory practices, have minimal effect on the lives of the members of the communities at large.<sup>23</sup> There is therefore a need to revisit the implemented laws that are aimed at women's rights protection to ensure that they are enforced and adhered to.

### 1.3 Argument

The patriarchal nature of customary law perpetuates gender stereotyping as it allocates specific rights and duties to various members of the community and family structures.<sup>24</sup> In this regard, women and children are given tasks that are not as complex as men's because they are deemed incompetent for such.<sup>25</sup> Not only are they regarded as incompetent, they also struggle when it comes to decision making within their family. South Africa has been experiencing a high rate of gender-based violence and most of the people affected are women and children of which one can conclude that men want women to be subordinated to them and if they oppose they end up fighting.<sup>26</sup> This is a clear indication that women's voices are not given that much of power as compared to men. Men believe that they are the family head and as such women are bound to be obedient to them. Should there be a disagreement, men retaliate by either beating or verbally abusing the woman or her child. It is well known that males were the only ones permitted to hold positions of either family head or traditional leadership.<sup>27</sup>

---

<sup>22</sup> Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC); Gumede V President of the Republic of South Africa and Others 2009 (3) SA 152 (CC).

<sup>23</sup> Akolokwu GA & Raji BA 'Discriminatory customary practices against women's rights: An account of intervention strategies by Southern African developing states' 2019 *ILJ* 119.

<sup>24</sup> Mbajjorgu G (2017) 14 *BJS* 19; Also see Ndulo M 'African Customary Law, customs, and women's rights' 2011 *IJGS* 90.

<sup>25</sup> Mbajjorgu G (2017) 14 *BJS* 18.

<sup>26</sup> See crime statistics by Minister Bheki Cele (fn 18).

<sup>27</sup> Niekerk C & Mwambene L 'The Gumede judgment: Another lost opportunity to develop customary law and protect women's rights?' *Speculum Juris*' (2009) 23 (1) *LNP* 94.

Despite women's and children's rights being protected either under domestic or international law, these laws hardly give a solution as to what should be done should human rights be infringed. As such, these harmful practices persist simply because they are not questioned or challenged. Furthermore, our communities have accepted them as being normal. I, therefore, argue that there is a need for women to assert, seek, and reassess their identities to break the continued patriarchal discriminatory practices against them.

This research will therefore argue that there is a need for the review and repeal of some customary laws most importantly those laws that are relevant when dealing with the family issues. There is a need to place more emphasis on community and traditional leader's participation when promoting the elimination of discriminatory laws against women and children. Furthermore, there is a need to develop new laws that support women's and children's rights protection. Once supportive laws are implemented, community engagement focusing on existing violations and disregard of human rights must be prioritized. There is a need to disseminate those new laws to ensure the promotion of the rights of women and children and their choice to disagree with customary customs and practices that discriminate against them is achieved. This will also lead to the development of partnerships between all government representatives including NGOs, media, traditional leaders, and community members that will be aimed at bringing awareness of women and children's rights in rural areas.

Additionally, there is a need for educating legal professionals (particularly those who oversee customary law) on matters pertaining to women's and children's rights issues. In order to make sure that some progress is made towards obtaining the necessary protection, it is necessary to establish a body at the national level that will carefully oversee the execution of the legal framework on the ground. The development of gender-disaggregated at national and local level that track advancements on women and children's rights, as well as equity in their households is also necessary.

## **1.4 Research aim and objectives**

### *1.4.1 Aim*

This research is aimed at critically determining the extent of patriarchy in our South African customs and its implications on the enjoyment of human rights by women and children. Furthermore, this study will also review the effectiveness of the implementation of various policies, laws, and also judicial decisions in the realization of women's and children's rights.

### *1.4.2 Objectives*

- To ascertain the state's responsibility in protecting women and children against discriminatory and patriarchal customs.
- To assess the effectiveness of government statutes, measures, and policies aimed at women's and children's rights protection.

## **1.5 Research questions**

The study aims to answer this central question: In what ways do patriarchal customs violate the rights of women and children? This question is probed with the following sub-questions:

- a) How do patriarchal customs infringe the constitutional rights of women and children?
- b) What factors influence the continuous observance of patriarchal customs?

## **1.6 Assumption of the study**

This study assumes that customs such as *ukuthwala*, *lobola*, polygamy and circumcision are discriminatory and patriarchal in nature with regard to women and children. It is further assumed that although international, regional and domestic laws aimed at protecting the rights of women and children are

currently in existence, change is yet to be seen within communities. It is also assumed that women and children are not fully aware of their rights, and they are unable to know when such rights are being violated.

### **1.7 The significance of the study**

The significance of the study is to outline women and children's rights that are protected under South African law that needs to be respected despite the need to preserve cultural believes and customs. Women and children will gain more understanding of how customs affect their daily lives. This study will highlight the impact and significance of customs before and after the coming in of the Constitution. This study will play a very important role of creating awareness with regard to available women and children's rights. It will also give a platform to women and children for them to know when a custom is infringing their rights and also fight for their rights.

### **1.8 Methodology**

The study's methodology consists of the collection and analysis of existing literature within and outside South Africa on the implication of customs on the enjoyment of human rights by women and children. The methodology adopted is a doctrinal approach, which places reliance on legal materials that are enacted and enforced by South Africa concerning discriminatory gender-related customs. This study examines international and state laws, norms, institutions, publications, and other legal instruments relating to discriminatory practices against women and children.

This study will also have a look at few neighboring countries selected for detailed study. These are Malawi, Botswana, and Lesotho. They were selected to make comparison and conclusions as possible in existing patriarchal customs that violates the rights of women and children. This is because these countries make use of different customs and traditions. This will enable this research paper to make submissions as to what lessons South

Africa can learn from its neighbouring countries for improvement in the protection of women and children's rights.

### 1.9. Literature review

Equality is a protected right in our constitution.<sup>28</sup> Everyone must be treated the same and must not be discriminated against because of e.g. race, gender or sex. Albertyne views customs such as *ukuthwala* and virginity testing as patriarchal.<sup>29</sup> Regrettably, these customs cannot be easily removed or changed within the community due to their self-enforcing perpetuation as tradition. She acknowledges that this persistence has been under constitutional scrutiny and constitutional judgments have been made concerning the protection of women's rights. Yet, the problem remains.<sup>30</sup> Albertyne also made reference to the ongoing and never-ending tensions between claims to culture and claims to gender equality in South Africa's constitutional democracy.<sup>31</sup> She submits that tension between culture, traditions, customary laws and human rights are very common within black African communities.<sup>32</sup> She then concluded that the challenge of taking cultural diversity and gender equality seriously under the Constitution will not always be settled in court but requires the courts to enable more open-ended processes in which court-mandated principles are developed within communities to secure rights and foster change in a manner that is respectful of cultural difference and gender equality.<sup>33</sup>

Albertyne's conclusion forms part of the argument of this study that there is a need for community cooperation in eliminating patriarchal practices. This is because although decisions and legislation may be made, if the communities are not willing to enforce them, patriarchy will forever remain an unresolved

---

<sup>28</sup> Section 9 of the Constitution.

<sup>29</sup> Albertyn C 2009 CCR 167.

<sup>30</sup> Albertyn C 2009 CCR 166.

<sup>31</sup> Albertyn C 2009 CCR 166.

<sup>32</sup> Albertyn C 2009 CCR 166.

<sup>33</sup> Albertyn C 2009 CCR 166.



problem. It is true that communities continue to carry out patriarchal customs despite them being invalidated by statutes and judgments.<sup>34</sup>

On the other hand, Ndulo refers to the pluralistic nature of our legal systems in relation to women's rights.<sup>35</sup> He set out that although we may label our African customary law as being patriarchal we ought not to forget that a huge part of our indigenous laws was and is still influenced by the colonial legal systems.<sup>36</sup> In this regard, Ndulo argues that the fight for gender equality needs to move to the courts and mass movements.<sup>37</sup> Moreover, he further set out that the challenge will be how to ensure that courts interpret the law in such a way that gender equality is advanced.<sup>38</sup> His conclusion is that social movements need to put pressure on the courts and society to act in the interests of gender equality as well as improvement on access to courts so that women can bring claims based on discrimination, and that will consequently give opportunities for the courts to reform the law.<sup>39</sup>

Ndulo's submissions are an indication that society plays a vigorous role in the development and promotion of customs, as such it is only then that we can remove any discriminatory customs against anyone in the community including women and children.

Writing about the implication of customary law for the enjoyment of rights by women, Makatsana concluded that although the right to culture and practice of customary law are protected in the international human rights law, there is at the same time realization that customary customs and practices if were not scrutinized closely may end up infringing the human rights, most importantly

---

<sup>34</sup> See Mwambene L & Kruuse H 'The thin edge of the wedge: Ukuthwala , alienation and consent' (2017) 33(1) *SAJHR* 25-45. In this article Mwambene makes submissions of how the community of Enqobco reacted after the decision was made in the case of Nvumeleni Jezile v The State 2015 (2) SACR 452 (WCC). Many community members were not happy the court judgment as they indicated that the government does not take their interest in cognisance. In this article it clearly shows that the community is adamant to continue practising ukuthwala despite the court judgement.

<sup>35</sup> Ndulo M 'Customary Law, customs, and women's rights' 2011 *IJGS* 88 (Hereinafter referred to as Ndulo M 2011 *IJGS*).

<sup>36</sup> Ndulo M 2011 *IJGS* 88.

<sup>37</sup> *Ibid.*

<sup>38</sup> Ndulo M 2011 *IJGS* 92.

<sup>39</sup> *Ibid.*

women's rights.<sup>40</sup> He then outlined the importance of international law instruments such as CEDAW, which has a committee aimed at ensuring that customary law provisions are on par with international law.<sup>41</sup> There is therefore a need to evaluate and scrutinize customary law practices as avoidance and lack of revision leads to infringement of the human right. This is frequent within initiation schools that take children for circumcision by force without their guardian's consent thereby violating their right to freedom. Values of our culture can be acknowledged but at the same time, we need to emphasize the need to support "positive context" which leads to the positive promotion of cultural values.

Albertyn and Dennis argue that real transformation constitutes the achievement of socio-economic equality and individual well-being by abolishing any laws that may be bringing favor to a certain group of people.<sup>42</sup> Tim Hodgson argues that it is important for transformative constitutionalism to have transformation which will enable a movement from the law and legal system of South Africa towards its people.<sup>43</sup> This is a demonstration that there is a need for the development of mechanisms to protect and ensure promotion of women and children's rights, most importantly the right to equality.

In the Bhe case, Langa considered the African customary law rule of male primogeniture and its application to inheritance of property as unfairly discriminatory against women and illegitimate children. Accordingly, he declared it to be unconstitutional and invalid.<sup>44</sup> Ngcobo holds a different perspective in that he submits that courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights contained in the Bill of rights, in particular, the right to equality.<sup>45</sup> He, then,

---

<sup>40</sup> Makonese M 'Customary law and its implications on the enjoyment of Human Rights by women in South Africa: A focus on Botswana, Lesotho and South Africa' 2016 available at <https://www.sadcla.org/content/customary-law.pdf> (accessed on 24 may 2022).

<sup>41</sup> Convention on the Elimination of Discrimination Against Women, 1979 (Hereinafter referred to as CEDAW).

<sup>42</sup> Albertyn C & Davis D 'Legal realism transformation and the legacy of Dugard' 2010 *SAJHR* 203.

<sup>43</sup> Hodgson TF 'Bridging the gap between people and the law: Transformative Constitutionalism and the right to constitutional literacy' 2015 *AJ* 1999.

<sup>44</sup> Bhe case, para 19.

<sup>45</sup> *Ibid*, 19.

suggested that the principle of male primogeniture should not be struck down but instead should be developed so as to be brought in line with the right to equality, by allowing women to succeed the deceased as well.<sup>46</sup> It is therefore notable that although patriarchy still persists within South African communities, the Constitution as well as the judiciary promotes the right to equality and has made its importance clear as outlined above.

## **1.10 Delimitation of the study**

This study focuses on patriarchal customs commonly exercised against women and children in South Africa. It examines the rights of women and children about cultural practices or customs in South Africa.

## **1.11 Definition of concepts**

### *1.11.1 customary law*

Despite conflicting views of what customary law is, for the purposes of this research customary law is defined as indigenous laws that are practiced and followed by different ethnic groups in Africa.<sup>47</sup> Pre-colonial laws of African people were composed of customary law, main sources being their traditional practices and customs.

### *1.11.2 Patriarchy*

Patriarchy is a system of law that mainly uses male lineage to determine the descendants and the oldest male is recognized as the family head. The rule of male primogeniture supports this system of law.

### *1.11.3 Discrimination*

Discrimination is any distinction, exclusion or restricted treatment on the ground of sex, gender or any other ground, which then affects, compromise or

---

<sup>46</sup> Ibid, 19.

<sup>47</sup> Ndulo M 'African Customary Law, customs, and women's rights' 2011 *IJGSL* 87.

destroy the promotion, recognition, exercise or enjoyment of human rights including fundamental freedoms in this case of women and children in all spheres of their lives.<sup>48</sup>

#### *1.11.4 Custom*

Customs are traditions that have been observed by a society for many years and are obeyed because they are admired and held in high regard, within a certain community.<sup>49</sup> These traditions are obeyed despite them being harmful to the well-being of some community members.

#### *1.11.5 Gender Inequality*

Gender inequality takes form of discrimination of one group of persons on the ground of gender.<sup>50</sup> Gender inequality takes place in various forms, dependent on the economic structure, culture or social organization, both men and women experience gender inequality.

### **1.12 Chapter outline or organization of the study**

This research consists of 5 chapters which are outlined as follows:

#### *1.12.1 Chapter One: The general outline of the study*

This chapter serves as an introductory chapter. It outlines some of the patriarchal customs that infringe on women's and children's rights. This chapter also set out the research aims, objectives, problem statement as well as research argument.

#### *1.12.2 Chapter Two: The patriarchal nature of customary law*

---

<sup>48</sup> Section 9 of the Constitution outlines the grounds on which a person may not be discriminated against.

<sup>49</sup> Martin P & Mbambo B 'An exploratory study on the interplay between African Customary Law and practices and children's protection rights in South Africa' 2011 *STC* 30.

<sup>50</sup> Lorber J *Gender Inequality and Feminist Theory* 4 ed (2010) 5.

This chapter looks at patriarchy as a concept. It gives more elaboration on women and children's rights prior to 1994, taking into consideration the continued persistence of patriarchy within our communities. It assesses women and children's rights after 1994 and also consider women's and children's constitutional rights mainly those that are protected in the bill of rights.

### *1.12.3 Chapter Three: Analysing the interplay between culture and protection of women and children's rights*

This chapter deals with the meaning of culture in our communities as culture is more connected with custom. This is because culture generates different approaches to patriarchy as well as gender equality. It gives more elaboration on cultural practices which are still observed in our communities although they are labeled as discriminatory against women and children, for example, circumcision, virginity testing, and *ukuthwala*.

### *1.12.4 Chapter Four: International, regional and national law policies that protects and promote women and children's rights*

This chapter outline some of the international, regional and national law policies that are put into place in order to ensure that women and children are not discriminated against.

### *1.12.5 Chapter Five: Recommendations and conclusion*

This chapter contains the recommendations for the improved implementation of women's and children's rights. This chapter also operates as the conclusion for the study.

## CHAPTER TWO

### THE PATRIARCHAL NATURE OF CUSTOMARY LAW

#### 2.1 Conceptualising “patriarchy”

In a patriarchal society, male lineage is used to determine the descendants and the oldest male is recognized as the family head.<sup>1</sup> As a result, the patriarchal system encourages male primogeniture, which is a form of male privilege. Men are at all times deemed to be above women which then leads to a social framework where men have unchallenged power. This social setting leads to a situation where men are obsessed with power and anyone who appears to be in opposition may be threatened.<sup>2</sup>

Culturally, women are regarded as inferior to men and at all times expected to remain obedient and faithful to their husbands. In defining patriarchy, one writer refers to the Code of Zulu law, which describes women as perpetual minors that are subject to their husband's marital powers.<sup>3</sup> This statement was later confirmed by Niekerk and Mwambene. They submitted that under customary law, a woman can only be deemed to have gotten a right through her family head, who happens to be a male.<sup>4</sup>

Due to the societal definition, women then become subservient and are treated as such. Therefore, culture oppresses women to an extent that they lose confidence and start to believe that they are powerless and cannot be independent. Research has shown that in a patriarchal setting, femaleness is a devalued and oppressed phenomenon and as such men do not suffer.<sup>5</sup>

---

<sup>1</sup> Martin P & Mbambo B 'An exploratory study on the interplay between African Customary Law and practices and children's protection rights in South Africa' 2011 *STC* 07.

<sup>2</sup> Bassey SA & Bubu NG 'Gender inequality in Africa: A re-examination of cultural values' *CMR* 2019 23.

<sup>3</sup> Mswela M 'Cultural Practices and HIV in South Africa: A Legal Perspective' (2009) 12 (4) *PER* 195, also see Bennett TW *A Sourcebook of African Customary Law for Southern Africa* (1991) 31.

<sup>4</sup> Niekerk C & Mwambene L 'The Gumedede judgment: Another lost opportunity to develop customary law and protect women's rights?' *Speculum Juris*' (2009) 23 (1) *LNP* 94.

<sup>5</sup> Johnson MP & Leone JM 'The differential effects of intimate terrorism and situational couple violence findings from the national violence against women survey' *JFI* 2005 324.

In his writing, Stromquist highlights that black women in South Africa experience triple oppression due to their gender, race, and socio-economic status.<sup>6</sup> In South Africa, patriarchy presents itself in a manner which men go to an extent of regulating female sexuality and reproduction (as to how many children a woman must give birth to).<sup>7</sup> In the private domain, women are frequently compelled to do things against their will. Men will then use violence to retaliate against any woman who refuse to be obedient. I therefore submit that the rise in the crime of gender-based violence in South Africa is caused by men wanting to be in control which now seems almost impossible as women nowadays want to be independent and deem themselves capable of making their own decisions. Consequently, children suffer the same fate as their mothers and as result, they are often exposed to abuse.

## **2.2 Customary law prior to 1994**

Customary law has never been completely acknowledged as a core component of South African law. Roman Dutch law was instead adopted and used as South African Common law.<sup>8</sup> The Cape colony served as the Dutch gateway in 1952. Since that time the legal system of South Africa has occasionally been referred to as Roman Dutch Law. Roman Dutch Law is typically thought of as a synthesis of Roman Law and Dutch law.

Current South African common law has been struggling when it comes to blending these two legal systems. In support of this claim, Rautenbach notes that South African law consists of conglomeration of what he refers as transplanted law, which is made up of Roman Dutch Law and English common law.<sup>9</sup> Furthermore, Nagel concludes that the legal system of South Africa is hybrid in nature and indicate that local customs, legislation, court decisions and English law are the main influencers of Roman-Dutch law.<sup>10</sup>

---

<sup>6</sup> Stromquist NP (Ed.) *Women in the Third World: An encyclopedia of contemporary issues* (2014) 567.

<sup>7</sup> Malesa KJ 'Married men's perceptions of their wives' Sexual and reproductive health rights: A Study conducted in the rural area of Waterberg District, Limpopo province, South Africa' available at <https://doi.org/10.1080/23293691.2021.2016136> (accessed on 08 April 2022).

<sup>8</sup> Bennett TW *Customary Law in South Africa* (2010) 34.

<sup>9</sup> Rautenbach C 'Electronic Journal of Comparative Law, South African Common Law of Intestate Succession: A question of Harmonization, Integration or Abolition' (2008) 3 *EJCL* 5.

<sup>10</sup> Nagel CJ *Commercial law* 3 ed (2006) 5.

Indigenous people's customary law was the sole legal system that affected their daily lives. The indigenous people's way of life was governed by their own system of customary law. A body of laws exists to enable and control how people interact with one another. In other words, the legislation provides society with order and predictability. It is said that not all conventions and laws are binding.<sup>11</sup> The law, according to Schoeman-Malan is all-encompassing and ever-changing, and like English Law, can be found in specific statutes and judicial rulings.<sup>12</sup>

It is believed that after the Dutch East India Company arrived, a mixed jurisdiction developed at the Cape of Good Hope. Other legal scholars like Palmer also confirmed the existence of a mixed jurisdiction and transplantation of the Dutch law into the South African legal system.<sup>13</sup> It is not a secret that the indigenous law of South Africans went through a drastic change as from 1952. The existence and development of the South African law, particularly the indigenous law have been seriously impacted by colonialism.<sup>14</sup>

It is a fact that a huge percentage of South Africans live according to their customary laws as it was the only law they easily understand. Not forgetting that due to its agrarian social structure, customary law is centered on the concept of patriarchy, which is founded on the idea that males are the dominating individuals as compared to females.<sup>15</sup> During the 21<sup>st</sup> century, women continued to play their customary role in the kitchen.<sup>16</sup> This role does not necessitate any knowledge gained through schooling or education of any type. Therefore, a girl-child does not need to go to school so that she can be a

---

<sup>11</sup> Kleyn D & Viljoen F *Beginners Guide for Law Students* (2002) 2.

<sup>12</sup> Schoeman Malan MC 'Recent Developments Regarding South African Common and Customary Law of succession' available at <https://www.ajol.info/index.php/pej/article/view/43433> (accessed on 10 January 2023) 1.

<sup>13</sup> Palmer VV *Mixed Jurisdiction Worldwide: The third legal family* (2001) 83.

<sup>14</sup> See Rautenbach C 'Electronic Journal of Comparative Law, South African Common Law of Intestate Succession: A question of Harmonization, Integration or Abolition' (2008) 3 *EJCL* 5, where he draws a picture on how colonialism had an impact on the law of succession and inheritance in South Africa.

<sup>15</sup> Kaganas F & Murray C 'The contest between culture and gender equality under South Africa's Interim Constitution' 1994 *JLBS* 7.

<sup>16</sup> *Ibid*, also see Mbajjorgu G (2017) 2 *BJS* 18.



good wife or a mother; she only had to be good at cooking, cleaning, and sewing.

These roles are given to women by emphasizing how well they fit on women's natural tendencies as mothers and wives. This is opposed to gender roles that are traditionally assigned to men, such as that of family head and traditional leadership positions which are seen as crucial for the prosperity of the family and the community.<sup>17</sup> Furthermore, deprivation of certain roles meant that women could not acquire certain rights such as the right to acquisition of property.<sup>18</sup> This is due to the fact that according to customary law, the family head has power over the family's assets.

Due to this practice, women now find themselves without access to land rights. As a result, they frequently experienced evictions following divorce or the passing of their spouses since they were occasionally required to leave the marital house which left them penniless as illustrated by Himonga<sup>19</sup> Deprivation of land rights when it comes to women and girls draws a clear picture that they were discriminated against reason being that land was regarded as the primary source to economic empowerment and had a potential of improving women's living conditions, and as such without rights to land, women's economic and physical security was compromised.<sup>20</sup>

Pre-colonial legislation such as the Black administration Act were put into place mainly having the purpose of providing for better control and management of Black affairs.<sup>21</sup> This was the Act that formalized the application of the rule of primogeniture.<sup>22</sup>

---

<sup>17</sup> Tebbe N 'Inheritance and disinheritance: African Customary Law and constitutional rights' 2008 *TJR* 468.

<sup>18</sup> Mutangadura G 'Women and land tenure rights in Southern Africa: A human rights-based approach' *Presentation at Land in Africa: Market Asset or Secure Livelihood Conference, London, UK* 2004 3.

<sup>19</sup> Himonga C 'Taking the gap - 'Living law land grabbing' in the context of customary succession laws in Southern Africa' 2011 *AC* 123.

<sup>20</sup> Note 65 above, 3 (Mutangadura).

<sup>21</sup> The Black Administration Act 38 of 1927 (Hereinafter referred to as 'the BAA'). Also see Rautenbach C 'South African common and customary law on intestate succession: A question of harmonization, integration or abolition' 2008 (3) *EJCL* 3.

<sup>22</sup> Section 23 of the BAA.

Patriarchy did not only affect women as alluded above, but it also had an impact on their children. Traditionally, women were not given any rights in respect of their children but such rights were accorded to members of their extended family who then bear the primary responsibility with regard to the upbringing of the child.<sup>23</sup> Hence, children were said to have derived rights from the family they belonged to, which is their father's family.<sup>24</sup>

It is worthy to note that customarily, children had to be categorized mainly for the purposes of allocating rights to each and every particular child.<sup>25</sup> Male children belonging to the husband's family were eligible to succeed to their father's estate in terms of the rule of primogeniture.<sup>26</sup> Ngidi outlines that in African society, children were categorized in the following manner:

- (a) Children of an unmarried woman who belonged to her family;
- (b) Children of a married woman who belonged to the family of the husband
- (c) Children given in adoption who belonged to the adoptive family;
- (d) Children born of a levirate relationship belonged to the deceased husband's family.<sup>27</sup>

This is the classification according to which children could be determined whether they qualify to inherit or not, and according to which the children's succession rights can be applied. However, children inherently possessed the right to be well cared for, to be provided with food despite their area of categorization.

The rule of primogeniture was put into place to make it a point that preference is given to biological children of the deceased more than those who may have been born as a result of an illegitimate affair or were adopted.<sup>28</sup> This in turn meant that only the eldest son of the deceased is the one who will inherit the

---

<sup>23</sup> Kaime T 'Convention on the rights of the child and the cultural legitimacy of children's rights in Africa: Some reflections' 2005 *AHRLJ* 230.

<sup>24</sup> *Ibid*; also see the case of *Hlophe v Mahlalela and another* 1998 (1) SA 449 (TPD) in which the court had to determine the custody of the child of a deceased wife whom *lobola* was not paid in full.

<sup>25</sup> Ngidi R (ed) *Upholding the best interests of the child in South African Customary Law* (2009) 230.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*.

<sup>28</sup> Tebbe N 'Inheritance and disinheritance: African customary law and constitutional rights\*' (2008) 88(4) *TJR* 470.

property of his father.<sup>29</sup> Customary law prior 1994 treated female children like their mothers as both of them were always less favorable and discriminated the most as compared to their fellow siblings.

### **2.3 Women and children's rights in the 1996 Constitution**

Women and children's rights changed significantly after 1994. This main cause being that the Constitution was given the highest standard against which every legislation must be tested. Notably, the South African Bill of Rights provides that "everyone is equal before the law and has the right to equal protection and benefit before the law".<sup>30</sup>

The state or any person may not unfairly discriminate either directly or indirectly, against anyone on the basis of, *inter alia*, their gender, sex, sexual orientation, pregnancy, marital status, or culture.<sup>31</sup> Therefore women and children can no longer be discriminated against based on their gender. Section 31 of the constitution unequivocally states that:

"Persons belonging to any cultural, religious, or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and may use their language; and to form, join and maintain cultural, religious, and linguistic associations.....The rights referred to above may not be exercised in a manner inconsistent with any provision of the Bill of Rights"<sup>32</sup>

A point worth noting from this provision is that everyone may practice their culture but such practice must be in accordance with the Constitution, particularly the bill of rights. This then means that any cultural practice needs to uphold the cornerstones of the Constitution such as equality which goes along with human dignity among others.

---

<sup>29</sup> Ibid.

<sup>30</sup> Section 9 of the Constitution.

<sup>31</sup> Section 9(3) of the Constitution.

<sup>32</sup> Section 31 of the Constitution.

The bill of rights made it a point that everyone's interests need to be protected and promoted, including the interest of women and children. This is actually contrary to customary law, which mainly preserves the common good interest of the community other than that of an individual. The Constitution also has had effect on customary law customs and practices that are in conflict with modern democracies such as the preference of males as the descents of the deceased, male dominance as well as the constant use of family lineage.

Accordingly, Section 39 of the Constitution set out the guidelines that needs to be followed when interpreting the bill of rights.<sup>33</sup> Any court, tribunal or forum must promote the values that form basis of an open and democratic society that are based on human dignity, equality as well as freedom.<sup>34</sup>

Furthermore, in promotion of these rights, international law also needs to be taken into consideration. Consequently, Section 39 of the Constitution has led to the ratification of a number of United Nations Conventions which give live to human rights such as CEDAW, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, the Protocol on the Rights of Women in Africa, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.<sup>35</sup> South Africa also implemented different legislative frameworks such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Children's Act amongst others, in an attempt to encourage the promotion and respect for human rights.<sup>36</sup> Some of these instruments will form part of chapter 4.

## **2.4 Principles and guidelines recognized in terms of women's rights in South Africa**

---

<sup>33</sup> Section 39 of the Constitution.

<sup>34</sup> Section 39 of the Constitution.

<sup>35</sup> See the International Covenant on Civil and Political Rights, 1976 (Hereinafter referred to as the ICCPR); The African Charter on Human and people's rights 1981, OAU Doc. CAB/LEG/67/3 rev. 5; (1986); The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990); The Protocol on the Rights of Women in Africa, 2005.

<sup>36</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Hereinafter referred to as the Equality Act).

The South African Constitution adopted guiding principles and directives with the intention of advancing and defending everyone's human rights. In order to advance the integration of gender in South Africa the following principles and guidelines with regard to women's rights have been recognized:

- Women's rights are understood to be human rights.
- All citizens have a right to enjoy equality, non-sexism and non-racism.
- All customary practices and customs are subject to the right to equality.
- Promotion of women's economic empowerment.
- Creation of a transformation process aimed at eliminating gender-discrimination.<sup>37</sup>

Consequently, South Africa has enacted a number of legislations to heal all the prejudice suffered by women not forgetting their children. The Constitution and the Equality Act, as well as other legislations reveal a clear purpose of ensuring gender equality. Women and children are no longer discriminated against on the ground of gender or age. This then means that they must be treated the same as everyone without any distinction.

#### *2.4.1 Gender relations*

The preamble of the United Nations Charter affirms that "...faith in fundamental human rights, in the dignity and worth of the human person, in the equality rights of men and women...".<sup>38</sup> It is according to the charter that the ideology of human rights respect and equality between men and women is rooted.

Although not yet achieved, South Africa is still in the process of transformation in relation to equality. The change in gender equality is one of the main goals in this process.<sup>39</sup> However, it can be difficult to develop a comprehensive transformation strategy that recognizes how changing gender relations fits

---

<sup>37</sup> United Nations Development Program 'Gender equality strategy' available at <https://www.undp.org/publications/gender-equality-strategy-2022-2025> (accessed on 29 November 2022).

<sup>38</sup> The preamble of the United Nation Charter, 1945.

<sup>39</sup> Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 258.

into the larger institutional change process. Gender justice does not imply equality between men and women, but rather that sex or gender should not be a factor in determining the opportunities and life chances of any person.<sup>40</sup>

## **2.5 Promotion of Equality and Prevention of Unfair Discrimination Act**

The Equality Act aims at ensuring compliance with South Africa's duties under international law and it came into effect as a result of Section 9 of the Constitution.<sup>41</sup> This provision prohibits any unfair discrimination against individual persons and it goes further to mention the grounds which a person may not be unfairly discriminated against. These grounds include, amongst others, race, gender, sex, pregnancy, marital status and many more.<sup>42</sup> Nonetheless, in ensuring equality for all, the preamble of the Equality Act places more emphasis on

“The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy; The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;.....”<sup>43</sup>

Of importance, the Equality Act aims to get rid of all indigenous law practices that are rooted in patriarchy, at least to the extent that they hold harmful consequences for women as evidenced in the preamble.<sup>44</sup> Section 6 of the Equality Act prohibits the state or any private persons from unfairly

---

<sup>40</sup> Albertyn C & Goldblatt B 'Facing the challenge of transformation: Difficulties in the Development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 255.

<sup>41</sup> Section 9 of the Constitution set out that everyone is equal before the law and the state must enact legislation to give effect to this right.

<sup>42</sup> Section 6-12 of The Equality Act; also see Section 9 (3) of the Constitution.

<sup>43</sup> The preamble of the Equality Act.

<sup>44</sup> *Ibid.*

discriminating against any person.<sup>45</sup> A point worth noting is that the Equality Act regularly makes use of the word 'practices' throughout its provisions.<sup>46</sup>

As a result, one may conclude that every aspect of customary law either practice or custom is intended to be directly subjected to the provisions of the Equality Act. Of importance Section 8 (d) which outlines that no person may be discriminated against based on:

“any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child”<sup>47</sup>

Any custom – whether it is a traditional custom or not – needs to be tested against this section in determination of its validity. Nonetheless, we must not turn a blind eye as we witness the persistence of these practices although they may have been deemed invalid and declared discriminatory further discussion will be made on chapter three.

## 2.6 Conclusion

It is evident from the discussion above, that customs and traditions are frequently invoked as a justification for the oppression of women and children. However, South Africa, like many other African countries, has developed its customary laws mainly due to socio-economic changes. It has shifted from an era where the rights of women and children were violated to an era where human rights, most importantly of women and children, are of paramount importance. Although patriarchy still remains within a number of customary law practices, its practice is no longer that vital when compared to its enforcement before 1994. According to Bennet, patriarchal principles and discriminatory actions served as the foundation for customary law.<sup>48</sup>

The next chapter will examine some of cultural practices that are still observed in African communities.

---

<sup>45</sup> Section 6 of The Equality Act prohibits and prevents unfair discrimination generally.

<sup>46</sup> S 6(d), and s 28(3)(b)(i) of The Equality Act, which mandates the State to 'audit laws, policies and practices in order to eliminate all discriminatory aspects thereof.

<sup>47</sup> Section 8(d) of the Equality Act.

<sup>48</sup> Bennet TW *Human Rights and African Customary Law: Under the South African Constitution* (1995) 80-81.

## CHAPTER THREE

### ANALYSING THE INTERPLAY BETWEEN CULTURE AND PROTECTION OF RIGHTS

#### 3.1 Introduction

There are numerous cultures in South Africa. Its cosmopolitan nature is reflected in the variety of its languages, races, religions and ethnic groupings.<sup>1</sup> South Africa is a home to approximately 60.6 million, with 81.0 percent of them Black, 7.7 percent White, 2.6 percent Indian or Asian, and 8.8 percent “coloured”.<sup>2</sup> There are eleven officially listed languages, most of which are used by and among the various ethnic groups. It should be highlighted that cultures are like languages; they are both specific to particular groupings, which explains South Africa’s extensive cultural diversity. Just the same as any other society in the globe, South Africa comprises of various cultures, and each culture has its own set of social mores, beliefs and practices. The enjoyment of human rights generally, and the rights of women and children in particular are negatively impacted by several cultural traditions.<sup>3</sup> Similar and contrasting cultural traditions such as the practice of “Ukuthwala” which refers to marriage by abduction violate the rights of both individuals and groups of people.<sup>4</sup> This chapter examines a number of cultural practices that run afoul of South African human rights laws, including circumcision, virginity testing, marriage by abduction, bride price, and polygamy.

#### 3.2 The meaning of culture in constitutional context

Cultural rights are safeguarded in terms of section 30 and 31 of the Constitution. Section 30 addresses the right of individuals to speak and practice their own language and culture, whereas section 31 addresses

---

<sup>1</sup> South Africa has 11 official languages from different cultural and ethnic groupings.

<sup>2</sup> See Statistics South Africa ‘2022 Mid-year population estimates [cited 28 July, 2022]’ available at <https://www.statssa.gov.za/publications/P0302/P03022022.pdf>. (accessed on 30 October 2022).

<sup>3</sup> Durojaye E ‘Woman, but not human’: widowhood practices and human rights violations in Nigeria’ (2013) 27(2) *IJPF* 51.

<sup>4</sup> Mwambene L & Sloth-Nielsen J ‘Benign accommodation? Ukuthwala, forced marriage? and the South African Children’s Act.’ 2011 *AHRLJ* 3.



cultural, religious and linguistic communities.<sup>5</sup> The notion of community membership, which is a key component of culture, is given increased weight in section 31 of the Constitution. People share their cultural rights with other people whom together make up a group or community and, as a result, “cultural rights are by their nature group oriented”.<sup>6</sup>

Additionally, section 185 of the Constitution provides for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>7</sup> Customary law is acknowledged under section 211(3) of the Constitution, which allows the courts to apply customary law, and consider its significance “subject to the Constitution and any legislation that particularly deals with customary law”.<sup>8</sup>

According to Grant the right to culture entails the right to respect and adherence to customary law.<sup>9</sup> It is important to keep in mind, that cultural rights covered by Section 30 and 31 are not unrestricted. These rights need to be exercised in a way that does not contravene any of the Bill of Rights. Moreover, restrictions must be “fair and justifiable in an open and democratic society, based on human dignity, equality and freedom”.<sup>10</sup> This is allowed under section 36 widely known as “the general limitation clause”.

The conflict between culture and human rights arises in the context of this limitation clause and the limitations incorporated in sections 30 and 31 of the Constitution.<sup>11</sup> This forms part of the gist of this study to say that individuals and communities possess the right to practice their culture; but such practice must not infringe the rights of another person. I shall then examine some of the practices that violate the rights of women and children.

---

<sup>5</sup> Section 30 and Section 31 of the Constitution.

<sup>6</sup> Devenish G A *commentary on the South Africa Bill of Rights* (1998) 10.

<sup>7</sup> Section 185 of the Constitution.

<sup>8</sup> Section 211 (3) of the Constitution.

<sup>9</sup> Grant E ‘Human rights, cultural diversity and customary law in South Africa’ (2009) *JAL* 7.

<sup>10</sup> Section 36 of the Constitution.

<sup>11</sup> Section 36 of the Constitution.

### 3.3 Cultural practices and traditions that violate human rights

#### 3.3.1 Circumcision and virginity testing

Male and female circumcision, initiations and virginity testing form an integral part of South African societies.<sup>12</sup> The month of June marks the commencement and establishment of initiation schools. It is during this month that young boys are taken for circumcision, the process is usually done in the mountain, in the rural areas or in hospitals in modernised society.<sup>13</sup> This is because it is culturally believed that children heal faster during winter as compared to other yearly seasons.<sup>14</sup> On contrary, girls participate in virginity testing.

Virginity testing is a common practice that is frequently practised in Kwazulu-Natal region of South Africa.<sup>15</sup> Virginity testing includes physically inspecting a girl's genitalia to see if the hymen, which is a little membrane that crosses a portion of the vaginal opening, is still there or not.<sup>16</sup> A girl is regarded as a virgin if her hymen is still present, and the one who would have a broken hymen would have failed the test.<sup>17</sup> Jewkes asserts that girls who are considered virgins are frequently mistreated and spurned.<sup>18</sup> In outlining the human-rights-based approaches to virginity testing, Jewkes further submits that despite the portrayal of virginity testing as a voluntary and safe indigenous response to AIDS that girls are proud to participate in, the unspoken truth is that due to strongly rigid gender power structures, girls are not really in a good position to make voluntary decisions.

Dekkers, Hoffer and Wills submit that males are mostly circumcised for health, precautionary measures, or religious reasons, while girls are circumcised

---

<sup>12</sup> Maluleke MJ 'Culture, tradition, custom, Law and Gender equality' 2012 *PER* 5-8.

<sup>13</sup> Mbajjorgu G '(2017) 2 *BJS* 26.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Mubangizi JC 'A South African perspective on the clash between culture and Human rights, with particular reference to Gender-related cultural practices and traditions' 2012 *JWIS* 38 (Hereinafter referred to as Mubangizi JC).

<sup>17</sup> Mubangizi JC 2012 *JWIS* 38.

<sup>18</sup> Jewkes R 'Child sexual abuse and HIV infection' 2004 *HSRC* 137.

mostly for culturally-related reasons<sup>19</sup> Mbajiorgu on the other hand, concluded that customs such as virginity testing and circumcision are carried out in order to uphold morality.<sup>20</sup>

Male circumcision and virginity testing commonly violate one's privacy and physical, psychological integrity, which includes the right to safety in and control over one's body.<sup>21</sup> These two rights are interconnected to the right to dignity.<sup>22</sup> It is therefore, understood that since the right to dignity is regarded as a foundational value and is in this circumstance related to the right to privacy and the right to bodily psychological integrity, violation of the later amounts to violation of dignity. This is because the way in which virginity testing is carried out (often in public) and the possibility of a girl child getting negative results always amount to violation of dignity.<sup>23</sup>

### 3.3.2 *Ukuthwala*

Koyana defines *ukuthwala* as a Xhosa word that literally means to "carry".<sup>24</sup> *Ukuthwala* is also referred to as "marriage by abduction".<sup>25</sup> This practice is prevalent among rural Xhosa communities in the region of Eastern cape and Kwazulu natal in South Africa. This practice is carried out by kidnapping a girl and marrying her at a man's home usually done by either the man's friends or relatives.

According to Mwambene, the girl is caught as part of a pre-planned arrangement.<sup>26</sup> The girl will typically put up a kind of resistant act but such is classified as pretended resistance because, more often than not, she is a willing party, but she will do so to appear unwilling and to retain her maidenly

---

<sup>19</sup> Dekkers W; Hoffer C & Wills J 'Bodily integrity and male and female circumcision' (2005) 8 *MHP* 180.

<sup>20</sup> Mbajiorgu G (2017) 2 *BJS* 27.

<sup>21</sup> Section 12 (1) and (2) and Section 14 of the Constitution.

<sup>22</sup> See the case of *Bhe and others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC), para 187 where the right to dignity was held to be co-related to other human rights such as the right to equality.

<sup>23</sup> World Health Organisation 'Virginity testing' A human rights violation, with no scientific basis-UN at <https://news.un.org/en/story/2018/10/1023401> ( Accessed on 28 July 2022).

<sup>24</sup> Koyana DS *Customary law in a changing society* (1980) 14.

<sup>25</sup> Koyana DS *Customary law in a changing society* (1980) 14.

<sup>26</sup> Mwambene L & Sloth-Nielsen J 'Benign accommodation? Ukuthwala,'forced marriage? and the South African Children's Act.' 2011 *AHRLJ* 4.

dignity.<sup>27</sup> The intended groom will then send a message to the girl's family informing them of the girl's safety, which is followed by the call for the bride price commonly known as "*Lobolo*".<sup>28</sup>

The girl will be returned to her parent's house and the man's family will be responsible for any damages if the families are unable to come to an agreement.<sup>29</sup> However should the families reach agreement the girls' status will then be elevated to that of a wife. Of importance girls between the age of twelve (12) and fifteen (15) years old are usually targeted for this kind of marriage.<sup>30</sup>

Normally, this type of a marriage is concluded with consent of the bride or her relatives having the purpose of saving both families from the stress of preparing and organizing for big traditional wedding.<sup>31</sup> Nevertheless, *ukuthwala* marriage can be concluded without the bride's consent resulting to her being a victim of rape or domestic violence in an attempt to lure her into marriage.<sup>32</sup>

Although this practice violates most children's rights, the Children's Act failed to mention it. Notably, neither *ukuthwala* nor the phrase "forced marriage" are specifically mentioned in section 12 of the Children's Act, which lists social, cultural and religious practices that are harmful to children's health or well-being.<sup>33</sup> Only the "minimum age required by law for a legitimate marriage and refraining from handing over a child "in marriage or engagement without his or her consent is mentioned.<sup>34</sup>

In addition, the practice of *ukuthwala* is not specifically addressed in section 305 of the Children's Act, which is the comprehensive penalty provision that

---

<sup>27</sup> Bekker JC et al *Introduction to legal pluralism in South Africa* (2006) 31.

<sup>28</sup> Siyo L & Mubangizi C 'The independence of South African judges: A Constitutional and legislative perspective' 2015 *PELR* 830.

<sup>29</sup> Curran E & Bonthuys E 'Customary law and domestic violence in rural South African communities' (2005) 21 *SAJHR* 613 (Hereinafter referred to as Curran E & Bonthuys E 2005 *SAJHR*).

<sup>30</sup> Monyane C 'Is Ukuthwala another form of forced marriage?' 2013 *SARS* 44.

<sup>31</sup> Note 56 above, 200 & 212-213 (Bennett).

<sup>32</sup> *Ibid*, 200-201; also see the case of Jezile.

<sup>33</sup> Section 12 (1) of the Children's Act.

<sup>34</sup> Section 12 (2) (a) and (b) of the Children's Act.

contains all the offences applicable for violating any of the provisions of the Act.<sup>35</sup> There is therefore a need for the laws that prohibit these human rights violation practices to mention “practices” by their names as compared to generalization.

The *ukuthwala* custom can no longer be practiced or carried out without the girl’s consent reason being that the Recognition of Customary Marriages Act require both parties to be married to have consented to do so, and as such *ukuthwala* custom cannot be used to surpass this requirement.<sup>36</sup>

### 3.3.3 Lobola

*Lobola*, also known as “*mamalo*” in Tshivenda, is an African term used to describe “bride price” or “dowry”.<sup>37</sup> Due to changing times, this word has received different definitions, as a consequence of the transition from the transfer of property that *lobola* was originally aimed to entail, to a transfer of cash which is currently the practice.<sup>38</sup> Through the payment and transfer of property by the groom’s family both the families of the bride and groom are brought together.

Previously, the word “property” used to refer to cows. However, nowadays cows have been replaced by money hence the alteration of the definition of *lobola*.<sup>39</sup> Family members traditionally negotiated for the *lobola* amount, which is to be paid in cattle and other livestock. The ideal situation would be for the father of the groom to raise the *lobola* for the groom’s first marriage, with the help of his family members. While in some groups the families would negotiate a price for *lobola*, in some the amount of *lobolo* is fixed.<sup>40</sup> Generally speaking, it wasn’t essential to pay the entire amount of *lobola* all at once. Instead, it would be repaid in installments, frequently over a long period of time. Normally, *lobola* cows were not sold or given away, but when a sister

---

<sup>35</sup> Section 305 of the Children’s Act.

<sup>36</sup> Section 3 (1) (a) of the Recognition Act.

<sup>37</sup> *Mamalo* is a Venda word that refers to dowry.

<sup>38</sup> Curran E & Bonthuys E 2005 *SAJHR* 614.

<sup>39</sup> Kaufman CDT & Stadler J ‘Adolescent pregnancy and parenthood in Africa’ 2001 *SFP* 153; Also see Understanding lobola’ available at <http://health.iafrica.com/psychonline/qa/general/124598.html>. (accessed on 24 June 2022).

<sup>40</sup> Note 127 above.

was married, the cattle she obtained could be used to supply *lobola* for her brothers.<sup>41</sup>

The advantages, disadvantages, challenges as well as significance of *lobola* has been part of protracted debates. Other people believe that the main function of *lobola* is to sort of “compensate” the bride’s family for taking her to school and also to officially transfer the bride to the groom’s family. This custom has always been reviewed against human rights, and central to this is the right to equality and the level of discrimination to women as compared to men.<sup>42</sup> Main questions amongst others are if our law views women as equal to men, why is it only men that pays for the *lobola*? Why are the bride prices different if all women are equal before the law? *Lobola* has been regarded as a problematic tradition that is potentially degrading to women, because women are treated as goods for sale in this regard.<sup>43</sup>

Ncobo submits that the right to equality must be used for the purposes of elevating the quality of life of the marginalized groups and to distribute privileges to those that are advantaged.<sup>44</sup> Evidenced from Ncobo’s statement is the proof that very often than not men are favored, and as a result they fail to consider women’s interest in relation to cultural practices such as *lobola*.

Today’s modern *lobola* custom is distinguished by unusually high demands for bride wealth in the form of cash. Only the distortion of the custom can account to the enormous increase for the bride wealth.<sup>45</sup> Ndulo contends that *lobola* no longer serves as an object of African pride and it has instead changed into what Westerners once claimed was a bride price, and has become an institution that is characterized by dominance and exploitation of women.<sup>46</sup>

---

<sup>41</sup> Olivier WH et al ‘Indigenous law’ (2003) 10-12.

<sup>42</sup> Note 127 above.

<sup>43</sup> Botha M ‘Lobola and the misuse of culture’ available at <http://www.genderjustice.org.za/in-issue-1-may-2011/lobola-and-misuse-of-culture> (accessed on 22 November 2022).

<sup>44</sup> Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 7 BCLR 687 (CC).

<sup>45</sup> Chigwedere A ‘Lobola: The pros and cons’ (1982) 59.

<sup>46</sup> Ndulo M ‘African Customary Law, customs, and women's rights’ (2011) *IJGLS* 93.

Likewise, Bonthuys and Curran makes similar submission to that of Ndulo in that evolving socio-economic setting has witnessed an increasing commercialization of *lobola*.<sup>47</sup> It has shifted from being a representation of two families coming together to a financial transaction.<sup>48</sup> As a result, it has become an institution that potentially perpetuates the subordinate and commodified status of girls and women in society, that is likely to encourage early marriages, and may compromise the safety of women and girls against domestic abuse.<sup>49</sup> This is more visible when the family force the girl to get married to a wealthy man reason being that they will get more money when the man pays lobola. This usually occurs to young girls that get married to a man that is older than her, of which the man expects to control the girl simply because he paid lobola for her.

Another notable change when it comes to payment of *lobola* is that the groom's themselves have resorted to paying *lobola* themselves instead of having their families raise the *lobola* amount.<sup>50</sup> This is the main reason that men get an opportunity to justify their abusive behavior towards their wives, as they hold a view that they "paid" for the wives which then gives them the right to do anything they like with them.<sup>51</sup> The limited involvement of the groom's family during *lobola* negotiations has resulted to a decreased family intervention when the married couples face challenges like domestic violence. On the other hand, *lobola* paid to the bride's family is usually spent immediately after the conclusion of the marriage negotiations, which then leaves women vulnerable as their families cannot be able to pay back the amount should the bride wish to return home.<sup>52</sup> As a result, bride's families tend to side with the abusive groom reason being the fear of paying back the *lobola* amount. Statistics have it that from April to June 2022, eight hundred and fifty five (855) women were killed in South Africa and over 11 000 assault

---

<sup>47</sup> Curran E & Bonthuys E 2005 *SAJHR* 618.

<sup>48</sup> *Ibid.*

<sup>49</sup> Bennett TW *Customary Law in South Africa* (2010) 235-250.

<sup>50</sup> *Ibid.*, 228.

<sup>51</sup> *Ibid.*, 235.

<sup>52</sup> Fishbayn et al 'The harmonisation of customary and civil law marriage in South Africa' 9

with intention to cause grievous bodily harm cases opened, with a huge percentage of female victims.<sup>53</sup>

Bennet also submits that the demand for higher prices for *lobola* has also led to a high percentage of couples resorting to cohabitation instead of marrying legally.<sup>54</sup> Rwezaura has made a strong criticism of the institution of “bride wealth” which is synonymous to “bride price”, based on the changed social and economic relations prevailing today. He has observed that “payment of bride wealth was not an individualized affair. It was a matter for the concern of a wider family”.<sup>55</sup> The commodified aspect of *lobola* has led to an increase in polygamous marriages, this shall form part of our next discussion.

### 3.3.4 Polygamy

Through the Recognition Act, polygamous marriages and *lobola* are recognized. The prerequisites for a lawful customary marriage are outlined in this Act, that also mention that the marriage must be negotiated and entered into or celebrated according to customary law.<sup>56</sup> It is my contention that the Act implies polygamous marriages although not expressly. The reason is that African customs allow for polygamous marriage and the Act itself provides that all the marriage processes must be undertaken according to customary law. Polygamy has been practiced for a very long period of time. This practice does not only take place in South Africa, as it is also common in other parts of the world.<sup>57</sup>

Polygamous marriages have been part of academic debates just as *lobola*. Proponents that support polygamous marriages do not see anything wrong with it as they believe polygamy is part of preserving their culture.<sup>58</sup>

---

<sup>53</sup> See Minister Bheki Cele, Quarter One Crime Statistics 2022/2023 Available at [Minister Bheki Cele: Quarter One Crime Statistics 2022/2023 | South African Government \(www.gov.za\)](https://www.gov.za/news/education/skills-development/2023/07/27/quarter-one-crime-statistics-2022-2023). (accessed on 27 July 2022)

<sup>54</sup> Note 136 above 223,225 & 234.

<sup>55</sup> Rwezaura BA ‘Traditionalism and law reform in Africa’ (Jan. 28, 1983) (paper presented at a seminar jointly arranged by the fundamental rights and Personal Law research project’ Centre for Applied Social Sciences, and the Department of Law, University of Zimbabwe) 14.

<sup>56</sup> Section 3 of the Recognition of Customary Marriages Act 120 of 1998.

<sup>57</sup> Thobejane TD & Takayindisa F ‘An Exploration of Polygamous Marriages: A Worldview’ (2014) 5 *MJSS* 1058.

<sup>58</sup> Twala C ‘The African tradition of initiation and circumcision: A curse or cure in South Africa?’ (2007) *SAJC* 27.



Nonetheless, those that oppose polygamy assert that polygamy is “quite frequently laden, polygamous marriages come with problems within the family circle, not just among women but also between the wives and the husband”.<sup>59</sup>

It is trite to also mention that having multiple partners increases the chance of contracting and spreading HIV/AIDS, and conflicts with regard to inheritance following the passing of the husband in a polygamous marriage are always foreseeable.<sup>60</sup>

Murray submits that it is hard to determine ways in which polygamous marriages are incompatible with notions of human rights. I however argue that this type of marriage always results in the violation of right to equality between men and women. Although both women may be married, the husband usually treat them differently provided that they are ranked differently e.g. first, second, third wife etc. Our communities are now comfortable with the notion of polygamy but are not ready to accept polyandry and that in itself can be described as discriminatory to women.<sup>61</sup>

Section 1 of the Constitution mentions the right to equality and the right to dignity as the values upon which the Republic of South Africa is founded as a sovereign democratic state.<sup>62</sup> Moreover Langa in the Bhe case noted:

“The rights to equality and dignity are the most valuable rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender”.<sup>63</sup>

Therefore, I submit that the recognition of polygamous marriage and payment of *lobola* create a platform for violation of the right to equality and dignity. As such, preservation of custom must not clash with human rights, because rights must be prioritized. The debate still remains as to how this customary

---

<sup>59</sup> Mswela M ‘Cultural practices and HIV in South Africa’ 2009 *PELJ* 172.

<sup>60</sup> Flint A *HIV/AIDS in Sub-Saharan Africa: Politics, aid and globalization* (2011) 63.

<sup>61</sup> Section 8(d) of the Equality Act.

<sup>62</sup> Section 1 of the Constitution.

<sup>63</sup> Bhe v Magistrate Khayelitsha 2005 (1) BCLR 1 (CC) para 71.

practice fits in our constitutional state which shall form part of our discussion below.

### **3.4 Harmful cultural practises in a constitutional state**

Majority of African countries restrict cultural practices that degrade or are injurious to the physical and mental health of women and children. Male circumcision, virginity testing, *ukuthwala*, *lobola* as well as polygamy are customs that we must preserve as part of our culture. However, such preservation must not be in violation of protected fundamental rights such as the right to bodily integrity, the right to privacy, the right to human dignity, and the right to equality.

As a signatory to CEDAW, South Africa has committed to eradicating discrimination against women that based on marital or familial relationships. In particular, it is required by customary law to discourage, and ultimately outlaw polygamous marriages. Notably, the practice is becoming less common as there are concerns about the extent to which customary law supports and condones it.

Cultural rights can be exercised as long as they don't hurt children, this is according to treaties such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child.<sup>64</sup> In this regard, Article 24(3) of the CRC mandate state parties to take all effective and suitable measures to eliminate customs that are harmful to children's health.<sup>65</sup> According to Article 21(1)(a) and (b) of the African Charter, state parties are required to take all reasonable steps to outlaw customs and practices detrimental to children's welfare, healthy growth and development of the child and in particular:

---

<sup>64</sup> The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) (Hereinafter referred to as the African Charter); The Convention on the Rights of the Child, 1990 (Hereinafter referred to as The CRC).

<sup>65</sup> Article 24(3) of The Convention on the Rights of the Child, 1990.

“those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status.”<sup>66</sup>

Moreover, Article 17 of the African Charter states that it is the responsibility of the state to uphold and safeguard the morals and traditional values acknowledged by the community as well as every person’s freedom to freely participate in his or her community’s culture.<sup>67</sup> On the other hand, Article 22(1) guarantees all peoples right to the development of their culture while giving appropriate knowledge to their freedom and identity in the equal enjoyment of the common heritage of mankind.<sup>68</sup> The family is required in terms of The African Charter’s Articles 18, 27 and 29(7) to uphold moral principles and family history.<sup>69</sup>

The question of acceptability and suitability of customs such as virginity testing still remains a mystery in our modern South Africa. This is due to the fact that peer pressure greatly affects the participants’ decisions and that children frequently do not want to be excluded, and as a result consent to be tested, as demonstrated above. The Children’s Act, as amended, establishes limitations on when children can participate in virginity testing and circumcision. It is only when a girl child is older than 16 that she can participate in virginity testing and the requirements under section 12(5) need to have been complied with.<sup>70</sup> It is trite to note that the age requirement is not complied with adequately. Young girls around the age of 10 fall victims of this human right disregard.

The child may not be marked in any way, and the findings of the test may not be shared without the child’s permission.<sup>71</sup> Only male children who are older than the age of 16 are eligible for male circumcision.<sup>72</sup> However, the Act allows for certain exceptions in which a male child may be circumcised before

---

<sup>66</sup> Article 21(1)(a) of the African Charter.

<sup>67</sup> Article 17(3) of The African Charter.

<sup>68</sup> Article 22(1) of The African Charter.

<sup>69</sup> Articles 18, 27 and 29(7) of the African Charter.

<sup>70</sup> Section 12(5) of The Children’s Act.

<sup>71</sup> Section 12(6) and (7) of The Children’s Act.

<sup>72</sup> Section 12(9)(b) and (c) of The Children’s Act.

reaching the required age of 16 years, which is done mostly for religious or medical purposes.<sup>73</sup>

With all being said, we need to not forget the need to acknowledge that South Africa is a diverse society comprised of broad range of communities. We ought to maintain the uniqueness of our African communities by regulating cultural activities through legislation and the Constitution.<sup>74</sup> Therefore, there is a need to harmonize customary law with the Bill of rights and other pertinent human rights documents, since doing so will make it easier to stop harmful cultural practices, especially those that are targeted at the marginalized groups such as women and children.

### **3.5 Conclusion**

This chapter has elaborated on the conflict that frequently occurs between culture and human rights through discussion of traditional customs. As a result, in order to achieve a meaningful amount of success when dealing with the conflict between culture and human rights, in specific contexts, Mubangizi suggest that a practical, adaptable and multi-faceted strategy must be used in this regard.<sup>75</sup> Legislative and constitutional measures are important, but they may not be relied on completely .<sup>76</sup> Human rights education is clearly necessary to reduce the conflicts between culture and human rights, but it should concentrate on particular cultural and community circumstances.<sup>77</sup> Human rights education may also be crucial in growth and development of culture in diverse society like South Africa.<sup>78</sup> The following chapter will assess some of international, regional and national instruments that are vital in protection of women and children's rights.

---

<sup>73</sup> Section 8 of The Children's Act.

<sup>74</sup> Section 39 of The Constitution provides for limitation of rights in certain instances.

<sup>75</sup> Mubangizi JC 2012 *JWS* 45.

<sup>76</sup> Mubangizi JC 2012 *JWS* 45.

<sup>77</sup> Mubangizi JC 2012 *JWS* 45.

<sup>78</sup> Ssenyonjo M 'Culture and the human rights of women in Africa: Between light and shadow' 2007 *JAL* 65.

## CHAPTER FOUR

### INTERNATIONAL, REGIONAL, AND NATIONAL LAWS AND POLICIES ON WOMEN AND CHILDREN'S RIGHTS

#### 4.1 Introduction

South Africa is well known for having many progressive laws and policies aimed at advancing gender equality and children's rights. The preceding chapter had a look at the interplay between culture and human rights in South Africa. It highlighted some of the harmful practices carried out in violation of human rights. This chapter deals with some international, regional, and national laws and policies that are important in protecting women's and children's rights.

Since 1994, South Africa has ratified a large number of conventions and agreements at the international and regional levels. The government is then required to regularly update international organizations on its efforts to eliminate inequality, and social injustice as well as its progression in doing so. It is therefore trite that I have a look at the effectiveness of these policies in the realization of women's and children's rights.

The fundamental idea of equal protection of human rights and equality is firmly rooted in the protection of women's rights against all types of discrimination.<sup>1</sup> International, regional and national laws that safeguard human rights express these ideas. The Universal Declaration of Human Rights resulted in the development of the International Covenant on Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights.<sup>2</sup> Both these two covenants including the UDHR make up the International Bill of Rights. International instruments are binding on all

---

<sup>1</sup> 'Women and children's rights' available at [http://www.wacolnigeria.org/women\\_and\\_children\\_right.doc](http://www.wacolnigeria.org/women_and_children_right.doc) (accessed on 31 October 2022).

<sup>2</sup> The Universal Declaration of Human Rights (hereinafter referred to as the UDHR); the International Convention on Economic, Social and Cultural Rights (As confirmed in the case of *Fraser v Children's court, Pretoria North and Others* 1997 (2) 261 para 272A, hereinafter referred to as ICESOR) and the International Covenant on Civil and Political Rights (Hereinafter referred to as the ICCPR).

member states that ratifies them. The International Bill of rights protects a wide range of individual rights and freedoms, this includes *inter alia* political, economic, social, cultural and civil rights. Furthermore, the International Convention on the Elimination of all Forms of Discrimination against Women recognise and protect the rights of women. I shall then examine the above-mentioned instruments and others that protect the rights of women and children.

## **4.2 International human rights instruments**

### *4.2.1 The Universal Declaration on Human Rights*

The UDHR is the first international document to specify the rights that should be granted to each and every person. South Africa is a state party to all international human rights treaties that are rooted in the UDHR. According to the UDHR all human beings are born free and equal in dignity and rights<sup>3</sup> This declaration was unanimously ratified by the general assembly as a commitment by all nations to uphold and promote human rights. The preamble of the UDHR makes it clear that the dignity and equality of all members of the human rights family is the inherent cornerstone of justice and freedom and peace in the world.<sup>4</sup> The UDHR enables women's and children's rights to find more support. As indicated earlier, customary law focuses more on the promotion of the interests of groups and the UDHR took a more focussed approach, which necessitates the promotion of the rights of an individual.

Every individual has a right to enjoy the rights contained in the UDHR without any discrimination of any kind.<sup>5</sup> Article 27 states that everyone has the right to freely engage in community and cultural activities.<sup>6</sup> Cultural rights forms an integral part of communities. This then means cultural rights are viewed as human rights and therefore individuals have a guaranteed right to practice

---

<sup>3</sup> Article 1 of the UDHR.

<sup>4</sup> Preamble of the UDHR, para 1.

<sup>5</sup> Article 2 of the UDHR.

<sup>6</sup> Article 27 of the UDHR.

their culture however such enjoyment must be free of discrimination of any kind. It is understood that any cultural custom carried out in violation of any human right in this case of women and children is not in any way protected under the UDHR.

#### *4.2.2 International Convention on the Elimination of all Forms of Racial Discrimination*

Any distinction, exclusion, restriction or preference based on race, colour, descent, national or ethnic origin that has an intention or effect of obstructing the recognition or enjoyment including excessive of human rights and fundamental freedom in the political, economic, social and cultural or any other sphere of public life is referred to as “racial discrimination” according to Article 1 of ICERD.<sup>7</sup> The ICERD does not only look at the rights of women but it also recognises and protects the rights of every individual. This international convention gives more emphasis of non-discrimination and equality.

One notable protection of women and children’s rights is the right to inheritance. State parties are obliged by article 5 (c) (v) and (vi) of ICERD to prohibit and abolish all kinds of racial discrimination and to uphold everyone’s right to equality under the law, regardless of their race, colour, national, or ethnic group.<sup>8</sup> It is as a result of the ICERD that women now have a right to own property either alone or in association with others. Women and children can now inherit despite their marital status or lineage. This Convention, therefore, successfully protected women and children against any form of discrimination.

#### *4.2.3 The International Convention on the Elimination of all forms of Discrimination Against Women*

Article 1 of the CEDAW defines discrimination as any differentiation or restriction based on sex in the political, economic, social, civil, or any other

---

<sup>7</sup> Article 1 of the International Convention on the Elimination of all Forms of Racial Discrimination (hereinafter referred to as the ICERD).

<sup>8</sup> Article 5 (c) (v) and (vi) of the ICERD.

sector of life.<sup>9</sup> CEDAW contains specific requirements that each member state must follow. The ongoing pursuit of gender equality, which is a target that no member state has yet attained, is one of the duties placed on all state parties.

*Inter alia* CEDAW places more emphasis that:

“.....states parties must take all appropriate measures, including legislation in order to ensure the full development and advancement of women, with the main aim of guaranteeing them the exercise of and enjoyment of human rights and fundamental freedoms on the basis of equality”.<sup>10</sup>

These commitments serve as a constant barometer that is used for all nations. According to CEDAW, achieving gender equality necessitates both the elimination of discrimination and the full recognition of all rights including those of girls and women.<sup>11</sup> It is acknowledged in the preamble that there is a significant prejudice against women, and that this discrimination breaches the principle of equality and respect for human dignity.

South Africa ratified the CEDAW and therefore committed itself in undertaking a series of measures aimed at eradicating discrimination against women and children in all forms, these include factors such as:

- Integrating the principle of equality between men and women in their legal systems;
- Elimination of all discriminatory laws and adoption of suitable laws that prohibit discrimination against women and children;
- Establish tribunals and public institutions that ensure adequate protection of women and children against any form of discrimination.<sup>12</sup>

Although the right to equality is incorporated in the South African Constitution, discrimination still persists. Discriminatory policies, and practices most importantly in the customary and religious spheres remain in action.<sup>13</sup> For

---

<sup>9</sup> Article 1 of CEDAW.

<sup>10</sup> Article 3 of CEDAW.

<sup>11</sup> Salil S 'Millennium Declaration and Development Goals: Opportunities for Human Rights, SUR' (2005) 2(2) *IJHR* 16.

<sup>12</sup> Ngaba S 'CEDAW and Eliminating Discrimination against Women' 1995 Agenda 82.

<sup>13</sup> A shadow report on the implementation of the 'Convention on the elimination of all forms of discrimination against women' submitted by Centre for the study of violence and reconciliation 7.



example, the consent of women in the decision to be married was traditionally not significant. Tradition and customs dictated that women thought of males as superior to them. In light of the gender gap that existed for years, men prayed on women. The coming in of the CEDAW then guaranteed women's equal recognition in circumstances of e.g. access to marital property and inheritance, which attempted to close this disparity. The foundation for recognising gender-equality is laid out on Article 6 of the CEDAW.<sup>14</sup> This provision acknowledges the right to equality in marriages as well as the right for women to consent to a marriage and thus provides that:

“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that...no marriage shall take place without the consent of both parties”.<sup>15</sup>

CEDAW protects the right of women to choose and it also recognizes culture as a significant factor in shaping gender and family roles.<sup>16</sup> Reproductive rights of women are also recognised in this international treaty.

#### *4.2.4 International Covenant on Economic, Social and Cultural Rights*

South Africa has ratified the ICESOR on the 12<sup>th</sup> of January 2015. All the rights outlined in the ICESOR must be practiced free from all forms of discrimination, including those based on race, colour, sex, language, religion, political opinion, national or social origin and any other form of discrimination.<sup>17</sup>

Article 2 of the ICESOR contains an equality provision which is against discrimination on various grounds.<sup>18</sup> South Africa signed and ratified the ICESOR. Most of the socio-economic rights are enshrined in the Bill of Rights. However, it is important to note that all the socio-economic rights are subject to availability of resources.

---

<sup>14</sup> Article 6 of CEDAW.

<sup>15</sup> Article 6 of CEDAW.

<sup>16</sup> Article 5 and 16 of CEDAW.

<sup>17</sup> Article 2 of ICESOR).

<sup>18</sup> Article 2 of ICESOR.

#### *4.2.5 International Covenant on Civil and Political Rights*

Each and every member state has a responsibility to pass laws that prevents unfair discrimination, as they are necessary in defending and advancing human rights. The concept of non-discrimination is codified in all the international covenants. As a result, everyone is afforded the same rights which are equal.<sup>19</sup>

regardless of a person's colour, sex, language, economic setting, national or social origin their rights should be promoted and upheld equally.

Equality between men and women is acknowledged by the International Covenant on Civil and Political Rights (the ICCPR). The ICCPR states that both women and men have the right to equality, non-discrimination and dignity, this instrument also provides for children's minimal rights.<sup>20</sup> States that have ratified the covenant have committed themselves in ensuring that men and women enjoy all their civil and political rights on an equal basis.<sup>21</sup>

The ICCPR mandates gender equality, in circumstances such as inheritances, property rights, and marital rights, and emphasizes that it should be maintained. These achievements ought to be made possible through respecting and advancing each person's human rights. The ICCPR further, states that everyone is equal before the law, and is entitled to equal legal protection without discrimination, and shall be provided with equal and effective protection of against discrimination.<sup>22</sup>

This Covenant made people more especially women to not feel like they are deprived of their rights because they believe they are less than others because of their gender or sexuality. Contrary to the later discussion, customarily women were not allowed to make decisions in their homes and were not aware of their rights under customary law.

---

<sup>19</sup> See the UDHR.

<sup>20</sup> The preamble of the International Covenant on Civil and Political Rights.

<sup>21</sup> Article 2 of the ICCPR.

<sup>22</sup> Maymon PL 'Judging women who kill their batterers in the United States: A violation of their right to equality before the Law under the ICCPR' 2021 *AUIR* 98.

For instance, in a case where the husband is deceased, women and children of the deceased husband usually find themselves being disowned by the heir to the inheritance who happens to be an elderly male of the deceased.<sup>23</sup> These types of decisions were taken without the woman's consent, and as such this deprived them of their rights. The ICCPR member states are required to make constant efforts to advance democracy and solidify the rule of law.

It is just unfortunate that most of the customary marriages in South Africa are unregistered.<sup>24</sup> This is because the South African socio-economic structure made it difficult for the vast majority of women living in rural areas to acquire more knowledge of their marital rights. South Africa had a high rate of illiteracy which actually formed part of the main barriers that made it difficult to eradicate discrimination. It is generally claimed that access to education is a pre-requisite for access to justice. Therefore, women and children's rights will be infringed and discrimination will persist if their rights to education are ignored.

### **4.3 Regional human rights instruments**

#### *4.3.1 The Protocol to the African Charter on human and Peoples rights on the Rights of Women in Africa*

The Protocol to the African Charter on Human and Peoples rights on the Rights of Women in Africa, commonly known as the Maputo protocol, guarantees women protection against discrimination and extensive measures for the protection of gender equality.<sup>25</sup> Other measures addressed in the Maputo protocol includes policies which are aimed at addressing detrimental or harmful cultural practices, discrimination and violence against women, equal political involvement, marital rights and also the rights of women in

---

<sup>23</sup> See the Bhe case.

<sup>24</sup> 'Good governance practices for the protection of human rights' available at [www.ohchr.org/documents/publications/goodgovernance.pdf](http://www.ohchr.org/documents/publications/goodgovernance.pdf). (accessed on 08 October 2022).

<sup>25</sup> The Protocol to the African Charter on Human and Peoples rights on the Rights of Women in Africa, 2005 (Hereinafter referred to as the Maputo protocol).

relation to family planning and reproduction health forms part of the protocol. Having the main aim of ensuring that all parties commit to taking the appropriate actions, including allocating funding for the full and effective acknowledgement of the rights therein, this protocol was put in place.<sup>26</sup>

As indicated earlier, women were customarily not given any chance to be their family's primary providers or breadwinners as such role was only afforded to males. Not much respect was afforded to women in their homes as males always appeared to be in control of almost everything. The Maputo Protocol made it a mandate that the later must be eliminated. It went as far as recognising women's rights in their marriages, during divorce. It also afforded more rights to widows. The Maputo Protocol also afforded women the right to property, which was not the case before.

Article 15 and 19 gives women assurance that they can acquire adequate standard of living for themselves as well as their families, after the death of their spouses.<sup>27</sup> This is the same stance that was taken by CEDAW, which stated that household and family environment is very crucial. This is concerning the impact that customs and potential repercussions may tend to have in a family setting where there is an unequal relationship between spouses.<sup>28</sup>

#### *4.3.2 The African Charter on the Rights and Welfare of the Child*

Concerning the protection of children, South Africa ratified the African Charter on the rights and Welfare of the Child (Hereinafter referred to as the African Charter).<sup>29</sup> The African Charter outlines that a child needs legal protection in circumstances of freedom, dignity, and security. The Charter further states that a child occupies a special and privileged position in our African society.

---

<sup>26</sup> Geng J *the Maputo Protocol and the reconciliation of gender and culture in Africa. In Research Handbook on Feminist engagement with International Law* (2019) 2.

<sup>27</sup> Article 15 and 19 of the Maputo protocol.

<sup>28</sup> Article 6, 7 and 21 of CEDAW.

<sup>29</sup> The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990).

Children also needs to grow in a family environment that is filled with happiness, love, and understanding.

Article 21 of the African Charter specifically protect children against any harmful social and cultural practices, and it states that:

“States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular.....those customs and practices discriminatory to the child -on the grounds of sex or other status”<sup>30</sup>

Every state party that has ratified this Charter are therefore required to ensure that children are not subjected to any practice that may be detrimental to their being. Article 21 makes it clear that good child development is of paramount importance and as such must be respected at all times.

This is the same Charter that is against child marriage. It requires member states to set a minimum age for entering into a marriage.<sup>31</sup> Eighteen years seems to be the appropriate suggested age for a person to enter into marriage. It is therefore understood that customary practices like *ukuthwala* being carried out on children younger than the suggested age, cannot suffice in this instance.

#### *4.3.3 The African Charter on Human and People’s Rights*

Discrimination on the basis of race, ethnic group, colour, sex, language, religion, political, or other opinions is prohibited under the African Charter on Human and Peoples Rights (hereinafter referred to as the ACHP).<sup>32</sup> Every member of the community has guaranteed equality, and any form of discrimination is outlawed. However, it must be noted that women’s and children’s rights remain severely constrained in many parts of Africa and that calls for intervention.

---

<sup>30</sup> Article 21 (1) of the African Charter.

<sup>31</sup> Article 21 (1) (c) of the African Charter.

<sup>32</sup> Article 2 of the African Charter on Human and people’s rights, 1981.

## 4.4 National laws

### 4.4.1 A Brief discussion of national laws

South Africa forms part of member states that ratified and approved various international human rights instruments aimed at safeguarding human women and children's rights, such as the ones discussed above. These instruments norms and standards are being incorporated into national legislation for example the Equality Act which I already explained in chapter 2. The Recognition Act forms part of national statutes that are responsible for carrying out international norm and principles. South Africa may also ask for advice from specialised international institutions like the ILO, on how to effectively bring its domestic legal system into compliance with global norms and standards.

The Constitution establishes a framework for its administration and acts as binding agreement between the government and its constituents. The Constitution also outlines a variety of inherent rights and liberties for every South African. Section 1 of the constitution which is a replica of the interim Constitutional values set out that constitutional values includes non-racialism and non-sexism; constitutional supremacy and the rule of law; as well as human dignity and equality.<sup>33</sup>

The Constitution upholds, defend and emphasizes the value of human rights. It outlines how women and children's rights should be treated and how their human dignity should be upheld in South Africa.

### 4.4.2 The Recognition of Customary Marriages Act

Customarily, men used to see the payment of *lobola* as a purchase of a woman and as such the woman had no choice but to follow every commandment that her husband places upon her.<sup>34</sup> According to the Recognition Act, payment of *lobola* is not specified as a necessary

---

<sup>33</sup> Section 1 of the Constitution.

<sup>34</sup> Tebbe N 'Inheritance and disinheritance: African customary law and constitutional rights' 2008 *TJR* 468.

requirement for the establishment of a valid customary marriage. However, the most important requirement that must be complied with is that a customary marriage must be entered into and celebrated in terms of customary law.<sup>35</sup>

Furthermore, section 6 of the Recognition Act affords a wife in a customary marriage the full status and well-being accorded that is the same as the one accorded to men.<sup>36</sup> Therefore, a woman married in terms of customary law now has the ability to enter into contracts, institute and defend legal actions. Women can now acquire and dispose of assets but such rights must be enforced on the basis of equality with her husband and most importantly subject to the matrimonial property regime governing the marriage. Consent to be married under customary marriage is also one of the listed requirements.<sup>37</sup> This then means that no one may be married against his or her will.

#### **4.5 National laws on children's rights**

South Africa adopted a dual legal system, one that simultaneously recognizes customary law on the one side and the common and statutory laws on the other, in an effort to satisfy the dual responsibility to preserve children's protection rights and cultural rights. Cultural rights are protected under the Constitution.<sup>38</sup> Additionally, the Constitution mandates that customary law be applied by courts; nevertheless, courts and tribunals must interpret it in accordance with the spirit, purpose, and goals of the Bill of Rights.<sup>39</sup> In cases where customary law and children's rights are in conflict, the Constitution additionally stipulates that the child's best interests must take precedence. All institutions are required under Sections 30 and 31 to reform or eliminate customary law that is damaging to children.<sup>40</sup>

---

<sup>35</sup> Section 3 (1) (b) of the Recognition Act.

<sup>36</sup> Section 6 of the Recognition Act.

<sup>37</sup> Section 3 (1) (a) (ii) of the Recognition Act.

<sup>38</sup> Section 30 & 31 of the Constitution.

<sup>39</sup> Section 39 (2) of the Constitution.

<sup>40</sup> Section 30 & 31 of the Constitution.

Children's rights such as the right to good family and parental care, to be protected from maltreatment, neglect and abuse, and the right to be protected from harmful practices, are protected in the Constitution.<sup>41</sup>

Majority of children's rights are protected under various legislations which seek to resolve any conflicts that may arise when it comes to the protection of human rights, specifically any conflict that may arise between customary practises and children's human rights. The Children's Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Child Justice Act are the foundational legislations that upon which the national child protection system is built.<sup>42</sup>

The preamble of the Children's Act makes it clear that the rights of every child are of paramount importance, and the state has the responsibility to protect, promote and fulfil those rights.<sup>43</sup> This legislation plays a huge role when it comes to defending children against e.g. discrimination, harmful cultural practices. Accordingly, section 12 (1) outlines that:

“Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being”<sup>44</sup>

The Children's Act goes further to prohibit and regulate some of the cultural practices and customs that are viewed as harmful to children such as forced marriages, child marriages, virginity testing and child circumcision.

#### **4.6 Analysis of cases on women and children's rights**

Sachs in the case of *Du Plessis and others v De Klerk and others* stated that the issue of how the Constitution interact with customary law or indigenous would eventually need to be resolved.<sup>45</sup> The court additionally ruled that the bill of rights would outlaw the principle of patriarchy, which forms the basis of

---

<sup>41</sup> Section 28 of the Constitution.

<sup>42</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act No 38 of 2005 as amended by Act 41 of 2007 and Act No 75 of 2008 and the Child Justice Act 75 of 2008.

<sup>43</sup> The preamble of the Children's Act.

<sup>44</sup> Section 12 (1) of the Children's Act.

<sup>45</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).



most indigenous African laws, thereby weakening the fundamental principles of indigenous law.

The Bhe case ruling is the one that declared Section 23 of the Black Administration Act together with its regulations as discriminatory to women based on gender and sex. This Act prohibited women from inheriting property. The court made it clear that the exclusion of women from being an “heir” thereby not allowing them to inherit property was mainly supported by the system of patriarchy.

As already indicated this system regarded women as subservient to their husbands as they are regarded as perpetual minors. In its decision, the court gave an emphasis to a number of international instruments in which South Africa is a signatory to. These instruments include CEDAW, The African Charter, as well as the Maputo Protocol. These instruments are the ones that emphasizes the importance of protecting women’s rights and elimination of all forms of discrimination. The court then reached a conclusion that prohibiting women from inheriting property on the ground of gender or sex amounted to a serious violation of women’s right to equality and which then have a negative impact on their human dignity.

The issue in Shilubana and others v Nwamitwa case was that women were traditionally barred from holding traditional tribal leadership positions.<sup>46</sup> The Constitutional court stated that a female child was previously not permitted by the Valoyi tribe to hold the position of a chief. However, the equality clause in the new Constitution viewed this type of practice as discriminatory. As a result, the Constitutional court had to take into consideration the principles of democracy and the new South African Constitution and then laid down that it is now acceptable for a female child to be an heir since she also requires to be treated equally to a male child.

---

<sup>46</sup> Shilubana and Others v Nwamitwa 2008 (9) BCLR (CC).

The validity of the customary norm of succession, which prohibited women from inheriting was an issue in the case of *Mthembu v Letsela*.<sup>47</sup> This norm was applied as a result of the rule of male primogeniture. Due to lack of sufficient evidence, the court was unable to rule on the legality of the customary marriage and instead submitted the case for oral evidence. The court then upheld the parties' submission that no customary marriage existed between the parties. Although the court decided that the rule of interstate succession applied it did not agree with the rule of male primogeniture.

The validity of a marriage concluded in terms of the *ukuthwala* custom was challenged in the case of *Jezile v State*.<sup>48</sup> Here, the appellant went to his home village to find himself a wife whom according to him must be less than the age of 18. It was his wish that the marriage be concluded in terms of *ukuthwala* custom which was commonly practised in his home village. In his search he managed to find a 14-year-old girl whom he then decided to send his people to negotiate for *lobola* on his behalf.

The complainant refused to be married but her rejection was not taken into consideration. The appellant moved back to his place of residence with the complainant and further had sexual intercourse with the complainant, which according to the complainant, the appellant forced himself on her. At issue was whether the complainant left with the appellant willingly to his place of residence or not. The complainant consent to sex was also at issue. The trial court then found that it was less probable that the complainant might have left willingly with the appellant and inconceivable that she consented to be married.

In its decision, the court made reference to the constitutional and criminal law provisions that are related to trafficking, gender equality, forced marriage as well as rape. The court gave an emphasis to South African international obligations. Accordingly, the court referred to Article 26 of CEDAW, this is the provision that mandates states parties to take appropriate measures that

---

<sup>47</sup> *Mthembu v Letsela and Another* 1998 (2) SA 675 (CC).

<sup>48</sup> *Nvumeleni Jezile v The State* 2015 (2) SACR 452 (WCC).

modifies social and cultural relations between men and women, aimed at eradicating discrimination and patriarchal customs and other practices.

The court also referred to article 16 which emphasizes the need to ensure equality in marriages and also the importance of free and full consent when entering into a marriage. The court also gave recognition to the point that South Africa is a signatory to the Maputo protocol which operates as a sibling to CEDAW.

By relying on the amicus submissions that held that the practice of *ukuthwala* custom requires that both parties consent to be married through a mock abduction which also formed part of the of the ritual. The form of *ukuthwala* that took place in this case was then referred as violent which includes co-ersion of the girl to be married of whom it appears that she did not consent to be married let alone to have sexual intercourse with the appellant.

Accordingly, the court then held that customary practices than involved violent form of *ukuthwala* could not be justified and protected under the South African law. Consequently, the appellant cannot evade liability for the offenses of human trafficking for the purpose of sexual intercourse and rape by relying on customary practices.

The negative impact of *lobola* payment were set out in the case of *S v Mvamvu*.<sup>49</sup> In this case the couple were married under customary law for a period of four (4) years and were having marital issues. Consequently, the wife moved back in with her brother. She presumed that the marriage was over, but the husband was certain that it was still going strong because *lobola* had not been paid back.<sup>50</sup> Despite having a domestic violence order against him, he kidnapped and raped his "wife" in different occasions in an effort to entice her to come back to his house.<sup>51</sup> The court a quo had the right to

---

<sup>49</sup> *S v Mvamvu* (350/2003) 2004 ZASCA 90; (2005)1 All SA 435 (SCA).

<sup>50</sup> *Ibid*, para 4.

<sup>51</sup> *Ibid*, para 5&6.

deviate from the obligatory minimum life sentence for rape, as a result the Supreme Court of Appeal submitted that:

“Taking into consideration the evidence presented it would appear that at the time of the offence that the couple were indeed in all probability still formally married under customary law. It is clear from his evidence that at the time of the incidents the accused honestly (albeit entirely misguidedly) believed that he had some ‘right’ to conjugal benefits.”<sup>52</sup>

This case raises a lot of questions as to are women whom *lobola* has been paid for and not returned when they decide to leave the marriage entitled to be abused by their husbands? If such is the case a huge percentage of women will be subjected to domestic violence and left with no choice but to remain in abusive marriages until *lobola* has been returned.

The validity of section 7(1) of the Recognition of Customary Marriages Act was declared invalid in the case of *Ramuhovhi v The President of the Republic of South Africa and others*.<sup>53</sup> This provision provided that the proprietary consequences of customary marriages entered into before the commencement of this Act continue to be governed by customary law.<sup>54</sup> The applicant’s polygamous marriage to their husband who was deceased was at issue. The deceased entered into subsequent marriage which was in community of property with another wife who was stated as a beneficiary to the deceased last will and testament. On appeal, the court confirmed the constitutional invalidity of section 7(1) of the Recognition Act on the basis that it is discriminatory against women in pre-Act polygamous customary marriages on the bases of gender and race, ethnic or social origin.

Women’s right to inherit property was recognized and enforced in the case of *Moseneke v The Master*.<sup>55</sup> In this case the man died intestate. Upon his death he had an estate which includes among others immovable property, motor

---

<sup>52</sup> Ibid, para 16.

<sup>53</sup> *Ramuhovhi and Others v The president of the Republic of South Africa* 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC).

<sup>54</sup> Section 7(1) of the Recognition Act.

<sup>55</sup> *Moseneke v The Master* 2001 (2) SA 18 (CC).

vehicles, shares, unit trusts and insurance policies. The deceased had a wife and 4 (Four) sons. The deceased's estate was reported to the Master of the High Court and had to be dissolved in terms of the Black Administration Act.

The Women's League Centre joined the matter as amicus curiae after the matter was Master passed the estate to Pretoria high court. The Women's League argued that section 23(7)(a) and Regulation 3(1) must be declared unconstitutional on the basis that they are discriminatory against all African women on the ground of culture, sex and gender.

They further argued that the procedures under the Administration of Estates Act were much better than the procedures employed in terms of the BAA. The Women's League also emphasized that the interaction between law of intestate succession of deceased black Africans, race, gender and culture was conflicting in a way that African women were discriminated against either directly or indirectly. The court then held that the wife had a right to inherit the property of her deceased husband.

The court had the chance to consider granting a father custody of his little daughter after the death of his wife in the case of *Hlophe v. Mahlalela and others* when the lobolo had not been fully paid at the time of her death.<sup>56</sup> According to Van den Heever AJ, the Court determined that regardless of what the position may have been generally in indigenous law regarding child custody, the fundamental principles thereof have been partially eliminated in favor of the common law.<sup>57</sup> The court also offered the following rules:

- "The interests of the child are prioritized in custody disputes (under customary law);
- the conclusion of a civil marriage following a customary marriage imposes a new personal status on the spouses, one governed by common law;

---

<sup>56</sup> *Hlophe v Mahlalela and another* 1998 (1) SA 449 (TPD)

<sup>57</sup> *Ibid*, para 458F - G.

- Any arrangement that appears to involve the purchase or sale of children will not be enforced."<sup>58</sup>

As a result, the court decided that the simple delivery or non-delivery of *lobolo* cannot be used to resolve issues regarding the custody of a minor. This is a clear indication that the customary belief that children belong to the husband's family cannot suffice in this modern day. This is simply because women have equal rights to those of their husbands with regard to custody of their children unless if other circumstances exist.

One thing that is common in the above cases is the violation of women and children's rights in the name of custom. It is quite common that the interests of women and children are not given adequate recognition. This then amounts to discrimination and violation of women and children's rights. The coming in of the Constitution made it mandatory that the rights of marginalized groups are prioritized. This requirement has resulted in the promotion and respect of their human rights as individuals.

#### **4.7 Conclusion**

International, regional and national measures are important in strengthening the protection of women and children's rights. This chapter has given an elaboration on some measures of international, regional and national frameworks that the state uses to defend and promote women and children against any type of discrimination as well as against harmful customary practices. The next chapter deals with the general conclusion as well as recommendations.

---

<sup>58</sup> Ibid, para 458G -459C.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

The preceding chapters examined some international, regional and national laws and policies on women and children's rights. It also examined some decided court cases that involved harmful cultural practices against women and children in South Africa. The overall purpose of the study was to investigate and analyse the interaction between patriarchal customs and the enjoyment of human rights by women and children in South Africa.

This chapter first provides the summary of the study before making conclusions and recommendations. This study discusses the patriarchal customs and practices that continue to be practiced within communities despite them being harmful and in violation of women and children's rights. It also highlighted women and children's rights as protected in the Constitution and national legislation. This was carried out by making a comparison between the application of women and children's rights before and after the coming into operation of the 1996 Constitution of South Africa.

Central to this study is the principle of equality. This principle forms the basis of all international, regional, and national instruments aimed at protecting women's and children's rights.<sup>1</sup> This study focused on South African women and children who are marginalized and vulnerable to harmful cultural practices. The ignorance and continuous persistence of rights violations and disregard of women and children's rights through harmful customs motivated this study.

Additionally, the study was motivated by policies and reported cases that remain ineffective and unable to eliminate harmful customs. However, this study was only limited to South Africa and was carried out by reviewing available literature such as journal articles, books, reported cases, internet

---

<sup>1</sup> See Article 1-5 of CEDAW, Article 2 of ICESOR and Article 2 of the CRC.

sources, and human rights instruments aimed at the promotion and protection of women and children's rights.

Having outlined the summary of the study, I will proceed to make conclusive remarks and recommendations drawn from the study.

## **5.2 Human rights education**

The necessity of human rights education is this study's most significant recommendation. Women and children must be empowered and made aware of their rights, as well as any laws or policies already in place that have been adopted to protect them. Additionally, women should question any custom that interferes with their ability to exercise their human rights.

When women's rights are violated, the Constitution's provisions must be used as a point of departure. Mobilizing, organizing, educating, and conveying of information to the general public is necessary as it will have positive impact on vulnerable victims, including organisations such as community radio stations and television as they are used as primary sources of information within communities.

The community must be made aware of the difficulties faced by women and children and the necessity for African societies to adopt a culture of respect for women. Continuous education is necessary to encourage men and women to take part in overcoming ingrained kinds of resistance to changing specific cultural customs. Despite having a number of international, regional, and national measures that forbid harmful cultural practices against women and children and guarantee equality and respect for human rights, harmful customs still persist.<sup>2</sup> It is also trite that instruments that protect human rights must be translated into all local languages spoken in South Africa in order to ensure that everyone has access to this information.

---

<sup>2</sup> Akolokwu GA & Raji BA 'Discriminatory customary practices against women's rights: An account of intervention strategies by Southern African Developing States' 2019 ILJ 98.



### 5.3 Conclusion on decided cases

A notable number of reported cases found certain customs to be in violation of women and children's rights.<sup>3</sup> The coming into force of the Constitution played a significant role in the protection of women and children and had the main aim of closing this gap. Furthermore, customs such as *Ukuthwala* are no longer practiced fully within communities. However, although the situation is improved, we need to not forget to consider certain factors that affect cultural practices. The right to equality before the law is of paramount importance to ensure that women and children are protected against harmful customs. The rule of male primogeniture, which formed the basis of most discussed cases is no longer fully practiced within communities.<sup>4</sup>

This study revealed a number of factors that lead to the violation of women and children's rights through harmful customs. Firstly, there is a lot of pressure from the community members as these two groups of people want to be accepted within the communities they reside in. Secondly, the notion of preserving culture also forms part of the reasons why a lot of women enter into polygamous marriage, and also the reason why children are circumcised even before the required age.<sup>5</sup>

### 5.4 Recommendations based on reported cases

A lot still needs to be learned about harmful cultural practices and women's and children's rights. It is evident that there is a growing amount of research on how traditional customs affect women and children's rights in South Africa. Clearly case law has not accurately evaluated and appreciated women's opinions and position about harmful customs. The significance of recognizing women and children's rights in relation to patriarchal customs is highlighted in this study.

---

<sup>3</sup> See *Nnumeleni Jezile v The State* 2015 (2) SACR 452 (WCC), the customary custom of *Ukuthwala* was criticized in this case.

<sup>4</sup> *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; SAHRC v President RSA* 2005 (1) BCLR 1 (CC).

<sup>5</sup> *Mbajjorgu G* (2017) 14 *BJS* 27.

Furthermore, this study revealed that it is not only women who are subjected to patriarchal customs but also young boys and girls suffer the same fate. Additionally, this study revealed that men and community members need to change their attitudes in an attempt to eliminate harmful customs. It is clear that a number of women are not aware of the laws that guarantee their fundamental human rights, particularly the right to equality, the right to human dignity and protection against harmful cultural practices.

The acceptance of and persistence of the violation of women's and children's rights to equality and the persistence of harmful practices is as a result of ignorance of the law. It is crucial to increase awareness and empower women to lead the reformation process. The findings and suggestions of this study could help the government and other organisations to take further steps to educate and empower women so they can stand up for their human rights.

### **5.5 Dealing with patriarchal customs**

Every effort to eradicate human rights infringement must be investigated, ideally with the participation of both men and women. Men frequently make decisions that have an impact on women without considering their rights and interests as women.<sup>6</sup> Every practice and custom that is harmful or promotes any prejudice to any member of the community must be challenged. Therefore, it is crucial to spread knowledge about the shortcomings of these customs as well as their possible impact on the rights of women and children.

Marriage could be used as an entrance point, since it serves as the centre of the family and the persistence of patriarchy and gender roles. For example, the prerequisites for a customary marriage must be satisfied for a marriage to be valid. Customary marriage was and is still seen as a union between two families as opposed to two individuals. Initially, customary marriage was not concerned with consensus between the bride and the groom. Generally, the

---

<sup>6</sup> Hindin MJ 'Women's autonomy, women's status and fertility-related behavior in Zimbabwe' (2000) 19(3) *PRPR* 256.

elders' judgment was final and the wishes of the engaged couple were disregarded. An agreement between the initiators on behalf of the engaged couple was a crucial prerequisite. This has since changed and the agreement between the marrying couple is one of the important requirements of a customary law marriage. Furthermore, children, families and traditional institutions need to be made aware of the negative consequences of polygamous marriages and payment of *lobola*.

*Ukuthwala* custom, which is known as marriage by abduction and is often done without the girl's consent, is no longer permissible. As I indicated earlier, consent of the marrying couple is now vital. It worthy to note that there was no minimum age set for entering into marriage under customary law, but this has since changed.

Regarding *Ukuthwala*, Mwambene concludes that a variety of lobbying campaigns directed towards the legislative and executive departments of government cannot lead to a full prevention of *ukuthwala*. Rather, the participation of communities affected is of paramount importance.<sup>7</sup> The campaign against child marriages needs to be led by traditional leaders, who should be given full support from government organizations and civil society. As a result, community-level message and action against child marriage will have more credibility. Working with formal traditional leadership frameworks such as the national and provincial Houses of Chiefs and Traditional Leaders would be beneficial in this regard. This is in addition to working with individual traditional leaders.

Considering how closely the practice of child marriage relates to family poverty, lobbying at this level should emphasize the advantages of earning an income along with the wellbeing of the family if females do not marry young.<sup>8</sup> In parallel, advocacy efforts should offer social security and community

---

<sup>7</sup> Mwambene L & Kruuse H 'Thethin edge of the wedge: Ukuthwala ,alienation and consent' (2017) 33(1) *SAJHR* 19.

<sup>8</sup> Malayandi TL, Prof Madya & Dr Ismail SMB 'Preventing child marriage in Malaysia to protect children's rights' 2021 *LNS* 6; also see the case of Jezile which took place in one of the rural areas that have been found to be one of the poorest villages.

development alternatives to boost family incomes. Additionally, traditional leadership structures must be equipped to assist parents who violate the prohibition on child marriages. Traditional leaders should be in a position to direct the families in question to service providers that may offer parenting and financial help rather than witnessing a scenario of stigmatisation and potential abuse of the rights to dignity and other rights of parents.

### **5.6 Individuals' engagements in eliminating harmful customs**

Men typically have significant authority in almost every aspect of society, and as such, they might be crucial to achieving gender equality. A peaceful connection between men and women can only be achieved through changes in men's understanding and attitudes to cultural norms.<sup>9</sup>

The goal is to encourage men to accept responsibility for their behaviour in their social and familiar roles in order to promote gender equality and ensure that men and women can function at an equal footing in both public and private life. This can be achieved through campaigns and role plays that illustrate the unfavourable effects of harmful customs and traditions.

The social status of children also requires to be elevated in order to enhance their full enjoyment of human rights. There is a need to build an environment that will allow responsiveness of children's engagement within the family, conventional leadership forums as well as within the community itself. This can be made possible through the creation and development of parenting programs with suitable information and by the creation of more public venues wherein children are able to voice their opinions.

Institutions such as religious organisations, schools, and youth programs must be contacted to encourage children's participation in plays, dances, and debates as a way of expressing their wants, rights and concerns.

---

<sup>9</sup> Kambarami M seminar series on 'Femininity, sexuality and culture: Patriarchy and female subordination in Zimbabwe' *South Africa: Africa Regional Sexuality Resource Centre.*

## **5.7 Community engagement**

Raising awareness within communities, especially in rural areas is very vital. Community engagement is important because it could modify people's perspectives, mind-sets and attitudes towards prejudice against young girls and women.<sup>10</sup> It is important that a community as a whole has more knowledge about cultural customs and that must not be underestimated.

Not only should political, religious, and traditional leaders educate their followers about the negative repercussions of harmful customs, they should also give them the skills they need to understand and uphold human rights. The foundation for a new approach to women's rights is the right to equality, non-sexism, and protection from discrimination as guaranteed by the Constitution. The State also needs to create a realisable plan for educating people about national and international human rights laws, including giving women access to the resources they need for information as well as support and guidance.

## **5.8 Access to information**

The human right to equality includes the prohibition of discrimination. Therefore, if only men are granted access to knowledge through education, women's right to receive information is infringed. Everyone has the right to access any information including the information that is stored by the state, as well as any information held by a third party that is necessary for the exercise or protection of any rights.

The Promotion of Access to Information Act is one of the national instruments that made it easy for marginalised groups to receive necessary information.<sup>11</sup> This Act goes hand in hand with section 8 of the Constitution.<sup>12</sup> The system of administration in South Africa before April 27 1994 is said to have produced,

---

<sup>10</sup> United Nations 'Eradicating harmful practices against women and children' available at <https://www.ohchr.org/en/stories/2014/11/eradicating-harmful-practices-against-women-and-girls> (accessed on 29 November 2022).

<sup>11</sup> Promotion of Access of Information Act (Hereinafter referred to as the Information Act)

<sup>12</sup> Section 8 of the Constitution.

among other things, a culture of secrecy and indifference in both public and private organizations, which frequently resulted in abuses of power and violations of human rights.<sup>13</sup>

According to the Constitution, everyone has the right to an education. Accordingly, if women are granted this opportunity, they can learn and assert their legal rights. Giving effect to the rights at hand means that the right of access to information is given an opportunity to foster an environment of accountability and transparency in both public and private authorities. As such, it will actively work towards creating a society in which citizens have reliable access to information, enabling them to exercise and defend all their legal rights.

### **5.9 Existing challenges of case law**

Despite the government's efforts to eliminate harmful customs and ensuring equality, women and children still face difficulties when it comes to accessing education and knowledge of their rights. For South Africa to reach the goal of eliminating harmful practices, more research on customs that violate women and children's rights needs to be carried out. The following may assist policymakers in discovering solutions to the issues involving women and children's rights.

- 1) Future studies must examine the causes of women's complicity in traditional behaviours that violate their rights, as well as the difficulties and other social barriers that stand in the way of efforts to acknowledge women's and children's rights.
- 2) It is important to conduct research on the contribution of education to the eradication of harmful customary practices. This requires them to be included in educational and development programs. The state must offer support and assistance in rural and urban areas.
- 3) There is a need to raise community and public knowledge of the present cultural practices that infringe on women's and children's rights through

---

<sup>13</sup> The Preamble of the Information Act.

disseminating information relating to the effects of customs.<sup>14</sup> However, such information must be easily accessible and available. Local languages must be used in this circumstance.

- 4) Laws are meant to be enforced, and as such there must be feedback on how the adopted laws, campaigns, and community programs aimed at eradicating harmful customs are working.<sup>15</sup> There must also be an opportunity for commentaries aimed at closing the gaps as well as how to address identified problems.

### **5.10 Recommendations**

These recommendations can assist policy makers to adopt and create a more specific and efficient system that adequately protects women and children rights. Elimination of certain custom and assurance of gender equality will never be possible without empowering women and children and also educating men and young boys as to what rights do they have. Moreover, failure to enlighten them on the types of customary practices that infringe human rights will only mean that those rights cannot be fully realised.

It follows logically from the findings that there is a need to combat all types of harmful customs as well as discrimination of any type. Human rights respect must be at the forefront instead of continuous stereotypes and customary practices. Women need to be educated as early as possible on the detrimental effects of various societal norms and cultural practices that have an impact on their rights. Women and children can benefit from these rights if they are given an opportunity to be adequately recognised. Failure to do as suggested will result in difficulties in the enjoyment of these rights.

Furthermore, men should be educated on how to respect women's rights, especially gender equality. Awareness programmes to spread information in local languages in particular and pertinent provisions of national laws

---

<sup>14</sup> United States Agency International Development 'Democracy, human rights and governance' available at <https://www.usaid.gov/southern-africa-regional/democracy-human-rights-and-governance> (accessed on 29 November 2022).

<sup>15</sup> Briefing paper by Index S 'Sexual exploitation of children in South Africa' (1986) 47.

forbidding discriminatory customary practices, notably those against women, should be offered and distributed by the government.

The government must use every effort to start programmes that educate lawmakers, municipal officials, and law enforcement officers about the detrimental effects of particular customs and traditional practices. This should be done with the goal of ensuring the application of legislation intended to get rid of cultural traditions that are bad for society, and it should cover both the protection of people negatively impacted by those activities as well as their potential victims' rights.

### **5.11 Conclusion**

Conflict between human rights and customary law practices still remain within our communities. However, the preceding recommendations can be used as an effective tool to facilitate and ensure fast development of customary law in the context of women's and children's rights. Research of this nature needs to be carried out, with the aim of not only making recommendations that need to be implemented by the legislature, with the aim of bringing change through legislation. Nevertheless, further study must be carried out in order to provide recommendations that will allow all affected parties such as community members, traditional leaders, and independent institutions to take part in the development process. This will require active participation of them altogether as a collective in an attempt to find solutions and a way forward that will ensure protection for all, as well as improving the protection of women and children especially those in rural communities.

Through the recommendations in this study, partnership that will facilitate development and reformation of customary law practices needs to be formed. This will assist in ensuring a safe environment for both women and children within their communities. Consequently, the development of customary law in these communities may be facilitated by the following guidelines:



- 1) Respectful and safe customary practices that consider women and children's rights.
- 2) Community discussions and engagements aimed at protecting women and children against harmful cultural practices.
- 3) Women and children's participation in issues that affect their rights.
- 4) Adequate support that will assist those who are close to women and children in acquiring necessary resources and information that will protect them against any form of abuse.
- 5) Responsive services such as community programs.

## BIBLIOGRAPHY

### Books

Bekker JC et.al *Introduction to legal pluralism in South Africa* (2006) Lexis Nexis.

Bennet TW *Human rights and African Customary Law: Under the South African Constitution* (1995) Cape Town: Juta.

Bennett TW *A Sourcebook of African Customary Law for Southern Africa* (1991) Juta & Co Ltd.

Bennett TW *Customary Law in South Africa* (2010) Juta and Company Ltd.

Chigwedere A *Lobola: The pros and cons* (1982) Books for Harare.

Devenish GA *Commentary on the South Africa Bill of Rights* (1998) Durban, Butterworths.

Flint A *HIV/AIDS in Sub-Saharan Africa: Politics, aid and globalization* (2011) Springer.

Kleyn D & Viljoen F *Beginners Guide for Law Students* 3 ed (2002) Juta, Cape Town.

Koyana DS *Customary law in a changing society* (1980) Cape Town: Juta & Co.

Lorber J *Gender inequality and Feminist theory* 4 ed (2010) Oxford University Press.

Nagel CJ *Commercial law* 3ed (2006) LexisNexis, Butterworth.

Ngidi, R (ed) *Upholding the best interests of the child in South African customary law* (2009) Juta, Cape Town.

Niekerk C & Mwambene L *The Gumede judgment: Another lost opportunity to develop customary law and protect women's rights? Speculum Juris* (2009) 23(1) Lexis Nexis Publishers (Pty).

Olivier WH et al 'Indigenous law' (2003) Butterworth South Africa.

Palmer VV *Mixed Jurisdiction Worldwide: The third legal family* (2001) Cambridge University Press, Cambridge.

Stromquist NP (ed) *Women in the Third World: An encyclopedia of contemporary issues* (2014) New York: Garland Pub.

### **Journal Articles**

Akolokwu GA & Raji BA 'Discriminatory customary practices against women's rights: An account of intervention strategies by Southern African Developing States' 2019 *Illum Law Journal* 89-120.

Albertyn C & Davis D 'Legal realism, transformation and the legacy of *Dugard*' *South African Journal on Human Rights* (2010) 26.2 *South African Journal on Human Rights* 188-216.

Albertyn C & Goldblatt B 'Facing the challenge of transformation: Difficulties in the development of an Indigenous Jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248-276.

Albertyn C 'The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa' 2009 *Constitutional Court Review* 165-208.

Albertyn C "Substantive equality and transformation in South Africa" (2007) 23 *South African Journal on Human Rights* 253-276.

Bassey SA & Bubu NG 'Gender inequality in Africa: a re-examination of cultural values' 2019 *Cogito: Multidisciplinary Res* 21-36.

Curran E & Bonthuys E 'Customary law and domestic violence in rural South African communities' (2005) 21(4) *South African Journal on Human Rights* 607-635.

Dekkers W., Hoffer C. & Wills J. 'Bodily integrity and male and female circumcision' (2005) 8 *Medicine Health Care & Philosophy* 179-191.

Diala & Kangwa 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' 2019 *De Jure Law Journal* 189-206.

Durojaye E 'Woman, but not human': widowhood practices and human rights violations in Nigeria' (2013) 27(2) *International Journal of Law, Policy and the Family* 176-196.

Grant E 'Human rights, cultural diversity and customary law in South Africa' (2009) 1 *Journal of African Law* 2-23

Himonga C 'Taking the gap - 'Living law land grabbing' in the context of customary succession laws in Southern Africa' 2011 *Acta Juridica* 114-139.

Hindin MJ 'Women's autonomy, women's status and fertility-related behavior in Zimbabwe' (2000) 19(3) *Population Research and Policy Review* 255-282.

Hodgson TF 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy' 2015 *Acta Juridica* 1999.

Jewkes R 'Child sexual abuse and HIV infection' 2004 *Human Science Research Council* 130-141.

Johnson MP & Leone JM 'The differential effects of intimate terrorism and situational couple violence findings from the national violence against women survey' (2005) 26(3) *Journal of Family issues* 322-349.

Kaganas F & Murray, C. 'The contest between culture and gender equality under South Africa's interim constitution' 1994 *Journal of Law and Bad Society* 409-433.

Kaime T 'Convention on the rights of the child and the cultural legitimacy of children's rights in Africa: Some reflections' 2005 *African Human Rights Law Review* 221-238.

Kambarami M seminar series on 'Femininity, sexuality and culture: Patriarchy and female subordination in Zimbabwe' *South Africa: Africa Regional Sexuality Resource Centre*.

Malayandi TL, Prof Madya & Dr Ismail SMB 'Preventing child marriage in Malaysia to protect children's rights' 2021 *Legal Network Series* 1-34.

Maluleke MJ 'Culture, tradition, custom, law and gender equality' 2012 *Potchefstroom Electronic Law Review* 02-22.

Martin p & Mbambo B 'An exploratory study on the interplay between African customary law and practices and children's protection rights in South Africa' 2011 *Save The Children* 5-103.

Maymon PL 'Judging women who kill their batterers in the United States: A violation of their right to equality before the Law under the ICCPR' 2021 *American University International Law Review* 97-149.

Mbajjorgu G 'The paradox between Customary Law and Human Rights Law in South Africa: The patriarchal nature of Customary Law' (2017) 14 *Bangladesh e-Journal of Sociology* 18-30.

Monyane C 'Is Ukuthwala another form of forced marriage?' 2013 *South African Review of Sociology* 64-82.

Mswela M 'Cultural practices and HIV in South Africa' 2009 *Potchefstroom Electronic Law Journal* 171-213.

Mubangizi JC 'A South African perspective on the clash between culture and human rights, with particular reference to gender-related cultural practices and traditions' (2012) 13(3) *Journal of International Women's Studies* 33-48.

Mutangadura G 'Women and land tenure rights in Southern Africa: A human rights-based approach' *Presentation at Land in Africa: Market Asset or Secure Livelihood Conference, London, UK 2004*.

Mwambene L & Kruuse H 'The thin edge of the wedge: Ukuthwala, alienation and consent' (2017) 30(1) *South African Journal on Human Rights* 25-45.

Mwambene L & Sloth-Nielsen J 'Benign accommodation? Ukuthwala, forced marriage and the South African Children's Act.' 2011 *African Human Rights Law Journal* 1-22.

Ndulo M 'African Customary Law, customs, and women's rights' 2011 *Indiana Journal of Global Legal Studies* 87-120.

Ngaba S 'CEDAW and eliminating discrimination against women' 1995 *Agenda* 81-89.

Rautenbach C 'South African common and customary law on intestate succession: A question of harmonization, integration or abolition' (2008) (3) *Electronic Journal of Comparative Law* 1-15.

Rwezaura BA 'Traditionalism and law reform in Africa' (Jan. 28, 1983) (paper presented at a seminar jointly arranged by the Fundamental Rights and

Personal Law Research Project, Centre for Applied Social Sciences, and the Department of Law, University of Zimbabwe) 5-26.

Salil S 'Millennium declaration and development goals: Opportunities for Human Rights, SUR' (2005) 2(2) *International Journal on Human Rights* 7-21.

Siyo L & Mubangizi C 'The independence of South African Judges: A Constitutional and legislative perspective' 2015 *Potchefstroom Electronic Law Journal* 817-846.

shadow report on the implementation of the 'Convention on the elimination of all forms of discrimination against women' submitted by Centre for the study of violence and reconciliation 1-74.

Ssenyonjo M 'Culture and the human rights of women in Africa: Between light and shadow' 2007 *Journal of African Law* 39-67.

Tebbe N 'Inheritance and disinheritance: African customary law and constitutional rights' 2008 *The Journal of Religion* 466-496.

Tebbe N 'Inheritance and disinheritance: African customary law and constitutional rights' (2008) 88(4) *The Journal of Religion* 466-496.

Thobejane TD & Takayindisa F ' An Exploration of Polygamous Marriages: A Worldview' (2014) 5 *Meditarranean Journal of Social Sciences* 1056-1066.

Twala, C. 'The African tradition of initiation and circumcision: A curse or cure in South Africa?' (2007) *South African Journal of Cultural History* 22-33.

## **Cases**

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 7 BCLR 687 (CC).

Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; SAHRC v President RSA 2005 (1) BCLR 1 (CC).

Du Plessis and Others v de Klerk and Another 1996 (3) SA 850 (CC).

Fraser v Children's court, Pretoria North and Others 1997 (2).

Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC).

Hlophe v Mahlalela and another 1998 (1) SA 449 (TPD)

Moseneke v The Master 2001 (2) SA 18 (CC).

Mthembu v Letsela and Another 1998 (2) SA 675 (CC).

Nvumeleni Jezile v The State 2015 (2) SACR 452 (WCC).

Ramuhovhi and Others v The president of the Republic of South Africa 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC).

S v Mvamvu (350/2003) 2004 ZASCA 90; (2005)1 All SA 435 (SCA).

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC).

Van Breda v Jacobs 1921 AD 330.

### **List of Statutes**

Convention on the Elimination of Discrimination Against Women, 1979.

The Protocol to the African Charter on Human and Peoples rights on the Rights of Women in Africa, 2005.

The African Charter on Human and people's rights, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, (1986).

The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990).

The International Covenant on Civil and Political Rights, 1976.

The Protocol on the Rights of Women in Africa, 2005.

The Convention on the Rights of the Child, 1990.

The Universal Declaration on Human Rights,

### **South African Acts and Other Legislations**

Children's Act 38 of 2005.

Du Plessis and Others v de Klerk and Another 1996 (3) SA 850 (CC).

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

Promotion of Access of Information Act

Recognition of Customary Marriages Act 120 of 1998.

Reform of Customary Law of succession and Regulation of related matters Act 11 of 2009.

### **Internet Sources**

'Good governance practices for the protection of human rights' available at [www.ohchr.org/documents/publications/goodgovernance.pdf](http://www.ohchr.org/documents/publications/goodgovernance.pdf). (accessed on 08 October 2022).

'Women and children's rights' available at [http://www.wacolnigeria.org/women\\_and\\_children\\_right.doc](http://www.wacolnigeria.org/women_and_children_right.doc) (accessed on 31 October 2022).

Botha M 'Lobola and the Misuse of Culture' available at <http://www.genderjustice.org.za/in-issue-1-may-2011/lobola-and-misuse-of-culture> (accessed on 22 November 2022).

Kaufman CDT & Stadler J 'Adolescent pregnancy and parenthood in Africa' 2001 Available at <http://health.iafrica.com/psychonline/qa/general/124598.html>. (Accessed on 24 June 2022).

Makonese M 'Customary law and its implications on the enjoyment of human rights by women in South Africa: A focus on Botswana, Lesotho and South Africa' 2016 available at <https://www.sadcla.org/content/customary-law.pdf> (accessed on 24 may 2022).

Malesa KJ 'Married men's perceptions of their wives sexual and reproductive health rights: A study conducted in the rural area of Waterberg District Limpopo Province, South Africa' available at <https://doi.org/10.1080/23293691.2021.2016136> (accessed on 08 April 2022).

Minister Bheki Cele, Quarter One Crime Statistics 2022/2023 Available at [Minister Bheki Cele: Quarter One Crime Statistics 2022/2023 | South African Government \(www.gov.za\)](https://www.gov.za/minister-bheki-cele-quarter-one-crime-statistics-2022-2023) (accessed on 27 July 2022).

Ngaba S 'CEDAW: Eliminating discrimination against Women' available at <https://www.jstor.org/stable/4065976> (accessed on 08 April 2022).

Schoeman Malan MC 'Recent Developments Regarding South African Common and Customary Law of succession' succession' available at



<https://www.ajol.info/index.php/pelj/article/view/43433> (accessed on 10 January 2023).

Statistics South Africa '2022 Mid-year population estimates [cited 28 July, 2022]' available at <https://www.statssa.gov.za/publications/P0302/P03022022.pdf>. (accessed on 30 October 2022).

United Nations 'Eradicating harmful practices against women and children' available at <https://www.ohchr.org/en/stories/2014/11/eradicating-harmful-practices-against-women-and-girls> (accessed on 29 November 2022).

United Nations Development Program 'Gender Equality Strategy' available at <https://www.undp.org/publications/gender-equality-strategy-2022-2025> (accessed on 29 November 2022).

United States Agency International Development 'Democracy, human rights and governance' available at <https://www.usaid.gov/southern-africa-regional/democracy-human-rights-and-governance> (accessed on 29 November 2022).

World Health Organisation 'Virginity testing' A human rights violation, with no scientific basis-UN at <https://news.un.org/en/story/2018/10/1023401> ( Accessed on 28 July 2022).