



**UNIVERSITY of the  
WESTERN CAPE**

**A critical analysis of Zimbabwe's legal response to traditional cultural practices and  
gender- based violence.**

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**Master of Laws (Legum Magister)**

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**01 DECEMBER 2014**

**DECLARATION**

I declare that *A critical analysis of Zimbabwe’s legal response to traditional cultural practices and gender-based violence* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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## **DEDICATION**

I dedicate this work to my mother Mrs Nkomo, my siblings Charity, Poula, Nkosana and Bukhosi and friends for their unconditional love and support in all my endeavors in life.

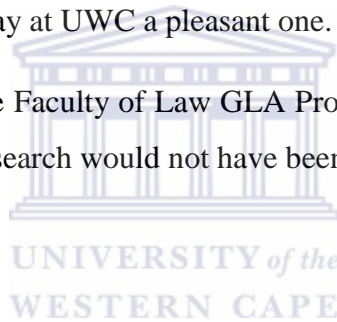


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## ACRONYMS AND ABBREVIATIONS

African Charter	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
African Protocol	Protocol to the African Charter on Human and People's Rights
CRC	Convention on the Rights of the Child
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

## KEY WORDS

Zimbabwe

Women

Customary law

Traditional cultural practices

Violence

Gender

Patriarchy

Traditional

Legal

Family



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## CHAPTER 1: INTRODUCTION

### 1.1 BACKGROUND

Gender-based violence is defined in the United Nations (UN) Declaration on the Elimination of Violence against Women as: '[a]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life.'<sup>1</sup>

It has also been defined by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) as '... a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.<sup>2</sup>

Insights into the causes of gender-based violence, in most African communities, have been traced to gender imbalances that exist between men and women under customary law and practices that subordinate women.<sup>3</sup> In Zimbabwe, there are several traditional practices, rituals and attitudes that can be seen as perpetuating gender based violence.<sup>4</sup> For example, under traditional customary rules and practices, a husband has the right to physically chastise his wife as a correctional measure if a wife disobeys, or neglects any marital duties.<sup>5</sup> In addition, women

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<sup>1</sup> Article 1 of the Declaration on the Elimination of Violence Against Women adopted by the UN General Assembly resolution in 1993.

<sup>2</sup> Article 1 of the Convention on the Elimination of all Forms of Discrimination Against Women Recommendation 19 of the 1991. It should be however, noted that for purposes of this study, both definitions are adopted. Gender-based violence in this study will be limited to women and girls because most traditional cultural practices in Zimbabwe have a negative impact on the human rights of these groups of people.

<sup>3</sup> Mashiri L 'Conceptualisation of 'Gender Based Violence in Zimbabwe' (2013) (3) *International Journal of Humanities and Social Science* 94. See also Bennett TW *Customary Law in South Africa* (2008) 1; according to Bennett customary law derives from social practices that the community concerned accepts as obligatory.

<sup>4</sup> Mugugunyeki M 'Traditional practices perpetuate Gender-Based Violence' available at <http://www.thestandard.co.zw/2013/12/08/traditional-practices-perpetuate-gender-based-violence/> (accessed 19 March 2014).

<sup>5</sup> Muronda F 'Country Report- Zimbabwe' available at [http://www.unafei.or.jp/English/pdf/RS\\_N069\\_17PA\\_Muronda.pdf](http://www.unafei.or.jp/English/pdf/RS_N069_17PA_Muronda.pdf) (accessed 3 March 2014).

are not able to inherit estates and property<sup>6</sup> left by their deceased male relative because traditional customary rules only allow the males to inherit.<sup>7</sup> Furthermore, during the negotiation of a customary marriage, only men are allowed to receive and negotiate *lobolo* on behalf of the woman's marriage.<sup>8</sup> Related to this, children born out of a valid customary marriage belong to the father and his family if the requirement of *lobolo* has been met.<sup>9</sup> Polygamy, which only allows men to have more than one wife, is still prevalent in Zimbabwe.<sup>10</sup> There is also the cultural practice of wife inheritance by the male relative to the deceased<sup>11</sup> which can sometimes be against a woman's consent to such a union.<sup>12</sup> Furthermore, there are several customary sexual delicts in which only men are allowed to claim damages for the delicts committed to women. For example, if a woman commits adultery, her husband can claim damages from the man who committed adultery with his wife but a wife cannot claim such damages.<sup>13</sup> Gender division of

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<sup>6</sup> Mugugunyeki M 'Traditional practices perpetuate Gender-Based Violence' available at <http://www.thestandard.co.zw/2013/12/08/traditional-practices-perpetuate-gender-based-violence/> (accessed 19 March 2014).

<sup>7</sup> Benschop M 'Women in Human Settlements Development - Challenges and Opportunities -Women's Rights to Land and Property' available at [www.unhabitat.org/downloads/docs/1556\\_72513\\_csdwomen.pdf](http://www.unhabitat.org/downloads/docs/1556_72513_csdwomen.pdf) (accessed on 2 April 2014). See also the judgment in *Magaya v Magaya* SC 210/98 where the court enforced the customary rule of male primogeniture. This rule excludes women and extramarital children from inheriting property left by their deceased male relative.

<sup>8</sup> Kheli O 'Tricky art of negotiating lobola' available at <http://mg.co.za/Article/2012-02-17-tricky-art-of-negotiating-lobola> (accessed 2 April 2014). See also Bennett TW *Customary Law in South Africa* (2008) 220-221. This has the potential of disempowering a woman's right to equality and dignity.

<sup>9</sup> 'Implementation of the Convention on the Rights of the Child' available at <http://www.children.gov.za/Publications/policies3.htm> (accessed 2 April 2014).

<sup>10</sup> Baobab Tales 'Some facts about marriage in Zimbabwe' available at <http://baobabtales.wordpress.com/2010/03/06/some-facts-about-marriage-in-zimbabwe/> (accessed 6 April 2014). Nearly a fifth of marriages in Zimbabwe are estimated to be polygamous; about eighteen percent of women are in polygamous marriages.

<sup>11</sup> Constitutionally speaking 'Further thoughts on polygamy' available at <http://constitutionallyspeaking.co.za/further-thoughts-on-polygamy/> (accessed 2 April 2014).

<sup>12</sup> The term used by the Ndebele speaking people in Zimbabwe to refer to wife inheritance by the deceased's relatives is '*ukungena*'; the same term is also used in South Africa.

<sup>13</sup> Thornberry E 'Custom Contested Views: Validity of "ukuthwala" depends on definition of custom' available at <http://www.customcontested.co.za/ukuthwala/> (accessed 2 April 2014). See also Knoetze E 'Customary law of delict' in Rautenbech C, Bekker JC, Goolam NMI *Introduction to legal pluralism* 3ed (2010) 1-15.

labour is also rife, especially in rural communities where women are usually placed in the kitchen while mostly men are often breadwinners.<sup>14</sup> These instances show that traditional cultural practices lead to gender-based violence because women are prohibited from enjoying rights and freedom on the basis of equality with men.

## 1.2 PROBLEM STATEMENT

Traditional cultural practices that lead to gender-based violence constitute a violation of the women's rights and fundamental freedoms<sup>15</sup> and as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW ) Committee rightly observed are: '... a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.<sup>16</sup> In particular, the women's right to dignity, mental, and physical integrity, liberty and security of the person, as well as their rights to be free of inhuman or degrading treatment and torture are breached.<sup>17</sup>

Zimbabwe is a party to several international and regional standards that proscribe human rights violations and acts of violence against women. These include: the Convention on the Elimination of All forms of Violence Against Women (CEDAW) (1991)<sup>18</sup>; African Charter on Human and Peoples Rights (African Charter)<sup>19</sup>; Protocol to the African Charter on Human and People's

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<sup>14</sup> Mugunyeke M 'Traditional practices perpetuate Gender-Based Violence' available at <http://www.thestandard.co.zw/2013/12/08/traditional-practices-perpetuate-gender-based-violence/> (accessed 19 March 2014).

<sup>15</sup> Horvath E 'Gender based violence laws in Sub-Saharan Africa' available at [http://www.reproductiverights.org/sites/.../GBV\\_Laws\\_in\\_Sub\\_Saharan\\_Africa.pdf](http://www.reproductiverights.org/sites/.../GBV_Laws_in_Sub_Saharan_Africa.pdf) (accessed 19 March 2014).

<sup>16</sup> Article 1 of CEDAW General Recommendation 19.

<sup>17</sup> Horváth E 'Gender based violence laws in Sub-Saharan Africa' available at [http://www.reproductiverights.org/sites/.../GBV\\_Laws\\_in\\_Sub\\_Saharan\\_Africa.pdf](http://www.reproductiverights.org/sites/.../GBV_Laws_in_Sub_Saharan_Africa.pdf) (accessed 19 March 2014).

<sup>18</sup> Convention on the Elimination of All forms of Violence Against Women (CEDAW) was adopted by the United Nations General Assembly in 1979; Zimbabwe ratified it on the 13<sup>th</sup> of May 1991.

<sup>19</sup> The African Charter on Human and Peoples' Rights was adopted in June 1981 and entered into force in October 1986. Zimbabwe signed this instrument in February 1986 and ratified it in April 1986.

Rights on the Rights of Women in Africa.<sup>20</sup> Zimbabwe is also a party to the 2004 Solemn Declaration on Gender and Equality in Africa;<sup>21</sup> and the SADC Protocol on Gender and Development.<sup>22</sup>

In compliance with these international standards,<sup>23</sup> the Constitution of Zimbabwe proscribes discrimination, which includes customary values and practices, mostly practiced in the private sphere.<sup>24</sup> The Government of Zimbabwe has also enacted several statutes and regulations aimed at protecting women from gender based violence. These include: the Domestic Violence Act of 2007,<sup>25</sup> Sexual Offences Act of 2001,<sup>26</sup> Administration of Estates Amendment Act Chapter 6:07 of 1997,<sup>27</sup> the Deceased Persons Family Maintenance Act of 1987,<sup>28</sup> and the Sexual Discrimination Removal Act of 1980.<sup>29</sup>

Despite these legal initiatives, gender based violence in the name of cultural practices and values remains high in Zimbabwe. A recent study by the Ministry of Women Affairs, Gender and Community Development, in conjunction with Gender Links, has revealed shocking statistics

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<sup>20</sup> The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa was adopted in Mozambique on July 11, 2003; Zimbabwe ratified it in 2008.

<sup>21</sup> African Union: Solemn Declaration on Gender Equality in Africa was signed in July 2004 – Addis Ababa.

<sup>22</sup> The protocol advocates for gender parity in all sectors and sets out 28 substantive targets for achieving gender equality by 2015.

<sup>23</sup> One of the ways through which States can comply with their legal international obligations as contained in treaties is by making those international norms or obligations part of the national legal or political order, that is, they become domesticated (internalised or incorporated).

<sup>24</sup> Section 56(3) of the Constitution of Zimbabwe 2013 provides that: "Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock."

<sup>25</sup> The Domestic Violence Act was enacted in 2007. It is a piece of legislation that was enacted to protect women from gender-based violence which is caused by culture among other factors.

<sup>26</sup> The Sexual Offences Act was enacted in 2001.

<sup>27</sup> Administration of Estates Amendment Act was enacted in 1997

<sup>28</sup> Deceased Persons Family Maintenance Act was enacted in 1987.

<sup>29</sup> Sexual Discrimination Removal Act was enacted in 1987.

that at least sixty eight percent of women have suffered from gender-based violence perpetrated by men that have been linked to traditional cultural practices and values such as wife inheritance and polygamy among others.<sup>30</sup> In another study by Armstrong indicates that many Shona men believe that wife battering is the traditional way of disciplining a misbehaving wife.<sup>31</sup>

Against this brief background, this study seeks to critically analyse Zimbabwe's legal response in protecting women from gender based violence perpetuated by traditional African customary rules and practices.

### 1.3 AIM

The main aim of the study is to critically assess Zimbabwe's legal response in protecting women from gender-based violence that can be linked to traditional African family laws and practices.

The research is guided by the following sub-objectives:

1. To examine international and regional standards on the protection of women from gender-based violence.
2. To discuss traditional cultural rules and practices and show how they lead to gender-based violence.
3. To examine Zimbabwe's legal framework for the protection of women from gender-based violence that can be linked to cultural practices; this will be done to determine its compliance with international and regional framework that seek to protect women from violence.

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<sup>30</sup> National Gender Policy 'Zimbabwe' available at <http://www.undp.org/content/dam/zimbabwe/docs/Governance/National%20Gender%20Policy%202013.pdf> (accessed 3March 2014).

<sup>31</sup> See Armstrong A 'Culture and choice: Lessons from survivors of gender violence in Zimbabwe' (1998) *Violence Against Women in Zimbabwe Research Project* as cited by Makahamadze T *et al* 'Examining the Perceptions of Zimbabwean Women About the Domestic Violence Act' (2011) xx(x) *Journal of Interpersonal Violence* 710.

4. To make recommendations where necessary.

## 1.4 LITERATURE REVIEW

While a lot has been written about gender based violence in Zimbabwe and its consequences on the victims, there is no research that directly focuses on Zimbabwe's legal response to gender-based violence that can be linked to traditional customary laws and practices. For instance, Mashiri's study focuses on the prevalent forms, pervasiveness and the effects of gender based violence and its relationship to development.<sup>32</sup> This study found that gender-based violence is a deterrent to development as it inhibits realisation of full potential which is critical to development.<sup>33</sup>

Furthermore, a study was undertaken by Counselling Services for Survivors of Domestic Violence which focuses on the consequences of domestic violence and the reason for the prevalence of such violence. This study found that although the Domestic Violence Act was enacted to protect women from gender-based violence that can be linked to cultural practices, it is in practice being treated as a social, rather than a legal issue by the Government and that this is one of the reasons for the prevalence of violence against women.<sup>34</sup>

Another important study in this area was conducted by the Human Rights Bulletin. This study focused on the factors that facilitate gender-based violence, and the traits, possible causes, and

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<sup>32</sup> Mashiri L 'Conceptualisation of 'Gender Based Violence in Zimbabwe' (2013) (3) *International Journal of Humanities and Social Science* 95.

<sup>33</sup> Mashiri L 'Conceptualisation of 'Gender Based Violence in Zimbabwe' (2013) (3) *International Journal of Humanities and Social Science* 95-98.

<sup>34</sup> Musasa Project 'Counselling services for survivors of Domestic Violence: Evaluation Of Services Provided By Musasa Project In Harare, Zimbabwe' available at [http://www.searcwl.ac.zw/index.php?option=com\\_docman&task...](http://www.searcwl.ac.zw/index.php?option=com_docman&task...) (accessed 3 March 2014).

effects of gender-based violence.<sup>35</sup> This study found that, women are affected more by gender-based violence than men, and that the violence is caused by the patriarchal nature of the Zimbabwean society.<sup>36</sup>

From the above literature, as pointed out earlier, none of the studies have focused on analysing Zimbabwe's legal response to gender based violence that can be linked to cultural practices. It is for this reason that this study seeks to cover this gap.

### **1.5 SIGNIFICANCE OF STUDY**

This study is important for the following reasons: it highlights the causes of gender-based violence that can be linked to traditional customary law and Zimbabwe's legal response; it provides literature to law makers on what policies they can make in dealing with gender-based violence that can be linked to traditional cultural practices; it also provides literature to students who will research on the same topic; and it highlights some of the possible solutions that can be used to address gender-based violence linked to customary laws and practices prevailing in Zimbabwe.

### **1.6 RESEARCH METHODOLOGY**

In critically assessing Zimbabwe's legal response to gender-based violence that can be linked to African customary law, the researcher will use sources of law such as: regional and international instruments and their optional protocols that advocate for the protection of women from all forms of discrimination and violence; comments from monitoring bodies; and relevant legislation and

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<sup>35</sup> Human Rights Bulletin 'Gender Based Violence in Zimbabwe' available at <http://www.hrforumzim.org/wp-content/uploads/2012/03/Gender-based-violence-in-Zim-WT20497.pdf> (accessed 3 March 2014).

<sup>36</sup> Human Rights Bulletin 'Gender Based Violence in Zimbabwe' available at <http://www.hrforumzim.org/wp-content/uploads/2012/03/Gender-based-violence-in-Zim-WT20497.pdf> (accessed 3 March 2014).

case law that deals with gender-based violence. In addition, sources such as textbooks, journal Articles, internet sources, reports of NGOs and newspaper Articles dealing with the topic in question will also be used.

## **1.7 CHAPTER OUTLINE**

Chapter 1 is the introduction. Chapter 2 will focus on international instruments and regional instruments on the protection of women from gender-based violence. The focus is on showing how these instruments have addressed the interaction between culture and gender-based violence. Chapter 3 will discuss different traditional cultural practices in Zimbabwe. The aim is to show how they conflict with international and regional standards on the protection of women from gender-based violence. Chapter 4 will assess whether Zimbabwe's compliance with international and regional standards on the protection of women from gender-based violence caused by traditional cultural practices as discussed in chapter 3 by looking at its legal framework. Chapter 5 will be a conclusion of the topic and possible recommendations will be made on what should be done to better protect women from violence caused by traditional cultural practices.



## CHAPTER 2: INTERNATIONAL AND REGIONAL INSTRUMENTS ON THE PROTECTION OF WOMEN FROM GENDER-BASED VIOLENCE

### 2.1 INTRODUCTION

One of the factors that indicate the presence of political commitment to end violence against women is the adoption of legal instruments and existence of institutional mechanisms which facilitate the elimination of violence against women.<sup>37</sup> To show its commitment, Zimbabwe is a signatory to several international and regional conventions that aim to combat gender-based violence. These include: the International Covenant on Civil and Political Rights (ICCPR);<sup>38</sup> International Covenant on Economic, Social and Cultural Rights;<sup>39</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>40</sup> African Charter on Human and Peoples' Rights (African Charter);<sup>41</sup> the Protocol to the African Charter on Human and Peoples' Rights (African Protocol);<sup>42</sup> SADC Protocol on Gender and Development;<sup>43</sup> the UN Convention on the Rights of the Child;<sup>44</sup> and the African Charter on the Rights and Welfare of

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<sup>37</sup> Study of the Secretary General 'Ending violence against women: from words to action' available at [www.un.org/womenwatch/daw/vaw/launch/english/v.a.w-exeE-use.pdf](http://www.un.org/womenwatch/daw/vaw/launch/english/v.a.w-exeE-use.pdf) (accessed 30 June 2014).

<sup>38</sup> International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly in December 1966, and came into force in March 1976, acceded to by Zimbabwe in August 1991.

<sup>39</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of December 1966. It entered into force in January 1976; Zimbabwe acceded to the (ICESCR) in May 1991.

<sup>40</sup> Convention on the Elimination of All Forms of Discrimination Against Women; adopted by the General Assembly of the United Nations in December 1979 and entered into force in September 1981; Zimbabwe acceded to the Convention in May 1991. However, it has not ratified the Optional Protocol to CEDAW.

<sup>41</sup> The African Charter on Human and Peoples' Rights was adopted in June 1981 and entered into force in October 1986. Zimbabwe signed this instrument in February 1986 and ratified it in April 1986.

<sup>42</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the AU in July 2003 and entered into force in November 2005. Zimbabwe signed this Protocol in November 2003, ratified in April and deposited it in September 2008.

<sup>43</sup> Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf) (accessed 30 June 2014).

<sup>44</sup> UN Convention on the Rights of the Child adopted in November 1989 (entered into force in September 1990) GA Res. 44/25 (1989), UN Doc A/RES/44/25 (1989). Zimbabwe acceded to this instrument in February 2012. This

the Child.<sup>45</sup> These instruments all recognise and protect the right to culture upon which traditional cultural practices leading to gender-based violence can be justified. At the same time, they give guidance on the approach to be taken in cases where culture conflicts with human rights.

It is for this reason that this chapter aims to show how international and regional frameworks have addressed the interaction between gender-based violence and traditional cultural practices. This will be achieved by looking at how each instrument recognises the right to culture and how it addresses the conflict between culture and human rights of women.

## 2.2 INTERNATIONAL INSTRUMENTS

The ICCPR and ICESCR form the cornerstone of an extensive series of internationally binding treaties covering a wide variety of issues in the field of human rights. The treaties define human rights and fundamental freedoms and set basic standards that have inspired a plethora of international and regional human rights conventions, declarations, sets of rules and principles.<sup>46</sup>

As a starting point, the ICCPR recognises minorities' right to culture. This is evidenced by its Article 27 which has been observed by the Committee on Civil and Political Rights (CCPR) to

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instrument together with the African Charter on the Rights and Welfare of the Child are relevant in this research because there are certain traditional cultural practices that are practiced in Zimbabwe that violate the human rights of the girl child. These are marriage by abduction and *kuripa ngozi*/ virgin pledging (child marriages).

<sup>45</sup> African Charter on the Rights and Welfare of the Child; adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and was entered into force in 1999. Zimbabwe ratified this instrument in January 1995 and deposited it in February 1995. It is important to discuss the provisions of the CRC and ACRWC because some traditional cultural practices that will be discussed in chapter 3 negatively affect the rights of girls.

<sup>46</sup> Fact Sheet 15 (Rev.1): Civil and Political Rights' the Human Rights Committee available at <http://www.ohchr.org/documents/publications/factsheet15rev.1en.pdf> (accessed 10 November 2014).

be the most widely accepted legally binding provision on minorities and provides the basis and inspiration for the UN Declaration on Minorities.<sup>47</sup> Article 27 reads:

*'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'*<sup>48</sup>

Furthermore, the CCPR notes that although Article 27 is expressed in negative terms, it nevertheless, recognises the existence of a 'right' and requires that it shall not be denied.<sup>49</sup> The CCPR States that with regard to the exercise of the cultural rights protected under Article 27, it observes that culture manifests itself in many forms.<sup>50</sup> In addition, the CCPR concludes that Article 27 relates to rights whose protection imposes specific obligations on State parties. One of these obligations is that State parties must ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.<sup>51</sup> Groni has observed that Article 27 merely guarantees the enjoyment 'of their own culture', that is to say, only the enjoyment of their specific minority culture without intercultural aspects; thereby, the participation in the cultural life of the majority is not guaranteed.<sup>52</sup> In addition, the wording 'in community with the other members of their group' was interpreted in a way that a purely individual enjoyment of culture is not protected by the same token.

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<sup>47</sup> Fact Sheet 15 (Rev.1): Civil and Political Rights' the Human Rights Committee available at <http://www.ohchr.org/documents/publications/factsheet15rev.1en.pdf> (accessed 10 November 2014).

<sup>48</sup> Article 27 ICCPR.

<sup>49</sup> Paragraph 6.1 Committee on Civil and Political Rights General Comment No. 23: Article 27 (Rights of Minorities) Adopted at the fiftieth Session of the Human Rights Committee, in April 1994.

<sup>50</sup> Para 7 Committee on Civil and Political Rights General Comment No. 23.

<sup>51</sup> Para 9 Committee on Civil and Political Rights General Comment No. 23.

<sup>52</sup> Groni C 'Day of general discussion: Right to take part in cultural life (Article 15 (1) (a) of the Covenant)' available at <http://www.ohchr.org/Documents/HRBodies/CESCR/.../ChristianGroni.pdf> (accessed 25 November 2014).

Scheinin has also observed that although Article 27 is expressed in negative terms it still recognises the existence of a 'right' and requires that it shall not be denied; this places an obligation on a State party to ensure that the existence and the exercise of this right is protected against its denial or violation.<sup>53</sup> Positive measures of protection are therefore, required not only against the acts of the State party itself but also against the acts of other persons within the State party.<sup>54</sup>

The link between the notion of 'culture' in the treaty provision and traditional forms of indigenous peoples' economic life on their historical lands was discussed in the case of *Länsman v. Finland*.<sup>55</sup> The case was related to the harmful effects of a stone quarry in relation to reindeer herding activities of the indigenous Sami. Although no violation of Article 27 was found, the CCPR established several general principles for the interpretation of Article 27. It emphasised that Article 27 does not protect only traditional means of livelihood but even their adaptation to modern times. As to what kind of interference with a minority culture constitutes 'denial' in the sense of Article 27, the Committee developed the combined test of meaningful consultation of the group and the sustainability of the indigenous or minority economy.

There is however, no provision in the ICCPR that directly addresses the conflict between culture and human rights. In addressing the conflict therefore, Article 3 is relevant. It recognises the right to equality between men and women in the enjoyment of their civil and political rights.<sup>56</sup>

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<sup>53</sup> Scheinin M 'Indigenous peoples' land rights under the International Covenant on Civil and Political Rights' available at [http://www.galdu.org/govat/doc/ind\\_peoples\\_land\\_rights.pdf](http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf) (accessed 28 November 2014).

<sup>54</sup> Scheinin M 'Indigenous peoples' land rights under the International Covenant on Civil and Political Rights' available at [http://www.galdu.org/govat/doc/ind\\_peoples\\_land\\_rights.pdf](http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf) (accessed 28 November 2014).

<sup>55</sup> See *Länsman v. Finland* No. 1 (Communication 511/1992). Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session.

<sup>56</sup> Article 3 ICCPR.

This provision, it is argued, can be used to address traditional cultural practices that treat women differently from men on the basis of gender and sex.

The second international instrument that will be discussed is the ICESCR. The ICESCR aims to ensure the protection of economic, social and cultural rights. This instrument also recognises the right to culture in its Article 15(1) (a). It States that the States parties to the present Covenant recognise the right of everyone to take part in cultural life.<sup>57</sup> The Committee on ICESCR has observed that the right of everyone to take part in cultural life is closely related to the other cultural rights contained in Article 15.<sup>58</sup> Furthermore, it has also observed that the right to take part in cultural life can be characterised as a freedom; this means that in order for this right to be ensured, it requires from the State party, both non-interference with the exercise of cultural practices and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).<sup>59</sup> In addition, the decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and therefore, it should be recognised, respected and protected on the basis of equality.<sup>60</sup>

According to Groni, the right to take part in cultural life is a fundamental human right laid down in several international legal instruments; the ICESCR provides the most comprehensive Article on the right to take part in cultural life in international human rights law.<sup>61</sup> According to Article

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<sup>57</sup> Article 15(1) (a) ICESCR.

<sup>58</sup> Para 2 Committee on Economic, Social and Cultural Rights (Forty-third session 2009) General Comment No.21: Right of everyone to take part in cultural life (Article 15 (1) (a), of the International Covenant on Economic, Social and Cultural Rights).

<sup>59</sup> Para 6 Committee on Economic, Social and Cultural Rights (Forty-third session 2009) General Comment No. 21.

<sup>60</sup> Para 7 Committee on Economic, Social and Cultural Rights (Forty-third session 2009) General Comment No. 21.

<sup>61</sup> Groni C 'Day of general discussion: Right to take part in cultural life (Article 15 (1) (a) of the Covenant)' available at <http://www.ohchr.org/Documents/HRBodies/CESCR/.../ChristianGroni.pdf> (accessed 25 November 2014).

15(1) (a) of the Covenant, States parties recognise the right to take part in cultural life, whereas paragraphs 2 to 4 of that provision should be regarded as instrumental means to achieve the full realisation of this right.<sup>62</sup> In addition, the right to take part in cultural life like all other human rights of the ICESCR is derived from the inherent dignity of the human being. As a result, ‘culture’ has to be interpreted in the light of human dignity.<sup>63</sup>

According to the Submission by the Information Society Project at Yale Law School to the Committee on Economic, Social and Cultural Rights, to take part in cultural life implies the ability to access, enjoy, engage with and extend the cultural inheritance; to enact, wear, perform, produce, apply, interpret, read, modify, extend and remix; to manifest, interact, share, repeat, reinterpret, translate, critique, combine and transform.<sup>64</sup> Emphasis on the right ‘of everyone’ to take part in cultural life is also important. ‘Everyone’ means women as well as men, children as well as adults, popular classes as well as elites, rural dwellers as well as urbanites, the poor as well as the wealthy and amateurs as well as professionals.<sup>65</sup> Therefore, realising the right of everyone to cultural participation requires the elimination of discriminatory barriers, and special measures to prevent barriers of geography, language, poverty, illiteracy or disability from blocking full and equal participation.<sup>66</sup>

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<sup>62</sup> Groni C ‘Day of general discussion: Right to take part in cultural life (Article 15 (1) (a) of the Covenant)’ available at <http://www.ohchr.org/Documents/HRBodies/CESCR/.../ChristianGroni.pdf> (accessed 25 November 2014).

<sup>63</sup> Groni C ‘Day of general discussion: Right to take part in cultural life (Article 15 (1) (a) of the Covenant)’ available at <http://www.ohchr.org/Documents/HRBodies/CESCR/.../ChristianGroni.pdf> (accessed 25 November 2014).

<sup>64</sup> Submission by the Information Society Project at Yale Law School to the Committee on Economic, Social and Cultural Rights ‘Access to Knowledge and the Right to Take Part in Cultural Life’ 41st Session, 3-21 November 2008.

<sup>65</sup> Submission by the Information Society Project at Yale Law School to the Committee on Economic, Social and Cultural Rights ‘Access to Knowledge and the Right to Take Part in Cultural Life’ 41st Session, 3-21 November 2008.

<sup>66</sup> Submission by the Information Society Project at Yale Law School to the Committee on Economic, Social and Cultural Rights ‘Access to Knowledge and the Right to Take Part in Cultural Life’ 41st Session, 3-21 November 2008.

In addition to the ICCPR and ICESCR, CEDAW recognises women's right to culture in the following ways: Article 13(c) provides that:

*'States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: the right to participate in recreational activities, sports and all aspects of cultural life'.<sup>67</sup>*

The CEDAW Committee in its General Recommendation 21 points out the fact that culture and tradition also play a significant part in restricting the exercise of basic rights by women<sup>68</sup> and therefore, cultural rights cannot be used as a justification for practices that discriminate against women or violate human rights.

In its regulation of the clash between gender equality and 'cultural patterns of conduct,' CEDAW in its Article 2(f) requires that States 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'<sup>69</sup> Israel has argued that CEDAW must be understood as referring to traditionalist cultural norms that are at variance with the human rights culture and to the maintenance of patriarchal norms that conflict with and resist gender equality.<sup>70</sup> These

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<sup>67</sup> Article 13(c) CEDAW. CEDAW is the principal international document to address the right of women to be free from discrimination and gender based violence. It is the most important human rights treaty for women. In addition, CEDAW obliges its State parties, firstly, to eliminate all forms of discrimination against women in all areas of life and secondly, to ensure women's full development and advancement in order for them to exercise and enjoy their human rights and fundamental freedoms in the same way as men. Thirdly, a State party must allow CEDAW Committee to scrutinize its efforts to implement the treaty, by reporting to the body at regular intervals.

<sup>68</sup> Para 3 Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21: Equality in marriage and family relations. Adopted at the Thirteenth Session of the Committee on the Elimination of Discrimination against Women, in 1994 (Contained in Document A/49/38).

<sup>69</sup> Article 2(f) CEDAW.

<sup>70</sup> Israel FR 'Culture , Religion, and CEDAW' s Article 5 (A)' available at

traditionalist cultures accord with a perception of culture as a “relatively static and homogenous system, bounded, isolated, and stubbornly resistant.”<sup>71</sup> In addition, Higgins and Fenrich argue that this provision implies that States must affirmatively regulate customs and social practices in a way that promotes gender equality.<sup>72</sup>

In matters relating to marriage and family relations, where most cultural practices can lead to gender-based violence, CEDAW in its Article 16(1) requires State parties to ‘take all appropriate measures to eliminate discrimination against women relating to marriage and family relations<sup>73</sup> and to ensure that women have on an equal basis with men, ‘the same right to enter into a marriage,<sup>74</sup> the same right freely to choose a spouse and to enter into marriage only with their free and full consent<sup>75</sup> and the same rights during marriage and its dissolution.’<sup>76</sup> However, the CEDAW Committee in its General Recommendation 21 has observed that whilst most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention.<sup>77</sup> A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.<sup>78</sup> In addition, an examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular

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[http://www.institut-fuer-menschenrechte.de/.../culture\\_religion\\_and\\_cedaws\\_ar...](http://www.institut-fuer-menschenrechte.de/.../culture_religion_and_cedaws_ar...) (accessed 10 September 2014). A wider definition of culture would clearly not be helpful as it would include the gender equality norms themselves.

<sup>71</sup> Israel FR ‘Culture , Religion, and CEDAW’ s Article 5 (A)’ available at

[http://www.institut-fuer-menschenrechte.de/.../culture\\_religion\\_and\\_cedaws\\_ar...](http://www.institut-fuer-menschenrechte.de/.../culture_religion_and_cedaws_ar...) (accessed 10 September 2014).

<sup>72</sup> Higgins TE and Fenrich J *The Future of African Customary Law 2011* (424).

<sup>73</sup> Article 16(1) CEDAW.

<sup>74</sup> Article 16(1) (a) CEDAW.

<sup>75</sup> Article 16(1) (b) CEDAW.

<sup>76</sup> Article 16(1) (c) CEDAW.

<sup>77</sup> Para 15 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>78</sup> Para 15 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.



groups of people, permit forced marriages or re-marriages.<sup>79</sup> Subject to reasonable restrictions based, for example, on woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.<sup>80</sup>

In addressing cultural practices such as polygamy which only allows a husband to have multiple spouses, Article 5(a) of CEDAW obligates States Parties to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'<sup>81</sup> Thus CEDAW Committee in its General Recommendation Number 21 has also found that polygamous marriages discriminate against women and recommend their prohibition.<sup>82</sup> Although CEDAW does not expressly prohibit polygamy,<sup>83</sup> in its General Recommendation Number 21, the CEDAW Committee found that polygamous marriages contravene a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.<sup>84</sup>

In general, the CEDAW Committee approach on the intersection between culture and human rights of women is that traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion,

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<sup>79</sup> Para 16 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>80</sup> Para 16 CEDAW UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>81</sup> Article 5(a) CEDAW.

<sup>82</sup> Para 14 CEDAW UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>83</sup> Polygamy is defined as the practice or custom of having more than one wife or husband at the same time. For the purpose of this discussion, polygamy will be used to refer to a situation where a man has more than one wife.

<sup>84</sup> Para 14 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

such as family violence, abuse, and forced marriages.<sup>85</sup> Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The CEDAW Committee asserts that the effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.<sup>86</sup>

Furthermore, CRC also recognises the right to culture. Article 30 states that:

*'In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture...'*<sup>87</sup>

The Committee on the Rights of the Child has observed that there is a close linkage between Article 30 of CRC and Article 27 of the ICCPR.<sup>88</sup> Both Articles specifically provide for the right, in community with other members of his or her group, to enjoy his or her own culture. The right established is conceived as being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures.<sup>89</sup> In addition to this, the Committee

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<sup>85</sup> Para 11 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 19: Violence against Women. Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992 (Contained in Document A/47/38).

<sup>86</sup> Para 11 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 19.

<sup>87</sup> Article 30 CRC. The CRC is the most comprehensive document on the rights of children. The CRC is concerned with four aspects of children's rights among others and these are: participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs.

<sup>88</sup> Para 16 Committee on the Rights of the Child General Comment 11: Indigenous children and their rights under the Convention, fiftieth session, Geneva, 2009.

<sup>89</sup> Para 16 Committee on the Rights of the Child General Comment 11: Indigenous children and their rights under the Convention, fiftieth session, Geneva, 2009.

on the Rights of the Child has noted that although Article 30 is expressed in negative terms, it nevertheless recognises the existence of a ‘right’ and requires that it ‘shall not be denied.’<sup>90</sup> A State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation.<sup>91</sup> Furthermore, the Committee on the Rights of the Child urges State parties to ensure that adequate attention is given to Article 30 in the implementation of the Convention. They should provide detailed information in their periodic reports under the Convention on the special measures undertaken in order to guarantee that indigenous children can enjoy the rights provided in Article 30.<sup>92</sup>

However, Article 24(3) of the Convention requires that State parties ‘shall take all effective and appropriate measures’ with a view to abolishing harmful traditional practices prejudicial to the health of children.<sup>93</sup> Tobin argues that the inclusion of the verb ‘shall’ imposes a mandatory and immediate obligation to take such measures. It is therefore an onerous obligation and was intended to be so.<sup>94</sup> In addition, Tobin States that it is important to recognise that the obligation imposed by Article 24(3) does not require that States immediately abolish such practices.<sup>95</sup> The inclusion of the phrase ‘with a view to abolishing’ provides recognition of the fact that the

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<sup>90</sup> Para 17 Committee on the Rights of the Child General Comment 11.

<sup>91</sup> Para 17 Committee on the Rights of the Child General Comment 11.

<sup>92</sup> Para 21 Committee on the Rights of the Child General Comment 11.

<sup>93</sup> Article 24(3) CRC.

<sup>94</sup> Tobin J ‘The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?’ (2009) 9(3) *Human Rights Law Review* 374. Tobin asserts that the original proposal for Article 24(3) had required that States ‘seek to eradicate traditional practices’ but it was noted by the Netherlands during the 1987 session of the Working Group that this formulation was too weak and should be replaced with the ‘more forceful language.’ During the Technical Review the observer for UNICEF noted that ‘[t]he use of the verb ‘to seek to’ is highly unusual in human rights treaties since it further dilutes the nature of an already qualified obligation.’ Thus when the proposal for Article 24(3) came before the Working Group at the Second Reading, the obligation ‘to seek’ was omitted and simply required that ‘States Parties shall take all effective and appropriate measures . . .’

<sup>95</sup> Tobin J ‘The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?’ (2009) 9(3) *Human Rights Law Review* 376.

abolition of harmful traditional practices will take time and is thus a progressive obligation.<sup>96</sup> Moreover, it does not necessarily require the abolition of traditional practices, customs and rituals in their entirety, only those aspects of a traditional practice which are prejudicial to the health of a child.<sup>97</sup>

Furthermore, States have a significant level of discretion with respect to the particular measures they adopt, Article 24(3) imposes the qualitative requirement that they must be 'effective' and 'appropriate.' The original proposal specifically required States to take all 'necessary legislative, administrative, social and educational measures'.<sup>98</sup> However, the Report of the Working Group shows that this listing was omitted in response to the concerns voiced by the delegation for Senegal which 'emphasised the dangers of forcing practices into clandestinity if they were prohibited by legislation'.<sup>99</sup> At the same time, this omission should not be taken to mean that legislative measures or administrative, social and educational measures will not be an appropriate way to achieve the abolition of harmful traditional practices.<sup>100</sup>

It has been observed by Tobin that Article 24 does not provide a list of those traditional practices which are deemed to be prejudicial to the health of children. Similarly, the drafting history does not evidence any intention on behalf of the drafters to detail such a list. This can pose challenges

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<sup>96</sup> Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) *Human Rights Law Review* 376.

<sup>97</sup> Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) *Human Rights Law Review* 376.

<sup>98</sup> Para 50 Report of the Working Group on a Draft Convention on the Rights of the Child, March 1986, E/CN.4/1986/39 as cited by Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) *Human Rights Law Review* 376.

<sup>99</sup> Para 24 Report of the Working Group on a Draft Convention on the Rights of the Child, 9 March 1987, E/CN.4/1987/25 as cited by Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) *Human Rights Law Review* 376.

<sup>100</sup> Para 29 Report of the Working Group on a Draft Convention on the Rights of the Child as cited by Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) *Human Rights Law Review* 377.

because some States will allow some traditional practices that are harmful to the health of children to be observed and argue that they are not listed as harmful traditional cultural practices. Tobin notes that the phrase ‘traditional practices prejudicial to the health of a child’ has been adopted as the basis for determining whether a practice falls within the scope of paragraph 3 of Article 24.<sup>101</sup> A question remains however as to the extent and way in which a traditional practice must be prejudicial to the health of a child before a State must take steps to secure its abolition.<sup>102</sup>

## 2.3 REGIONAL INSTRUMENTS

The African Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.<sup>103</sup> The African Charter recognises the right to culture. Article 17(2) and (3) provides that:

*‘every individual may freely take part in the cultural life of his community. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.’<sup>104</sup>*

According to the African Commission Economic, Social and Cultural Rights Guidelines, the right to take part in cultural life vests in the individual and should be protected as such by States

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<sup>101</sup> Tobin J ‘The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?’ (2009) 9(3) *Human Rights Law Review* 377.

<sup>102</sup> Tobin J ‘The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?’ (2009) 9(3) *Human Rights Law Review* 377.

<sup>103</sup> African Commission on Human and Peoples’ Rights ‘Principles And Guidelines on the mplementation of Economic, Social And Cultural Rights in the African Charter on Human And Peoples’ Rights’ available at <http://www.achpr.org/instruments/achpr/> (accessed 10 July 2014).

<sup>104</sup> Article 17(2) & (3) African Charter.

parties.<sup>105</sup> It is integral to the way of life of individuals and communities, including promotion and preservation of their culture, heritage and institutions. It refers not only to the enjoyment of cultural activities and access to materials but to participation, policy-making and artistic freedom.<sup>106</sup> In addition to this, it includes freedom from interference with the enjoyment of cultural life, the freedom to create and contribute to culture, the freedom to choose in what cultures and cultural life to participate and the freedom to manifest one's own culture. It also encompasses the freedom to disseminate one's own culture and cultural values, the freedom to cooperate internationally, the right to participate in the definition, preparation and implementation of policies on culture and the enjoyment of other rights necessary for the enjoyment of the right to participate in cultural life.<sup>107</sup> Furthermore, it is inherently linked to the right to freedom of expression. However, in addressing the conflict between culture and women's rights, States must ensure the right to freedom of expression as a condition for the realisation of the right to culture.<sup>108</sup> According to the African Commission Economic, Social and Cultural Rights Guidelines, the right to culture protects positive African values consistent with

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<sup>105</sup> African Commission on Human And Peoples' Rights 'Principles and Guidelines on the implementation Of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights' available at [www.peopletoparliament.org.za/...rights/.../african.../African.../download](http://www.peopletoparliament.org.za/...rights/.../african.../African.../download) (accessed 6 November 2014).

<sup>106</sup> African Commission on Human And Peoples' Rights 'Principles and Guidelines on the implementation of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights' available at [www.peopletoparliament.org.za/...rights/.../african.../African.../download](http://www.peopletoparliament.org.za/...rights/.../african.../African.../download) (accessed 6 November 2014).

<sup>107</sup> African Commission on Human And Peoples' Rights 'Principles And Guidelines on the implementation of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights available at [www.peopletoparliament.org.za/...rights/.../african.../African.../download](http://www.peopletoparliament.org.za/...rights/.../african.../African.../download) (accessed 6 November 2014).

<sup>108</sup> African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights' available at [www.peopletoparliament.org.za/...rights/.../african.../African.../download](http://www.peopletoparliament.org.za/...rights/.../african.../African.../download) (accessed 6 November 2014).

international human rights standards, and implies an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights.<sup>109</sup>

Just like CEDAW, the African Charter prohibits discrimination on grounds of sex and other grounds. This is evidenced by Article 2 which provides that ‘every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex...’<sup>110</sup> This provision can be used in addressing traditional cultural practices which are discriminatory towards women on the basis of gender as it will be discussed in chapter 3.

The second regional instrument that will be discussed is the African Protocol. It seeks to improve the status of African women by bringing about gender equality and eliminating discrimination.<sup>111</sup> It commences with the definition of terms. For example, ‘discrimination against women’ is defined to mean ‘any distinction, exclusion or restriction based on sex, or any other differential treatment whose objective or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life’.<sup>112</sup>

Furthermore, the expression ‘harmful practices’ is defined as ‘all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right

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<sup>109</sup> African Commission on Human and Peoples’ Rights ‘Principles And Guidelines on the Implementation of Economic, Social And Cultural Rights In The African Charter On Human And Peoples’ Rights’ available at [www.peopletoparliament.org.za/...rights/.../african.../African.../download](http://www.peopletoparliament.org.za/...rights/.../african.../African.../download) (accessed 6 November 2014).

<sup>110</sup> Article 2 African Charter on Human and Peoples' Rights.

<sup>111</sup> See Ebeku KSA ‘A New Hope for African Women: Overview of Africa’s Protocol on Women’s Rights’ (2004) 13(3) *Nordic Journal of African Studies* 268.

<sup>112</sup> Article 1 African Protocol.

to life, health, dignity, education, and physical integrity'.<sup>113</sup> The African Protocol further defines 'violence against women'<sup>114</sup> as 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat of such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or war'.<sup>115</sup>

In addressing the conflict between culture and human rights, the African Protocol, just like CEDAW, requires States to 'enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting all forms of discrimination particularly those harmful practices, which endanger the health and general well-being of women.'<sup>116</sup> In terms of this instrument, States parties must also allocate resources necessary for enforcement and must undertake education efforts and any additional steps necessary to ensure equal rights for women.<sup>117</sup> Therefore, Zimbabwe is under an obligation to enact and effectively implement legislative measures prohibiting cultural practices such as marriage by abduction, polygamy and virgin pledging which have a negative effect on the health and well-being of women. Furthermore, under Article 2(2) of the African Protocol, State parties commit to modify social and cultural patterns through public education and information strategies 'with a view to achieving the elimination of harmful cultural and traditional practices and all other practices

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<sup>113</sup> Article 1 African Protocol.

<sup>114</sup> Article 1 African Protocol. Article 1 also defines 'women' to mean 'persons of female gender, including girls'.

<sup>115</sup> Article 1 African Protocol.

<sup>116</sup> Article 2(1) (b) African Protocol.

<sup>117</sup> See Articles 1 and 25 African Charter.



which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.’<sup>118</sup>

The African Protocol provides that States ‘shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage’ and they shall enact legislation to ensure that ‘no marriage shall take place without the free and full consent of both parties.’<sup>119</sup> This provision can be used to address several traditional cultural practices, particularly marriage by abduction and *kuripangozi*/virgin pledging prevalent in Zimbabwe. In addition, the minimum age of marriage for women shall be eighteen years.<sup>120</sup> This provision can be used to address child marriages concluded on the basis of physical development or growth.<sup>121</sup> In regulating the relationship of husband and wife during the subsistence of her marriage, the African Protocol provides that during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.<sup>122</sup> Where a woman becomes a widow she shall have the right to an equitable share in the inheritance of her husband’s property.<sup>123</sup>

In regulating gender-based violence that comes with polygamy, the African Protocol provides that legislation should guarantee that ‘monogamy is encouraged as the preferred form of marriage but that the rights of women in all types of marriages, including polygamous marriages are protected.’<sup>124</sup> Jonas has observed that this provision represents a compromise born out of

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<sup>118</sup> Article 2(2) African Protocol.

<sup>119</sup> Article 6(a) African Protocol.

<sup>120</sup> Article 6(b) African Protocol.

<sup>121</sup> Kounte K *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Simplified)*, *Women in Law and Development in Africa (WILDAF-West Africa)* (2005)11.

<sup>122</sup> Article 6(j) African Protocol; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa was adopted by the AU on 11 July 2003 and entered into force on 15 November 2005.

<sup>123</sup> See Article 21(1) African Protocol. The customary rules of succession deprive women from enjoying this right because in terms of these rules succession to property is limited to males only.

<sup>124</sup> Article 6(c) African Protocol.

highly contested and diametrically opposed viewpoints: on one hand being those who support polygamy and on the other being those who denounce it. Jonas asserts that this might be a result of its lack of clarity as to whether the Protocol rejects or condones the practice of polygamy.<sup>125</sup> On the face of it, Article 6(c) seeks to ensure equality between men and women. This is undoubtedly a positive development that is long overdue and highly welcome, particularly in Africa where for ages women's rights were subordinated to men's interests.<sup>126</sup> However, Jonas has observed that Article 6(c) has several problems, one of these is that it is in contrast to Article 8(f) sitting in the same instrument, which enjoins States parties to 'reform existing discriminatory laws and practices in order to promote and protect the rights of women.' It is therefore surprising that instead of enjoining States to legislate against polygamy in a clear and unequivocal language, the African Protocol only States that 'monogamy is encouraged as the preferred form of marriage.'<sup>127</sup>

In addition, the African Protocol in its General Comment 28 on equality between men and women, the Human Rights Committee Stated that 'polygamy violates the dignity of women. It is an inadmissible discrimination against women; therefore it should be abolished wherever it continues to exist.'<sup>128</sup>

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<sup>125</sup> Jonas O. 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' available at [http://www.academicjournals.org/Article/Article1380034821\\_Obonye.pdf](http://www.academicjournals.org/Article/Article1380034821_Obonye.pdf) (accessed 26 November 2014).

<sup>126</sup> Jonas O. 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' available at [http://www.academicjournals.org/Article/Article1380034821\\_Obonye.pdf](http://www.academicjournals.org/Article/Article1380034821_Obonye.pdf) (accessed 26 November 2014).

<sup>127</sup> Jonas O 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' available at [http://www.academicjournals.org/Article/Article1380034821\\_Obonye.pdf](http://www.academicjournals.org/Article/Article1380034821_Obonye.pdf) (accessed 26 November 2014).

<sup>128</sup> Economic Commission for Africa 'African Governance Report II' (2009) 193.

Furthermore, the SADC Protocol on Gender and Development is a tool used to set realistic, measurable targets, time frames and indicators for achieving gender equality and equity and monitor and evaluate the progress made by Member States.<sup>129</sup> The Protocol focuses on issues of constitutional and legal rights, governance, education, training, productive resources, employment, gender based violence, HIV/Aids and Conflict Resolution.<sup>130</sup> The Protocol also looks into integration and main streaming of gender issues into the SADC Programme of Action and Community Building initiatives which is important to the sustainable development of the SADC region.<sup>131</sup> The Protocol aims to provide for the empowerment of women, to eliminate discrimination and achieve gender equality by encouraging and harmonising the development and implementation of gender responsive legislation, policies and programmes and projects.<sup>132</sup>

Of relevance to this discussion is Article 8(1) which provides that States Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.<sup>133</sup> Article 8(2) further States that legislation on marriage shall ensure that no person under the age of eighteen years shall marry unless otherwise specified by law which takes into account the best interests and welfare of the child; that every marriage takes place with the free and full consent of both

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<sup>129</sup> Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf)(accessed 30 June 2014).

<sup>130</sup> Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf)(accessed 30 June 2014).

<sup>131</sup> See Constitutive Act of the African Union (AU) 200/2001.

<sup>132</sup> Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf)(accessed 30 June 2014).

<sup>133</sup> Article 8(1) Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf)(accessed 30 June 2014).

parties; and lastly that every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws.<sup>134</sup> These provisions can be used to address child marriages and marriage by abduction that takes place without the full and free consent of both parties especially girl children.

In addition, further guidance in addressing the conflict between culture and human rights is provided for in Article 21(1). It states that States parties shall take measures including legislation, where appropriate, to discourage traditional norms, including social, economic, cultural and political practices which legitimise and exacerbate the persistence and tolerance of gender based violence with a view to eliminate them.<sup>135</sup> In addition, Article 21 (2) provides that States parties shall, in all sectors of society, introduce and support gender sensitisation and public awareness programmes aimed at changing behaviour and eradicating gender-based violence.<sup>136</sup>

The third regional instrument on the protection of, particularly girl children from gender-based violence linked to traditional cultural practices is the ACRWC.<sup>137</sup> The ACRWC shows remarkable tolerance for African cultural values and customary law.<sup>138</sup> This is evidenced in its preamble which States that ‘the African approach to children’s rights takes cognisance of the

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<sup>134</sup> Article 8(2) Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf) (accessed 30 June 2014).

<sup>135</sup> Article 21(1) Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf) (accessed 30 June 2014).

<sup>136</sup> Article 21 (2) Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf) (accessed 30 June 2014).

<sup>137</sup> The ACRWC, the first regional treaty on children’s rights builds on the 1979 Declaration on the Rights and Welfare of the African Child, but most of its provisions are modeled after those of the CRC. The ACRWC sets forth the principles of non-discrimination and the best interests of the child.

<sup>138</sup> Himonga C ‘African customary law and children’s rights: Intersections and domains in a new era’ in Sloth-Nielsen J (ed) *Children’s Rights in Africa: A legal perspective* (2008) 75.

virtues of the African cultural heritage and the values of African civilisation.’ In addition to this, Article 31(d) places a duty on the child to ‘preserve and strengthen African cultural values in his relationship with other members of the society...’ Himonga has rightly observed that these provisions send a very strong message that customary practices are not to be lightly dismissed with regard to the protection and interpretation of children’s rights in the African context.<sup>139</sup> However, Article 1(3) of ACRWC States that any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in this Charter shall to the extent of its inconsistency be discouraged.<sup>140</sup>

In addition, Article 21(1), urges States parties to the Charter to 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 prejudicial to the health or life of the child,<sup>141</sup> and those customs and practices discriminatory to the child on the grounds of sex or other status.<sup>142</sup> Gose has observed that the concept of harmful cultural practices is very broad because it includes customs and practices affecting the health or life of the child, and those practices which are discriminatory on the ground of sex or other status.<sup>143</sup> Even though no particular practice is mentioned by name, one can assume that marriage by abduction and *kuripangozi*/virgin pledging (child marriages) fall under this description because they directly affect the dignity, and the normal growth and development of the girl child.

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<sup>139</sup> Himonga C ‘African customary law and children’s rights: Intersections and domains in a new era’ in Sloth-Nielsen J (ED) *Children’s Rights in Africa: A legal perspective* (2008) 75.

<sup>140</sup> Article 1(3) ACRWC.

<sup>141</sup> Article 21(1) (a) African Charter on the Rights and Welfare of the Child.

<sup>142</sup> Article 21(1) (b) African Charter on the Rights and Welfare of the Child.

<sup>143</sup> Gose M ‘The African Charter on the Rights and Welfare of the Child’ Community Law Centre, University of Western Cape 2002 (51).

Furthermore, Article 21(2) provides that child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.<sup>144</sup> Given that the ACRWC is very strict in defining the term ‘child’<sup>145</sup> and does not allow for any exceptions, this means that marriages of all children under the age of eighteen years are prohibited.<sup>146</sup> This provision, obviously targets traditional cultural practices that lead to child marriages.

## 2.4 CONCLUSION

In a nutshell, international law and regional law discussed above, provide guidelines on the protection of women and children from gender-based violence that can be linked to traditional cultural practices. It is also clear that these instruments recognise that the rights to equality and human dignity must take precedence over the right to culture in cases where it may lead to gender-based violence. The next chapter will discuss different traditional cultural practices in Zimbabwe and show how they are in conflict with human rights of women and children.

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<sup>144</sup> Article 21 (2) African Charter on the Rights and Welfare of the Child.

<sup>145</sup> Article 2 of the ACRWC provides that “for the purposes of this Charter, a child means every human being below the age of eighteen years.”

<sup>146</sup> Gose M ‘The African Charter on the Rights and Welfare of the Child’ Community Law Centre, University of Western Cape 2002 (53).

## CHAPTER 3: TRADITIONAL CULTURAL PRACTICES AND GENDER-BASED VIOLENCE IN ZIMBABWE

### 3.1. INTRODUCTION

Traditional cultural practices reflect values and beliefs held by members of a particular community.<sup>147</sup> As the previous chapter has shown, most international instruments recognise the right to culture subject to non-violation of human rights.<sup>148</sup> The Committee on the Elimination of all forms of Discrimination Against Women (CEDAW Committee) in its General Recommendation 21 provides that CEDAW recognises the importance of culture and tradition in shaping the thinking and behaviour of men and women.<sup>149</sup> In addition, it has been observed that some traditional cultural practices are harmful to the physical and psychological integrity of the individual especially women and girls.<sup>150</sup> However, the CEDAW Committee, commenting on Articles 2(f), 5 and 10(c) has observed:

*‘...traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of*

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<sup>147</sup> UN Fact Sheet No.23 ‘Harmful Traditional Practices Affecting the Health of Women and Children’ available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/unfactsheets/No.23harmfultraditionalpractices/> (accessed 22 July 2014).

<sup>148</sup> Most international and regional instruments recognise the right to culture, however those instruments mandate State parties to take legislative and other measures to abolish harmful cultural practices.

<sup>149</sup> See Para 3 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>150</sup> Wadesango N ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) *Anthropologist* 121.

*the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.*<sup>151</sup>

In addition, it has been observed that some traditional cultural practices are harmful to the physical and psychological integrity of the individual, especially women and girls<sup>152</sup> and they play a significant part in restricting the exercise of basic human rights by women.<sup>153</sup> It is for this reason that this chapter discusses the different traditional cultural practices in Zimbabwe that may lead to gender based violence. Ultimately, the chapter will show how such practices can be a violation of human rights of women and lead to gender-based violence. This will be achieved by defining different cultural practices, their forms, reasons for practising them, their legal significance under customary law and measure them against international and regional human rights law.

### **3.2 TRADITIONAL CULTURAL PRACTICES RELATED TO MARRIAGE**

The different cultural practices to be discussed will be divided into two categories: firstly those that are related to marriage; and secondly those that are related to inheritance. Under the first category these will include cultural practices such as payment of *lobolo* (bride price), polygamy/polygyny<sup>154</sup>, marriage by abduction and *kuripa ngozi*/virgin pledging (child marriages). The principle of male primogeniture and wife inheritance will fall under the second category.

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<sup>151</sup> Para 11 Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 19.

<sup>152</sup> See Iyanuolu AE 'The Challenge of Culture for the Rights of Women in Africa: A Critical Analysis of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ( unpublished LLM thesis, University of Cape Town, 2008) as cited by Wadesango N'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *Anthropologist* 125.

<sup>153</sup> See Para 3 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>154</sup> As mentioned earlier, polygamy refers to a marriage in which one man marries more than one woman at time.



### 3.2.1 Lobolo (Payment of bride price)

*Lobolo* is known by different terms.<sup>155</sup> It is known as *ukulobola*, *amalobolo* or *lobolo* amongst the Ndebele speaking people of Zimbabwe.<sup>156</sup> The Shona speaking people of Zimbabwe usually call it *pfuma*, *rovora*, *kurowora* or *roora*.<sup>157</sup> Each of these words nevertheless refer to the transfer of property, usually livestock, by the husband (or his guardian) to the wife's family as part of the process of constituting a marriage.<sup>158</sup> For purposes of this study, the terms *lobolo* and *lobola* will be used interchangeably. Arguably, this practice conflicts with CEDAW and the African Protocol's non-discrimination provisions as discussed in the previous chapter because only men are involved in the main roles of *lobolo* negotiations.

In Zimbabwe, the practice of *lobola* consists of a series of payments under two categories: the 'small items' and the 'main marriage items.'<sup>159</sup> The small items payments are made to introduce the groom's and the bride's families and serve roughly the same function as an engagement in western cultures.<sup>160</sup> These payments are full and final and cannot be refunded in the event of a divorce.<sup>161</sup> The 'main marriage deal,' or the actual *lobola* payment, consists of two major parts. The first payment is *rusambo* which is a payment specifically to the father of the bride, and 'it is not meant to buy the bride or the -the person of the bride-but all the services rendered to the son-

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<sup>155</sup> Other African countries such as South Africa, Zambia and Malawi observe this practice.

<sup>156</sup> The term '*lobolo*' is also used by the Zulu speaking people of South Africa to refer to the payment of bride price. South Africa's Recognition of Customary Marriages Act defines the custom of *lobolo* as property in cash or kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *magadi*, *amabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

<sup>157</sup> Goldin B and Gelfand M *African law and custom in Rhodesia* (1975) 129.

<sup>158</sup> Bennett TW & Peart NS *A Sourcebook of African Customary Law for Southern Africa* (1991) 194.

<sup>159</sup> Chigwedere A *Lobola: The Pros and Cons* (1982) 4.

<sup>160</sup> Chigwedere A (1982) 4.

<sup>161</sup> Chigwedere A (1982) 7.

in-law and his relatives.’<sup>162</sup> The second major part of the *lobola* payment is *danga* (cattle). *Danga* was traditionally paid in cattle and often still is.<sup>163</sup> This is the largest component of the *lobola* payment, reflecting the fact that children were traditionally regarded as the most important, and indeed sometimes the only reason to get married.<sup>164</sup> In other words, the payment of *danga* secures the husband and his family legal rights over the children of the marriage; the husband’s family usually retains rights to the children even on default of full payment.<sup>165</sup> In addition to this, the father has absolute rights in the control of his children and on the dissolution of a marriage by death or divorce the husband or his kin are the children's natural guardians and custodians.<sup>166</sup> Bennett asserts that bridewealth can be described as ‘child price’ because it is upon payment of bridewealth that parental rights can be determined. The practice of transferring reproductive rights of women to a man and his family and not vice-versa can arguably be discriminatory to women. This would be in direct conflict with Article 16(1) (g) of CEDAW which mandates State parties to take measures to eliminate discrimination in matters relating to family and marriage and ensure on the basis of equality of men and women that they have ‘the same rights and responsibilities with regard to guardianship of children...’ This provision remains relevant to the practice of payment of *lobolo* which seems to transfer exclusive rights of children only to the husband.<sup>167</sup>

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<sup>162</sup> Chigwedere A (1982) 10. Rusambo (beads) in pre-colonial society were obtained from Moor traders. In modern society, this payment has been converted to monetary terms.

<sup>163</sup> *Danga* could also be paid in goats or farm equipment.

<sup>164</sup> May J *Zimbabwean Women in Customary and Colonial Law* (1983) 86. Similarly, in South Africa the payment of bridewealth refers to the transfer of property, usually livestock by the husband (or his guardian) to the wife’s family as part of the process of constituting a marriage.

<sup>165</sup> Bennett TW & Peart NS (1991) 197.

<sup>166</sup> May J (1983) 86. *Lobolo* is an alternative spelling of *lobola*. The term *lobola* is sometimes used to refer specifically to the *danga* payment.

<sup>167</sup> The payment of *lobolo* is also seen to be discriminatory against women because it enables men to exercise their power and authority at the expense of women’s enjoyment of their rights and freedoms on an equal basis with

Recently the practice has become commercialised with cash forming a major component of the transaction.<sup>168</sup> In most communities bridewealth consists of cash, consumer goods or a combination of these and livestock. Some parents are demanding money or cellular phones. This has greatly distorted the original theme underlying this practice.<sup>169</sup> It has been conceded that at a superficial level the payment of an often substantial amount of livestock or cash in exchange for a bride does have all the makings of the sale of a woman.<sup>170</sup> Therefore, this causes girl children and women to be perceived as property of male members of the family who can be the father, uncle or brother.<sup>171</sup> This can be argued to be in violation of women's right to equality with men as provided for in Article 2 of CEDAW and Article 2 of the African Charter since they are treated as commodities being sold to men because of the commercialisation of *lobolo*.<sup>172</sup>

There are several reasons behind the customary practice of *lobolo*. Firstly, *lobolo* starts the process of marriage. It is regarded as an expression of honour to the parents but also an undertaking of responsibility to the spouse.<sup>173</sup> According to the African way of thinking, the most important ingredient of a valid marriage is bridewealth, the time-honoured practice that

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men and therefore is inconsistent with Articles 2(d), 3 of CEDAW and Article 2 of the Banjul Charter which proscribes discrimination on the grounds of sex and culture.

<sup>168</sup> Hanzi R 'Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: a human rights perspective' (unpublished LLM thesis, University of Pretoria, 2006) as cited by Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *Anthropologist* 125.

<sup>169</sup> Hanzi R 'Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: a human rights perspective' (published LLM thesis, University of Pretoria, 2006) as cited by Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) *Anthropologist* 13(2) 125. The original theme of payment of *lobolo* is to start the process of marriage; it is the most important ingredient of a valid marriage.

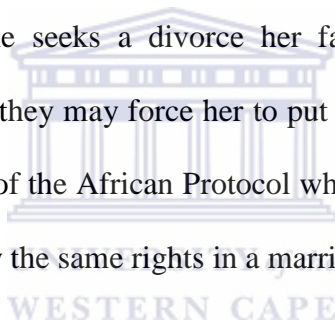
<sup>170</sup> *Mesadoosa v Links* 1915 TPD 357 at 359 held that bridewealth could not be tolerated because 'a woman is in every respect the legal equal of a man according to our civilised customs.'

<sup>171</sup> Hanzi R 'Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: a human rights perspective' (published LLM thesis, University of Pretoria, 2006) as cited by Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *Anthropologist* 125.

<sup>172</sup> Article 2 of CEDAW and Article 2 of the African Charter.

<sup>173</sup> His People Johannesburg 'What we believe about lobola' available at <http://hispeoplejoburg.org/Article/Statement-on-lobola/> (accessed 29 June 2014).

gives the union its distinctively African character.<sup>174</sup> Secondly, the intention of paying *lobolo* is to cement the relationship between the two families.<sup>175</sup> *Lobolo* has been regarded as a token of appreciation from the husband to his in-laws.<sup>176</sup> Thirdly, *lobolo* is so central to the way of life of many Zimbabweans that a couple is not considered married unless and until it has been paid.<sup>177</sup> In addition, many Africans see *lobola* as linked to their very identity and to their survival as a people and a culture.<sup>178</sup> Fourthly, *lobola* is a public acknowledgement that the marriage is genuine. Because of *lobola*, the husband and wife cannot easily separate and divorce. There must always be discussion with the family members before marital separation.<sup>179</sup> This position, has however been argued to have a negative effect on individual freedom by binding a wife to an unwanted marriage because if she seeks a divorce her family is usually obliged to return bridewealth, and rather than do so they may force her to put up with an unhappy relationship.<sup>180</sup> This is inconsistent with Article 6 of the African Protocol which requires parties to a marriage to be recognised as equal and to enjoy the same rights in a marriage.



In addition, besides being a kind of marriage settlement, it is calculated to add dignity and respect to the woman: it adds to her value to her husband, and is likely to ensure for her kind and considerable treatment.<sup>181</sup> The fact that *lobola* adds value to a woman and ensures her good treatment from her husband and not vice-versa can be argued to violate Article 16(1) (c) of

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<sup>174</sup> Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) 118.

<sup>175</sup> Hanzi R 'Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: a human rights perspective' (published LLM thesis, University of Pretoria, 2006) as cited by Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *Anthropologist* 125.

<sup>176</sup> 'Lobola: A contributory factor to domestic violence' available at <http://www.chronicle.co.zw/lobola-a-contributory-factor-to-domestic-violence/> (accessed 21 August 2014).

<sup>177</sup> Chavunduka GL *A Shona Urban Court, in Mambo Occasional Papers-Socioeconomic Series No. 14* (1979) 58.

<sup>178</sup> Chavunduka GL (1979) 58.

<sup>179</sup> Chavunduka GL (1979) 58.

<sup>180</sup> Bennett TW (1995) 118.

<sup>181</sup> Story JG *Customary Law in Practice* (1979) 43.

CEDAW which requires parties to a marriage to have the same rights during and upon dissolution of a marriage because payment of *lobola* deprives a woman from enjoying marriage rights on the same basis as her husband.

The legal significance of the payment of *lobolo* under customary law is that it transfers rights of a woman to her husband and his agnatic group. These rights include rights both as a wife (rights in uxorem) and as a mother (rights in genetricem).<sup>182</sup> Under the first category falls the rights of sexual access and labour, both in the home and in the fields.<sup>183</sup> Thus in exchange for *lobolo*, the husband and his family are entitled to the physical labour of his wife. She is to cook, clean, work in the fields, and generally serve the husband and his community as needed.<sup>184</sup> Where a wife is deemed incompetent in her duties she can be returned to her parents for further training.<sup>185</sup> Her husband can claim reparation for any injury which impairs the fulfilment of these duties.<sup>186</sup> One can argue that the fact that the payment of *lobolo* transfers a woman's rights to her husband and his family violates Article 16(1) (c) of CEDAW and Article 6 of the African protocol which requires parties to a marriage to enjoy equal rights in a marriage and to be regarded as equal partners in a marriage. In addition, Shenje-Peyton has observed that because *lobolo* binds a woman to work for her husband and his family, it denies her the right to acquire property in her own name and prevents her from attaining economic independence.<sup>187</sup> However, Article 6(j) of the African Protocol confers on a woman the right to acquire her own property and to administer and manage it freely. Therefore, this shows that *lobolo* is an institution that violates a woman's

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<sup>182</sup> Bennett TW *Human Rights and African Customary Law Under the South African Constitution* (1995) 197.

<sup>183</sup> Bennett TW (1995) 197.

<sup>184</sup> Chigwedere A (1982) 10.

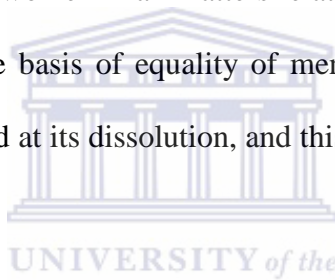
<sup>185</sup> Chigwedere A (1982) 10.

<sup>186</sup> Bennett TW (1991) 197. See also Chigwedere A (1982) 10.

<sup>187</sup> Shenje-Peyton A 'Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe' (1996) 9 *Harvard Human Rights Journal* (105) 130.

right to property because she has to work for her husband and she is therefore denied the opportunity to advance herself economically so as to be able to own her own property.

Another consequence of *lobolo* which may lead to gender-based violence is that it confers on the husband exclusive power to end the marriage through divorce.<sup>188</sup> Thus a husband can dissolve the marriage anytime without giving the wife reasons for doing so because in paying *lobolo* he ‘marries’ the woman, therefore he assumes the exclusive right to dissolve the marriage.<sup>189</sup> Therefore, this denies women the right to have control over their marriages and lives which is contrary to Article 16(1) (c) of CEDAW mandates State parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on the basis of equality of men and women: the same rights and responsibilities during marriage and at its dissolution, and this provision remains very relevant to *lobolo*.



Despite its deep cultural roots, *lobolo* can be linked to the subordination of women first by their fathers and then by their husbands.<sup>190</sup> This is due to the fact that after payment of *lobolo*, a woman will still be regarded as a minor under the authority of her husband; she shifts from being under the authority of her father or guardian to that of her husband.<sup>191</sup> One can argue that the practice of paying *lobolo* contravenes Article 2(2) of the African Protocol which mandates State parties to commit to modify social and cultural patterns through public education and information strategies ‘with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or

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<sup>188</sup> Sibanda M ‘Married too soon: child marriage in Zimbabwe’ *The Research and Advocacy Unit* (2011) 8.

<sup>189</sup> Chavunduka GL (1979) 58.

<sup>190</sup> Chigwedere A (1982) 54.

<sup>191</sup> Bennett TW (1995)198.

superiority of either of the sexes, or on stereotyped roles for women and men because it perpetuates the subordination of women.

### 3.2.2 Polygamy

Polygamy refers to the practice or custom of having more than one wife or husband at the same time.<sup>192</sup> For purposes of this discussion, polygamy will be used to refer to a situation where a man has more than one wife. A man is not restricted by customary law concerning the number of wives he is entitled to have. Historically a man's standing in the community was influenced by the number of wives he 'owned'.<sup>193</sup> The greater the number of wives he owned, the greater the esteem and consequence which he enjoyed in the community.<sup>194</sup> '*Murume we barika*'<sup>195</sup> is the term used by the Shona speaking people of Zimbabwe to refer to a man who is in a polygamous union. His wives are known as '*mukadzi we barika*' or '*wechipari*'. '*Isithembo*' is a term used by Ndebele speaking people of Zimbabwe to refer to polygamy.<sup>196</sup> The wives of such a union are referred to as '*abafazi besithenjini*.'

The husband is the acknowledged head of the polygamous family. He owns his wives and he is their guardian. In polygamous marriages the wives take seniority according to the order in which the husband married each of them.<sup>197</sup> All the wives owe their husband allegiance and absolute submission to his sexual interests and wants.<sup>198</sup> Nearly a 5<sup>th</sup> of marriages in Zimbabwe are

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<sup>192</sup> 'Polygamy Law and Legal Definition' available at <http://definitions.uslegal.com/p/polygamy/> (accessed 2 September 2014). In practise however, it is men who marry more than one wife.

<sup>193</sup> Goldin B & Gelfand M (1975) 176.

<sup>194</sup> Goldin B & Gelfand M (1975) 176.

<sup>195</sup> Goldin B & Gelfand M (1975) 176.

<sup>196</sup> Goldin B & Gelfand M (1975) 176.

<sup>197</sup> Goldin B & Gelfand M (1975) 176.

<sup>198</sup> Goldin B & Gelfand M (1975) 176.

estimated to be polygamous; about 18 percent of women are in polygamous marriages.<sup>199</sup> The fact that women are not allowed to have more than one husband, and also that they must submit to their husband's sexual needs and not vice-versa is inconsistent with Article 16(1) (g) of CEDAW which mandates parties to a marriage to have the same personal rights as husband and wife. The CEDAW Committee in its General Recommendation 21 has also found that polygamous marriages contravene a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.<sup>200</sup>

In addition, in recognising its discriminatory nature, the African Protocol in its Article 6(c) provides that legislation should guarantee that 'monogamy is encouraged as the preferred form of marriage' but that the rights of women in all types of marriages, including polygamous marriages are protected.<sup>201</sup> It has been argued that polygamous marriages seriously inhibit several rights of women because the husband in such a marriage tends to view himself as the guardian of his wives, makes choices for them and owns their conjugal rights.<sup>202</sup>

### **3.2.3 Marriage by abduction (*ukuthwala*)**

*Ukuthwala*<sup>203</sup> is a term that is commonly used when referring to marriage by abduction<sup>204</sup> which is a practice found in some of the SADC countries.<sup>205</sup> According to Mwambene and Sloth-

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<sup>199</sup> 'Some facts about marriage in Zimbabwe' available at <http://baobabtales.wordpress.com/2010/03/06/some-facts-about-marriage-in-zimbabwe/> (accessed 6 April 2014).

<sup>200</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 21.

<sup>201</sup> Article 6(c) African Protocol.

<sup>202</sup> Goldin B & Gelfand M (1975) 176.

<sup>203</sup> *Ukuthwala* is also defined as a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations.

<sup>204</sup> Marriage by abduction is also known as bride kidnapping or marriage by capture. It is one of the forms of forced marriage.



Nielsen *ukuthwala* means ‘to carry.’ It is a culturally legitimated abduction of a woman whereby, preliminary to a customary marriage, a young man will forcibly take a girl to his home.<sup>206</sup> The main aim of *ukuthwala* is to force the girl’s family to enter into negotiations for the conclusion of a customary marriage.<sup>207</sup> The procedure for *ukuthwala* is as follows: The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day, towards sunset or at early dusk, and they will ‘forcibly’ take her to the young man’s home. On the same day as the *ukuthwala* or early the following day, those who have effected *ukuthwala* are required to make a report at the girl’s home, to tell the abducted girl’s family not to be worried because the girl is safe with them. They then indicate what amount of cattle they propose to pay and how soon that can be done.<sup>208</sup> A friendly relationship is thus established between the two families, and the status of the girl is immediately elevated to that of a young wife. Sooner or later some cattle will be paid to the girl’s father as *lobolo* (bride price).<sup>209</sup> However, if the families cannot reach an agreement, the girl will return to her parental home, while the man’s family will be liable for damages.<sup>210</sup>

It violates the rights of the girl child by virtue of the fact that in most cases, the girl is forced into marriage without her consent.<sup>211</sup> She is carried away by a group of people, one of them being the

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<sup>205</sup> In South Africa, the custom originated from the Xhosas. However, although the custom is predominantly practiced among Xhosa-speaking tribes, the practice has expanded into different ethnic groups such as the Mpondo clan.

<sup>206</sup> Sloth-Nielsen J & Mwambene L in ‘Benign accommodation? Ukuthwala, ‘forced marriage’ and the South African Children’s Act ‘(2011) 2.1 *Journal of Family Law and Practice* 6.

<sup>207</sup> Sloth-Nielsen J & Mwambene L in ‘Benign accommodation? Ukuthwala, ‘forced marriage’ and the South African Children’s Act ‘(2011) 2.1 *Journal of Family Law and Practice* 6.

<sup>208</sup> Wadesango N ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) *Anthropologist* 123.

<sup>209</sup> Wadesango N ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) *Anthropologist* 123.

<sup>210</sup> Sloth-Nielsen J & Mwambene L in ‘Benign accommodation? Ukuthwala, ‘forced marriage’ and the South African Children’s Act ‘(2011) 2.1 *Journal of Family Law and Practice* 6.

<sup>211</sup> Sloth-Nielsen J & Mwambene L in ‘Benign accommodation? Ukuthwala, ‘forced marriage’ and the South African Children’s Act ‘ (2011) 2.1 *Journal of Family Law and Practice* 6 argue that sometimes the girl is caught unaware,

future husband. She is kept hidden and raped after which family members from both sides meet and discuss marriage between the abducted girl and the would-be husband.<sup>212</sup> Article 6(a) and (b) of the African Protocol provides that States ‘shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage’ and they shall enact legislation to ensure that ‘no marriage shall take place without the free and full consent of both parties and that the minimum age for marriage is eighteen years.’<sup>213</sup> In addition, the African Charter on the Rights and Welfare of the Child (ACRWC) provides in its Article 21(2) that child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.<sup>214</sup> This is also supported by Article 8(2) of the SADC Protocol on Gender and Development further provides that ‘legislation on marriage shall ensure that no person under the age of eighteen years shall marry unless otherwise specified by law which takes into account the best interests and welfare of the child; that every marriage takes place with the free and full consent of both parties; and lastly that every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws.’<sup>215</sup> Therefore, one can conclude that marriage by abduction violates these regional standards which require that there should be consent when people get into a marriage and that children must be of a marriageable

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but in many instances she is caught according to prior plan and agreement. In either case, the girl will put up a show of resistance to suggest to onlookers that it is against her will, when in fact, it is seldom so.

<sup>212</sup> Malawi Human Rights Commission (2005) ‘Research Report on Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi’ as cited by Wadesango N ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) *Anthropologist* 124.

<sup>213</sup> Article 6(a) and (b) of the African Protocol.

<sup>214</sup> Article 21(2) ACRWC.

<sup>215</sup> Article 8(2) Southern African Development Community: Protocol on Gender and Development available at [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Gender_and_Development_2008.pdf) (accessed 30 June 2014).

age when entering into a marriage because these types of marriages often occur before a child has reached the stipulated marriage age and without her consent.<sup>216</sup>

### 3.2.4 Virgin Pledging/ *Kuripa ngozi* (Child Marriages)

Child marriage, also known as early marriage, is defined as:

*‘any marriage carried out below the age of 18 years, before the girl is physically, physiologically, and psychologically ready to shoulder the responsibilities of marriage and childbearing’.*<sup>217</sup>

These marriages may take place with or without formal registration, and under civil, religious, or customary laws. Child marriage affects both sexes, but girls are disproportionately affected as they are the majority of the victims.<sup>218</sup> This practice takes place not only in Zimbabwe but in almost all the countries in the SADC region.<sup>219</sup> The legal significance of child marriages under customary law in most countries is that they are used to build or strengthen alliances between families.<sup>220</sup> Sometimes this may even include the betrothals of young children or babies.<sup>221</sup> Arguably, the fact that these marriages are entered into to build relations between families and that sometimes parents enter into contracts of marriage with other people on behalf of their

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<sup>216</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 21.

<sup>217</sup> IPPF ‘Ending Child Marriage: A guide for Policy Action’ available at <http://www.ippf.org/NR/rdonlyres/8415A7E9-0833-4500-AE53-9AA09F1A56D8/0/endchildmarriage.pdf> (accessed 29 May 2014). A child is defined under Article 1 of the Convention on the Right of the Child as: ‘...every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’

<sup>218</sup> Sibanda M ‘Married too soon: child marriage in Zimbabwe’ *The Research and Advocacy Unit* (2011) 8.

<sup>219</sup> Wadesango N ‘Violation of Women’s Rights by Harmful Traditional Practices’ (2011) 13(2) *Anthropologist* 124. These marriages also take place in other African countries such as South Africa, Malawi, Botswana amongst others.

<sup>220</sup> Sibanda M ‘Married too soon: child marriage in Zimbabwe’ *The Research and Advocacy Unit* (2011).

<sup>221</sup> Sibanda M ‘Married too soon: child marriage in Zimbabwe’ *The Research and Advocacy Unit* (2011).

minor children without their children's consent violates Article 21(2) of the ACRWC prohibits the betrothal of both girls and boys.

Several studies acknowledge that accurate data on the true extent of child marriage is difficult to obtain because many marriages go unregistered and girls' ages may be falsified. However, UNICEF estimates that globally, some 64 million young women (aged between the ages of twenty to twenty four years) were married before the age of eighteen years.<sup>222</sup> Child marriages are common in Zimbabwe and according to the Girl Child Network, twenty one percent of children mostly girls are married before the age of eighteen years,<sup>223</sup> hence directly violating Article 21(2) of ACRWC provides that the minimum age for marriage is eighteen years.

Child marriages take different forms, for example, in Zimbabwe; they can take place through virgin pledging known as *kuripa ngozi*<sup>224</sup> among the Shona tribes. *Kuripa ngozi* is defined as the use of marriage to remedy criminal offences; the practice centres on the giving of a virgin of the perpetrator family to the aggrieved family in order to atone for a wrongdoing.<sup>225</sup> Reported instances of *kuripa ngozi* exclusively discuss murder by the perpetrator family which prompts demands for compensation in the form of a virgin by the aggrieved family.

*Kuripa ngozi* is one of many well established traditions which use the exchange of women for tangible and intangible community goods.<sup>226</sup> This cultural practice is in direct conflict with

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<sup>222</sup> Sibanda M 'Married too soon: child marriage in Zimbabwe' *The Research and Advocacy Unit* (2011) 8.

<sup>223</sup> Sokwanele 'UN Day of the Girl Child - 11 October 2012' available at <http://www.sokwanele.com/thisiszimbabwe/archives/8128> (accessed 29 June 2014).

<sup>224</sup> *Kuripa ngozi* is the customary practice of offering a young girl or grown women as compensatory payment in inter-family disputes as well as in the appeasement of avenging deceased spirits.

<sup>225</sup> Australian Government 'Refugee Review Tribunal: Country Advice Zimbabwe' available at [www.justice.gov/.../zimbabwe/kuripa%20ngozi%20\(virgin%20pledging\)](http://www.justice.gov/.../zimbabwe/kuripa%20ngozi%20(virgin%20pledging))... (accessed 21 August 2014).

<sup>226</sup> Australian Government 'Refugee Review Tribunal: Country Advice Zimbabwe' available at [www.justice.gov/.../zimbabwe/kuripa%20ngozi%20\(virgin%20pledging\)](http://www.justice.gov/.../zimbabwe/kuripa%20ngozi%20(virgin%20pledging))... (accessed 21 August 2014).

Article 16 (1) (b) and (c) of CEDAW and Article 21(2) of ACRWC which require both parties to a marriage to consent and to be of marriageable age when concluding a marriage. In cases of *kuripa ngozi* as described, children are often coerced to marry against their will and before they reach eighteen years which is stipulated to be the marriageable age by international and regional law.

In some instances of child marriages, girls are married off to older men when they are at the age of eleven, twelve and thirteen; some even as young as six years. Because they cannot abstain from sex or insist on condom use, child brides are often exposed to such serious health risks as premature pregnancy, sexually transmitted infections and, increasingly, HIV and AIDS.<sup>227</sup>

Child marriage is widely recognised as a violation of children's rights. It is also a direct form of discrimination against the girl child, who, as a result of the practice, is often deprived of her basic rights to health, education, development, and equality.<sup>228</sup> The harmful consequences of child marriage include separation from family and friends, lack of freedom to interact with peers and participate in community activities and decreased opportunities for education. Child marriage can also result in bonded labour or enslavement, commercial sexual exploitation and violence against the victim.<sup>229</sup> This shows that child marriages are against the best interests of the child which the ACRWC mandates State parties to protect.

Tshabalala-Msimang asserted that child marriage is regarded as a form of gender-based violence against the girl child; hence one needs to acknowledge that this practice will ultimately

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<sup>227</sup> Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *Anthropologist* 124.

<sup>228</sup> Sibanda M 'Married too soon: child marriage in Zimbabwe' *The Research and Advocacy Unit* (2011).

<sup>229</sup> Stormorken S L, Vincent K, Santisteban R 'No More Excuses: Ending all Harmful Traditional Practices against Girls and Young Women. Norway: Plan' 2007.

compromise the development of the girl child and can result in early pregnancies, increasing the chances of maternal mortality.<sup>230</sup> Furthermore, the young girl will suffer from social isolation, with little or no education, poor vocational training, responsible for household chores in running families at young age, will increase her vulnerability to domestic violence. This then reinforces the gendered nature of poverty.<sup>231</sup>

In addition, child brides are frequently susceptible to domestic violence because the age difference emphasizes the powerlessness of the girl child. This is supported by empirical evidence that child marriages are associated with increased risk of girl's experiencing domestic violence and sexual abuse.<sup>232</sup> Article 16(1) (c) requires parties to a marriage to have the same rights during marriage and at its dissolution. However, the girl will not be able to enjoy the same rights as her husband because of her powerlessness.<sup>233</sup> Article 6(a) and (b) of the African Protocol, Article 21(2) of the ACRWC, Article 8(2) of SADC Protocol on Gender and Development and Article 24(3) of the CRC are relevant in highlighting that child marriages violate the human rights of girl children.

Altogether, these provisions discussed above discourage marriages entered into without the consensus of the child, without reaching the stipulated marriageable age and cultural practices

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<sup>230</sup> Tshabalala-Msimang M 'Address by Dr MantoTshabalala-Msimang during the Lusikisiki Imbizo on Girl Child Abductions, Forced and Early Marriages, 24 March 2009' available at <http://www.gov.za/m-tshabalala-msimang-lusikisiki-imbizo-girl-child-abductions-forced-and-early-marriages> (accessed 10 October 2014).

<sup>231</sup> Tshabalala-Msimang M 'Address by Dr MantoTshabalala-Msimang during the Lusikisiki Imbizo on Girl Child Abductions, Forced and Early Marriages, 24 March 2009' available at <http://www.gov.za/m-tshabalala-msimang-lusikisiki-imbizo-girl-child-abductions-forced-and-early-marriages> (accessed 10 October 2014).

<sup>232</sup> ICW 'New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs International Center for Research on Women, Report prepared for USAID, Washington' available at <http://www.icrw.org/docs/2007-new-insights-preventing-child-marriage.pdf> (accessed 22 July 2014).

<sup>233</sup> See Article 16(1) (c) CEDAW.

which are prejudicial to the health, growth and development of the child.<sup>234</sup> Child marriages contravene these provisions because in most cases girl children are coerced into such marriages before reaching the age of eighteen years which is the stipulated age for children to enter into a marriage. Such marriages directly affect their growth and development because children are separated from their families and friends.<sup>235</sup> In addition to this, such marriages violate their right to health because they are unable to abstain from sex or use protection; as a result of this they become vulnerable to sexually transmitted diseases.<sup>236</sup>

### 3.3 TRADITIONAL CULTURAL PRACTICES RELATED TO INHERITANCE

#### 3.3.1 Male primogeniture

The starting point in discussing the customary principle of male primogeniture<sup>237</sup> in Zimbabwe is the *Magaya v Magaya*<sup>238</sup> case. In this case the Supreme Court of Zimbabwe upheld the customary rule that a woman cannot be appointed as a customary heir. The case concerned the challenge to the application of African customary law of male primogeniture under succession. The deceased had married two wives in terms of customary law; one female child was born of the first marriage and three male children of the second. The eldest female child claimed heirship to the deceased's estate, in conflict with the customary rule of male primogeniture. In this case, the court acknowledged that the exclusion of women as heirs under customary law could amount

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<sup>234</sup> Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) *Anthropologist* 13(2) 123.

<sup>235</sup> Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) *Anthropologist* 13(2) 123.

<sup>236</sup> Wadesango N 'Violation of Women's Rights by Harmful Traditional Practices' (2011) *Anthropologist* 13(2) 123.

<sup>237</sup> According to Bennett TW (2008) 335 the principle of male primogeniture determines the order of succession: the oldest, and therefore first-born, son succeeds in preference of younger ones. This principle excludes women from succeeding to the family head. According to Knoetze E 'Westernization or promotion of African women's rights?' (2006) 20 *Speculum Juris* 106 male primogeniture can be regarded as a form of discrimination that entrenches past patterns of disadvantage among a very vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under a constitutional order.

<sup>238</sup> *Magaya v Magaya* (SC 210/98).

to *prima facie* discrimination on the basis of sex but the court still did not give the award of heirship to the eldest female child in this case.<sup>239</sup> Again, in *Chihowa v Mangwende*<sup>240</sup> the deceased had died intestate, leaving no male descendant, but a widow, two major daughters, a father, and four brothers. Under customary law a male relative should have inherited the estate, but one of the daughters applied for an order that she was entitled to succeed. The court regarded lack of capacity as the only barrier to females succeeding to the estates of their male relatives.<sup>241</sup> With the removal of minority under the Legal Age of Majority Act,<sup>242</sup> however, women became eligible heirs. Unfortunately, *Chihowa's case* offers no hope for widows because it did not upset the customary rule of primogeniture.<sup>243</sup>

From the brief discussion of the two cases, we see that customs and traditions in Zimbabwe are consistent with the fact that widows and female children traditionally have limited right to inherit property from their husbands' and fathers' estate.<sup>244</sup> Even if the property was acquired during the marriage, widows cannot inherit.<sup>245</sup> This position is in direct conflict with Article 21(1) of the African Protocol provides that where a woman becomes a widow, she shall have the right to an equitable share in the inheritance of the property of her husband.

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<sup>239</sup> In *Bhe v Magistrate Khayelitsha*, the Constitutional Court ruled that the principle of male primogeniture applied in the Customary Law of succession applicable in South Africa offended the right to equality protected under section 9 of the South African Constitution and was consequently declared invalid.

<sup>240</sup> *Chihowa v Magwende* 1987 (1) ZLR 228 (S).

<sup>241</sup> *Chihowa v Magwende* 1987 (1) ZLR 228 (S).

<sup>242</sup> Legal Age of Majority Act 15 of 1982.

<sup>243</sup> See *Muriso v Muriso* 1992 (1). According to this case, *Chihowa* could not be read to allow a widow to be appointed the intestate heir of her husband's estate.

<sup>244</sup> Gopal G & Salim M (eds) *Gender and Law: Eastern Africa Speaks*, Conference organised by The world Bank & The economic commission for Africa, Washington DC: The International Bank for reconstruction and Development (1998).

<sup>245</sup> Gopal G & Salim M (eds) *Gender and Law: Eastern Africa Speaks*, Conference organised by The world Bank & The economic commission for Africa, Washington DC: The International Bank for reconstruction and Development (1998).



Related to the institution of *lobolo* discussed earlier, the general rule of customary law is that the eldest son is the natural heir of his deceased father. This right to inherit is established once it is shown that the father has paid *lobolo*.<sup>246</sup> More particularly, the heir is the one whom his deceased father's name was given. He does so, on the principle that he succeeds to his father's name and exercises control over his father's 'house' for the benefit of its members. Thus, a brother of the deceased may succeed in the absence of male issue.<sup>247</sup> This practice is discriminatory towards women because in terms of it only males reserve the right to inherit and exercise control over the deceased's dependants; therefore this violates Articles 2(d), 3 of CEDAW and Article 2 of the Banjul Charter which proscribe discrimination on the grounds of sex and culture.

According to the customary rules of succession, no female may inherit property, more especially where the deceased leaves children and there is no provision in customary law whereby the sister of the deceased is entitled either to inherit or distribute her brother's estate.<sup>248</sup> This practice is discriminatory and therefore it directly violates a woman's right to equality with men as provided for in Article 1 of CEDAW<sup>249</sup> because it only benefits men. Even if a woman contributed property during her marriage she cannot inherit it when her husband dies because only the male issue has the right to inherit. This is also a violation Article 21(2) of the African Protocol which

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<sup>246</sup> Bennett TW (1995) 126.

<sup>247</sup> Story JG (1979) 81.

<sup>248</sup> Story JG (1979) 81.

<sup>249</sup> To further elaborate that the primogeniture rule violates the right to equality and non-discrimination, the *Bhe and Others v Magistrate Khayelitsha and Others* where this rule was declared unconstitutional by the South African Constitutional Court will be used as an example. In this case, the father of applicants, Nonkuleleko and Anelisa Bhe (aged 9 years and 2 years), had died, and the mother (the third applicant) brought an action to secure the deceased's property for her daughters. Under the African customary law rule of primogeniture as well as section 23 of the Black Administration Act, the house became the property of the eldest male relative of the father, in this case the grandfather. The Constitutional Court declared the African customary law rule of primogeniture unconstitutional and struck down the entire legislative framework regulating intestate deceased estates of black South Africans. The Court held that this rule discriminates unfairly against women and illegitimate children on the grounds of race, gender and birth.

provides that women and men shall have the right to inherit, in equitable shares, their parents' properties.<sup>250</sup>

Furthermore, the heir has the same standing and status as the deceased had.<sup>251</sup> This entails that he becomes the owner of all the property which the deceased owned at the time of his death.<sup>252</sup> Along with the 'ownership' of the property come tremendous responsibilities, for not only is the heir liable for the deceased's debts, he also becomes the guardian of the women and minor sons and daughters of the deceased. He is furthermore, on the basis of his guardianship, duty bound to maintain and support them.<sup>253</sup> The fact that males can inherit whilst women cannot do so directly conflicts with Article 2 of CEDAW which proscribes discrimination on grounds of sex. Apart from the principle of male primogeniture, African customary laws of succession are interstate, universal and onerous. Upon the death of the family head his oldest son (if the deceased had more than one wife; it would normally be the oldest son of his first wife) succeeds to the *status* of the deceased. Emphasis on the term *status* implies that an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to support surviving family dependants.<sup>254</sup> This cultural practice is discriminatory against women because only males can succeed to the status of the deceased and is therefore in direct conflict with Articles 2(d), 3 of

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<sup>250</sup> Article 21(2) African Protocol.

<sup>251</sup> Venter T & Nel J 'African Customary Law of Intestate Succession and Gender (in)equality' (2005) (1) *TSAR* 89. See also Knoetze E 'Westernization or promotion of African women's rights?' (2006) 20 *Speculum Juris* 106.

<sup>252</sup> Venter T & Nel J 'African Customary Law of Intestate Succession and Gender (in)equality' (2005) (1) *TSAR* 89. See also Knoetze E 'Westernization or promotion of African women's rights?' (2006) 20 *Speculum Juris* 106 who states that with succession the heir steps into the shoes of the family head and acquires all his rights and assumes all the responsibilities of family headship. Thus the rule of male primogeniture prevents the partitioning of the family property and keeps it intact for the support of the widows, unmarried daughters and younger sons. Members of the family were thus assured of the heir's protection and enjoyed the benefit of his maintenance and support.

<sup>253</sup> Venter T & Nel J 'African Customary Law of Intestate Succession and Gender (in)equality' (2005) (1) *TSAR* 89.

<sup>254</sup> Bennett TW *Human Rights and African Customary Law Under the South African Constitution* (1995) 126.

CEDAW and Article 2 of the Banjul Charter which proscribes discrimination on the grounds of sex and culture.

The principle of male primogeniture can also be linked to property grabbing. Under African customary law, formal wills do not exist. This leaves claims of interState succession open to manipulation and abuse by members of a deceased male's extended family.<sup>255</sup> African customary law is often cited by members of the deceased male's extended family to justify disenfranchising a widow from owning property in the matrimonial home left by the deceased spouse. This may also include property that the wife owned herself or that she acquired jointly with her husband.<sup>256</sup> This practice is most commonly referred to as 'property-grabbing' (property stripping).<sup>257</sup> This practice can be linked to gender-based violence because it threatens the security of women and in most cases where widows are evicted from their homes, the forced evictions are often accompanied by further acts of violence such as physical and mental harassment.<sup>258</sup> In addition, this practice is in direct conflict with Article 21(2) of the African because it denies a woman the right to inherit her spouse property and even her own property that she contributed during the course of their marriage.<sup>259</sup>

Furthermore, custom requires chiefs to allocate land to male heads of households, but women do not automatically inherit this land upon a husband's death.<sup>260</sup> Consequently, they may be evicted from the land when widowed. Many who remain on the land do so at the pleasure of their in-

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<sup>255</sup> Bennett TW & Peart NS (1991) 197.

<sup>256</sup> Bennett TW & Peart NS (1991) 197.

<sup>257</sup> Bennett TW & Peart NS (1991) 197.

<sup>258</sup> Gender and development 'Gender-based violence and property grabbing in Africa: a denial of women's liberty and security' available at <http://policy-practice.oxfam.org.uk/publications/gender-based-violence-and-property-grabbing-in-africa-a-denial-of-womens-liberty-131630> (accessed 28 November 2014).

<sup>259</sup> Article 21(2) African Protocol.

<sup>260</sup> Culture of Zimbabwe 'Countries and their cultures' available at <http://www.everyculture.com/To-Z/Zimbabwe.html> (accessed 29 May 2014).

laws or traditional leaders. Childless widows are often evicted, as are young widows who refused to be physically 'inherited' by a male relative of their late husband, often a brother.<sup>261</sup> However, CEDAW in its Article 2 requires that women and men are treated equally and not discriminated against on the basis of gender but the principle of male primogeniture does this because women cannot automatically inherit the land that their deceased husbands owned.

### 3.3.2 Wife Inheritance

Wife inheritance is a traditional practice whereby a widow is 'inherited' by her husband's brother.<sup>262</sup> The Shona tribes of Zimbabwe refer to the practice of wife inheritance as *kugaranhaka*<sup>263</sup> and the Ndebele tribes refer to it as *ukungena*.<sup>264</sup> It takes two principal forms: a woman whose husband has died may be given to a surviving brother-in-law to marry, or a man whose wife has died is given a young girl from his wife's family to marry. In the second instance, the girl could either be a sister of the wife or the wife's niece. This often happens with a son-in-law who is in good standing, and more often one who is rich, so that the wife's biological family continues to benefit from the wealth.<sup>265</sup> This practice usually takes place against a woman's consent to such a union.<sup>266</sup> Therefore, this practice violates Article 16(1) (b) and (c) which requires people to consent when entering into a marriage because in most circumstances the woman enters into such a marriage without fully and freely consenting to it.

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<sup>261</sup> Culture of Zimbabwe 'Countries and their cultures' available at <http://www.everyculture.com/To-Z/Zimbabwe.html> (accessed 29 May 2014).

<sup>262</sup> See Submissions made by FIDA, Kenya, for the African Regional Dialogue of the Global Commission on HIV and the Laws as cited by Day E and Maleche A 'Traditional Cultural Practices and HIV: Reconciling Culture and Human Rights' Global Commission on HIV and the Law Working Paper 2011.

<sup>263</sup> Goldin B & Gelfand M (1975) 176.

<sup>264</sup> Goldin B & Gelfand M (1975) 176.

<sup>265</sup> Kanchense JHM 'Urologic and Gynecologic Health Problems among Zimbabwean Women: What is the Role of Poverty?' available at [http://www.medscape.com/viewArticle/564664\\_4](http://www.medscape.com/viewArticle/564664_4) (accessed 27May 2014).

<sup>266</sup> Kanchense JHM 'Urologic and Gynecologic Health Problems Among Zimbabwean Women: What is the Role of Poverty?' available at [http://www.medscape.com/viewArticle/564664\\_4](http://www.medscape.com/viewArticle/564664_4)(accessed 27May 2014).

The legal significance of wife inheritance under customary law is that it is viewed as a form of social protection where one of the brothers of the deceased would be identified to take care of the immediate needs of the widow and of the orphans.<sup>267</sup> The basis of wife inheritance was never related to sexual intercourse, but, in many countries in Africa including Zimbabwe the practice has changed over the years, and now women are often coerced into a sexual relationship with the inheritor.<sup>268</sup> However, even though the practice of *kugaranhaka* purports to be a way of ‘protecting’ the widow, yet it violates her fundamental rights to self-determination because in most cases women are forced to get married to a certain man; this can pose major physical and mental health threats.<sup>269</sup> In both instances of *kugaranhaka*, one can deduce that it is the man that enjoys this practice more than the woman because they are the main actors and the practice is done to fulfil their needs whilst they hide behind the veil of protecting the women in question.<sup>270</sup> This therefore is in direct contravention of the right to equality as provided for in Articles 2 of CEDAW and the African Charter. As outlined above, Article 5 of the Protocol to the African Charter on Human and Peoples Rights on the rights of women in Africa mandates State parties to prohibit and condemn all forms of harmful cultural practices which negatively affect the human rights of women and which are contrary to recognised international standards.<sup>271</sup> Therefore, this provision remains relevant to the practice of wife inheritance as practiced in Zimbabwe.

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<sup>267</sup> See Human Rights Watch ‘Policy Paralysis: A call For Action on HIV/AIDS Related Human Rights Abuses Against Women and Girls in Africa’ *Human Rights Watch* (2003) 6.

<sup>268</sup> See Human Rights Watch ‘Policy Paralysis: A call For Action on HIV/AIDS Related Human Rights Abuses Against Women and Girls in Africa’ *Human Rights Watch* (2003)6.

<sup>269</sup> Kanchense JHM ‘Urologic and Gynecologic Health Problems Among Zimbabwean Women: What is the Role of Poverty?’ available at [http://www.medscape.com/viewArticle/564664\\_4](http://www.medscape.com/viewArticle/564664_4)(accessed 27May 2014).

<sup>270</sup> Kanchense JHM ‘Urologic and Gynecologic Health Problems Among Zimbabwean Women: What is the Role of Poverty?’ available at [http://www.medscape.com/viewArticle/564664\\_4](http://www.medscape.com/viewArticle/564664_4)(accessed 27May 2014).

<sup>271</sup> Article 5 African Protocol.

### 3.4 CONCLUSION

To sum up, it is clear that the traditional cultural practices discussed above violate international and regional standards on the protection of women from gender-based violence. This has serious implications on the achievement of gender equality in society. Zimbabwe is a party to most international and regional standards on the protection of women from cultural practices that can lead to gender-based violence as shown in chapter 2. As a party to these instruments, she has a duty to address cultural practices that lead to gender-based violence. The following chapter therefore, will assess her compliance with these standards on the protection of women from gender-based violence by looking at the Constitution of Zimbabwe, Domestic Violence Act and other pieces of legislation.



## CHAPTER 4: ZIMBABWE'S LEGAL FRAMEWORK ON THE PROTECTION OF WOMEN FROM GENDER-BASED VIOLENCE

### 4.1 INTRODUCTION

This chapter will discuss Zimbabwe's response on the protection of women from gender based violence that is caused by traditional cultural practices. This will be achieved by looking at the different pieces of legislation in Zimbabwe that are aimed at protecting women from cultural practices that lead to gender-based violence and measuring them against international and regional standards discussed in chapter two. The discussion will start with an assessment of the Constitution<sup>272</sup> as the supreme law of the land.<sup>273</sup> It should be pointed from the onset that as the supreme law of the land, the obligations imposed by it are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.<sup>274</sup>

The paper will also discuss other types of legislation including: the Marriage Act,<sup>275</sup> Customary Marriages Act,<sup>276</sup> Administration of Estates Amendment Act,<sup>277</sup> Deceased Persons Family Maintenance Act,<sup>278</sup> Matrimonial Causes Act,<sup>279</sup> Legal Age of Majority Act<sup>280</sup> and the Domestic Violence Act.<sup>281</sup>

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<sup>272</sup> Constitution of Zimbabwe Amendment (No. 20) Act 20 of 2013. This Act repeals and replaces the 1979 to 2008 Constitutions. It sets out the new Constitution in the Schedule to the Act.

<sup>273</sup> Section 2(1) of the Constitution of Zimbabwe provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency.

<sup>274</sup> Section 2(2) of the Constitution of Zimbabwe.

<sup>275</sup> Marriage Act (Act No. 81 of 1964 as amended through Act No. 18 of 1989) Chapter 5:11.

<sup>276</sup> Customary Marriages Act (Ordinance No. 5 of 1917 as amended through Act No. 6 of 1997) Chapter 5:07.

<sup>277</sup> Administration of Estates Amendment Act No. 6 of 1997.

<sup>278</sup> Deceased Persons Family Maintenance Act No. 39 of 1978 (as amended through Act No. 9 of 1997) (Chapter 6:03). In terms of this Act, there is an obligation to maintain certain categories of dependents of a deceased person regardless of whether customary or the general law is applied or whether the eState is teState or inteState.



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<sup>279</sup> Matrimonial Causes Act Chapter 5:13 of 1986.

<sup>280</sup> Legal Age of Majority Act Act No. 15 of 1982.

<sup>281</sup> Domestic Violence Act Chapter 5:16 of 2006.



## 4. DISCUSSION OF ZIMBABWE'S LEGAL FRAMEWORK

### 4.2.1 Constitution of Zimbabwe

Just like the international and regional instruments, the Constitution recognises and values cultural practices that do not negatively impact on a person's dignity and well-being. This is evidenced by *section 16 (1)* which provides that the State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans.<sup>282</sup> This provision is partly in line with Article 2(f) of CEDAW, Article 5 of the African Protocol and Article 21(1) of the SADC Protocol on Gender and Development which recognise cultural values that are not in conflict with recognised international standards such as equality between men and women because it places such duties on the public domain only. It can be argued that this provision does not place a duty on the private domain to preserve cultural values that enhance the dignity and well-being of individuals when in practice it is in the private domain where most cultural values and practices violate women's rights to dignity and equality.

The Constitution also respects the rights of children. *Section 19(1)* of the Constitution makes it an obligation for the State to adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.<sup>283</sup> In addition to this, *Section 81(1)* provides that every child, under the age of eighteen years, has the right<sup>284</sup> to be protected

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<sup>282</sup> Section 16 (1) of the Constitution of Zimbabwe.

<sup>283</sup> Section 19 (1) of the Constitution of Zimbabwe.

<sup>284</sup> Section 81 (1) of the Constitution of Zimbabwe. Chapter 33 of the Children's Protection and Adoption Act defines a child in its section 2 as any person (including an infant) under the age of sixteen years. The Legal Age of Majority Act, 1982, defines any person below the age of eighteen years as a minor. A person between the age of sixteen and eighteen is defined as a young person in Chapter 33. It has been suggested that Chapter 33 should be amended to reflect eighteen years as the only age of majority to avoid confusions and loopholes. This definition is in line with the CRC. However, it is noted that the Zimbabwean cultural or traditional definitions of a child differ to

from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse.<sup>285</sup> Section 81(2) also provides that a child's best interests are paramount in every matter concerning the child.<sup>286</sup> This provision is in line with one of the fundamental principles of the CRC which requires that the best interests of children are protected.<sup>287</sup> In addition to this, the ACRWC also mandates States to abolish cultural practices that have a negative impact on the normal growth and dignity of the child.<sup>288</sup> This provision, therefore, can be used to address cultural practices such as marriage by abduction and *kuripa ngozi* which have a negative impact on the normal growth and dignity of children and are at variance with children's rights as discussed in the previous chapter.

In relation to marriage, section 26 provides that the State must take appropriate measures to ensure that—no marriage is entered into without the free and full consent of the intending spouses;<sup>289</sup> children are not pledged in marriage;<sup>290</sup> there is equality of rights and obligations of spouses during marriage and at its dissolution;<sup>291</sup> and in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses.<sup>292</sup> This provision is in compliance with Article 16(1) (a)–(c) of CEDAW, Article 6(a), (b), (c) and (j) of the African Protocol and Article 8(1)-(2) of the SADC Protocol on Gender and Development which all require that every marriage is entered into with the free and full consent of persons concerned and that there is equality during a marriage and upon its

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some extent. According to customary practices in Zimbabwe a person is still a child as long as he or she remains under parental authority rather than being defined by chronological age.

<sup>285</sup> Section 81(1) (e) of the Constitution of Zimbabwe.

<sup>286</sup> Section 81(2) of the Constitution of Zimbabwe.

<sup>287</sup> See Article 3 CRC.

<sup>288</sup> See Article 1(3) ACRWC.

<sup>289</sup> Section 25 (a) of the Constitution of Zimbabwe.

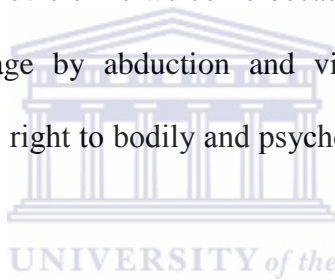
<sup>290</sup> Section 25 (b) of the Constitution of Zimbabwe.

<sup>291</sup> Section 25 (c) of the Constitution of Zimbabwe.

<sup>292</sup> Section 25 (d) of the Constitution of Zimbabwe.

dissolution. This provision is welcome because it can address traditional cultural practices such as payment of *lobola*, marriage by abduction, virgin pledging/ *kuripa ngozi* (child marriages) and property grabbing.

Furthermore, the Constitution provides for the protection of every individual's psychological and bodily integrity which might be affected by the actions of the public and private spheres. This is evidenced by *section 52* which provides that every person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources;<sup>293</sup> subject to any other provision of the Constitution, to make decisions concerning reproduction.<sup>294</sup> This provision is welcome because it can help to address traditional cultural practices such as marriage by abduction and virgin pledging/*kuripa ngozi* (child marriages) which infringe on one's right to bodily and psychological integrity and freedom from violence.



The right to non-discrimination is found in section 56. Section 56(3) provides that:

*'Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.'*<sup>295</sup>

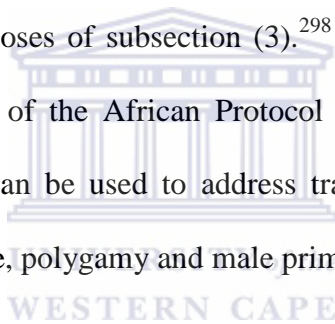
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<sup>293</sup> Section 52 (a) of the Constitution of Zimbabwe.

<sup>294</sup> Section 52 (b) of the Constitution of Zimbabwe.

<sup>295</sup> Section 56(3) of the Constitution of Zimbabwe 1996. The Constitution of Zimbabwe originally prohibited discrimination on the basis of race, tribe, place of origin, political opinions, colour or creed but not sex or gender. In 1996 the Constitution was amended to include "sex" to the list of prohibited grounds for discrimination. Thus, section 23(1) after the amendment Stated that "no law shall make any provision that is discriminatory either of

It is of paramount importance to note that this section does not permit discrimination on grounds of culture and therefore the Zimbabwean Constitution can be applauded for this major positive transition. In addition to this, *section 56(5)* States that discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.<sup>296</sup> The Constitution also makes it the obligation of the State to take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and such measures must be taken to redress circumstances of genuine need;<sup>297</sup> and no such measure is to be regarded as unfair for the purposes of subsection (3).<sup>298</sup> This provision is also in line with Article 2 CEDAW and Article 2 of the African Protocol which proscribe discrimination on grounds of sex and culture and can be used to address traditional cultural practices such as payment of *lobola*, wife inheritance, polygamy and male primogeniture rule.



The Constitution also stipulates the minimum age requirement for concluding a marriage. In terms of *section 78*, every person who has attained the age of eighteen years has the right to

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itself or in its effect”, which means that a law may not prejudice “persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or sex”. However, the greatest pitfall in that provision was that all aspects of customary law and personal law were explicitly excluded from this clause. This provision was seen to be limited in two respects; firstly it was focused on the public sphere and it allowed discrimination in matters of customary law. Given that customary practices are often discriminatory against women, the application of customary law alongside laws aimed at enhancing gender equality often leaves women in a vulnerable position. This section was used as a basis for denying women the right to inherit property from their deceased relatives’ eStates as discussed in Chapter three in the *Magaya v Magaya* case. This section secondly permitted discrimination in matters of “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”.

<sup>296</sup> Section 56 (5) of the Constitution of Zimbabwe.

<sup>297</sup> Section 56 (6) (a) of the Constitution of Zimbabwe.

<sup>298</sup> Section 56 (6) (b) of the Constitution of Zimbabwe.

found a family<sup>299</sup> and no person may be compelled to enter into marriage against their will.<sup>300</sup> This provision is in compliance with Article 6(a) and (b) and Article 8(2) of the SADC protocol on Gender and Development which provide that eighteen years is the marriageable age and prohibits forced marriages such as marriage by abduction and *kuripa ngozi*/virgin pledging (child marriages) that are practiced in Zimbabwe.<sup>301</sup>

Furthermore, with regards to the guardianship of children, *section 80* States that women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.<sup>302</sup> This provision is in compliance with Articles 16 (c) of CEDAW and 16(1) (f) which provides that both women and men must have the same rights during and after the dissolution of their marriage including the same right to guardianship over their children. Since it has been observed that the payment of *lobola* denies a woman guardianship of her children upon divorce because children are considered to belong to the husband and his family by virtue of the payment of *lobola* to the woman's family, this provision can be used to address such cultural practices. In addition to this, *section 80(3)* States that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.<sup>303</sup> This provision is partly in line with Article 2(f) of CEDAW which requires States to 'take appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'

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<sup>299</sup> Section 78 (1) of the Constitution of Zimbabwe.

<sup>300</sup> Section 78 (2) of the Constitution of Zimbabwe.

<sup>301</sup> Refer to para 3.2. on traditional cultural practices related to marriage.

<sup>302</sup> Section 80 (2) of the Constitution of Zimbabwe.

<sup>303</sup> Section 80 (3) of the Constitution of Zimbabwe.

In addition, the Constitution further shows Zimbabwe's willingness to implement international and regional standards. This is evidenced by its section 34<sup>304</sup> which provides that the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law. In addition to this, section 327 directly addresses the application of international law in Zimbabwe. This section States that, 'any international treaty which has been concluded or executed by the President or under the President's authority, does not bind Zimbabwe unless it has been approved by parliament and it does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.'<sup>305</sup> Furthermore, section 326 States that 'Customary International Law is part of the Law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament.'<sup>306</sup> The implication of these Constitutional provisions is that International treaties are only binding on Zimbabwe once they have been ratified into law by Parliament, with the President's authority and that any accepted interpretation of customary international law will not apply where a version, no matter how absurd, of it has been incorporated into a Statute.

#### **4.2.2 Marriage Act [Chapter 5:11] and the Customary Marriages Act [Chapter 5:07]**

The Marriage Act deals with rights and obligations of parties to a civil marriage. This Act provides that there has to be consent of the man and woman who are parties to the marriage and sets the marriage age for both men and women. This is evidenced by *section 22* of the Act which

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<sup>304</sup> Section 34 of the Constitution of Zimbabwe.

<sup>305</sup> Section 327 of the Constitution of Zimbabwe.

<sup>306</sup> Section 326 of the Constitution of Zimbabwe.

States the minimum age requirement for marriage for both men and women. In terms of this section:

*'No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable.'*<sup>307</sup>

With regards to the issue of consent, this provision complies with Article 16(1) (a) and (b) of CEDAW, Article 6(a) of the African Protocol and Article 8(2) of the SADC Protocol on Gender and Development which all require that every marriage is entered into with the free and full consent of persons concerned. However, this provision is in conflict with the CRC which defines a child as any person below the age of eighteen years and does not make a distinction whether it's a boy or girl who must be under that age.

The Customary Marriages Act was originally formulated in 1951 and at that stage it was known as the 'African Marriages Act Chapter 238', but it has been subsequently amended.<sup>308</sup> This Act must be read together with the Marriage Act which governs formalities pertaining to civil marriage. It must also be read together with the Married Persons Property Act [Chapter 5:12] and the Matrimonial Causes Act [Chapter 5:13], both of which apply to all 'solemnised' marriages.<sup>309</sup>

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<sup>307</sup> Section 22(1) Marriage Act.

<sup>308</sup> Legal Assistance Centre of Namibia 'Proposals for Law Reform on the Recognition of Customary Marriages' (1999) 58.

<sup>309</sup> Legal Assistance Centre of Namibia 'Proposals for Law Reform on the Recognition of Customary Marriages' (1999) 58.

The Customary Marriages Act provides that a customary marriage shall be 'regarded as a valid marriage' only if it is registered in terms of the Act.<sup>310</sup> However, unregistered customary marriages will be 'valid marriages' for 'the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such a marriage'.<sup>311</sup> Thus, in essence, an unregistered customary marriage operates in terms of customary law and totally outside the general legal system.<sup>312</sup> This provision fails to address the discrimination associated with customary marriages such as guardianship of children, status of women and regulation of property upon divorce or death. Therefore, this provision is not in line with Article 2, 16(1) (g) of CEDAW, 21(1) and 6(j) of the African Protocol which deal with the issue of guardianship of children, women's rights to property and the right to equality as discussed in chapter two.

The Customary Marriages Act further prohibits the pledging of girls and women in marriage.<sup>313</sup> The Act in section 11(1) provides that any agreement in which a person, whether for consideration or otherwise, pledges or promises a girl or woman in marriage to a man shall be of no effect.<sup>314</sup> This is in line with Article 6(a) of the African Protocol which requires parties to a marriage to consent hence prohibiting parents from compelling their daughters to marry against their will and Article 21(1) of the ACRWC which prohibits the betrothal of girls. In addition to this, section 11(2) States that any person who enters into an agreement of pledging women and girls in marriage shall be guilty of an offence and liable to a fine not exceeding one thousand

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<sup>310</sup> Section 3 (1) Customary Marriages Act.

<sup>311</sup> Section 3 (5) Customary Marriages Act.

<sup>312</sup> Legal Assistance Centre of Namibia 'Proposals for Law Reform on the Recognition of Customary Marriages' (1999) 58.

<sup>313</sup> The Customary Marriages Act previously made it illegal to pledge girls under the age of 12. However, now it is illegal in terms of section 11 for a person to pledge or promise any girl or woman in marriage.

<sup>314</sup> Section 11 (1) Customary Marriages Act.



dollars or, in default of payment, to imprisonment for a period not exceeding one year.<sup>315</sup> This provision can be applauded for taking an extra mile by criminalising pledging of girls which is not the case with international and regional law.

Section 12 (1) States that whenever Africans desire their marriage to be solemnised in terms of the Marriage Act, such Africans shall appear before a magistrate for the purpose of obtaining a certificate stating that there is no bar to such marriage by reason of lack of consent of the parents or guardian of the woman.<sup>316</sup> This provision is discriminatory because only the consent of the guardian or parents of a woman is required; this implies that a woman is still regarded as a minor who cannot give consent pertaining to a matter that directly affects her life. This provision therefore fails to comply with Article 2 of CEDAW and Article 2(1) of the Banjul Charter which prohibit discrimination on the grounds of sex.

Section 16 provides for the dissolution of marriages concluded under this Act. According to this section: No marriage solemnized in terms of this Act or the Marriage Act or registered under the Native Marriages Act or contracted under customary law before the 1st April, 1918, shall be dissolved except by order of a court of competent jurisdiction in terms of the Matrimonial Causes Act.<sup>317</sup> The legal significance of this is that the customary law position which allowed a man to divorce a woman whenever he pleased, without giving her reasons, is not recognised by the law because a marriage can only be dissolved after a court order has been granted. This partly complies with Article 16(1)(c) which provides that men and women must have the same rights during a marriage and at its dissolution.

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<sup>315</sup> Section 11 (2) Customary Marriages Act.

<sup>316</sup> Section 12 (1) Customary Marriages Act.

<sup>317</sup> Section 16 Customary Marriages Act.

One of the flaws of this Act is that it does not stipulate the minimum age requirement for contracting a valid customary marriage.<sup>318</sup> This is not in line with Article 6(b) of the African Protocol which provides that the minimum age for marriage is eighteen years. In addition to this, the Act is also silent on the issue of polygyny when polygynous marriages are recognised as valid marriages under Zimbabwe's customary law. However, the Zimbabwe Supreme Court ruled in 1999 that a customary marriage is potentially polygynous, while a civil marriage under the Marriage Act is monogamous.<sup>319</sup> By recognizing polygyny the Act does not comply with Article 6(c) of the African Protocol which provides that legislation should guarantee that 'monogamy is encouraged as the preferred form of marriage.'

#### **4.2.3 Matrimonial Causes Act (1987) [Chapter 5:13] and the Deceased Persons Family**

##### **Maintenance Act (Act No. 39 of 1978 as amended through Act No. 9 of 1997) (Chap. 6:03)**

In Zimbabwe the type of marriage one enters into determines property rights at death and divorce. If a woman is married in terms of the Marriage Act or the Customary Marriages Act, upon divorce the Matrimonial Causes Act determined the proprietary consequences.<sup>320</sup> The Act aims to place spouses in a position that they would have been had a normal marriage relationship continued between the parties. It does this by providing guidelines for the equitable distribution of matrimonial property upon divorce in terms of its *section 7*.<sup>321</sup> This Act only applies to

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<sup>318</sup> See Ncube W *Family Law in Zimbabwe* (1989) 138. See also Knoetze E 'Westernization or promotion of African women's rights?' (2006) 20 *Speculum Juris* 106.

<sup>319</sup> See Manyemba A "Supreme Court judgement sparks debate", *The Herald*, 11 March 1999 as cited by 'Proposals for Law Reform on the Recognition of Customary Marriages' (1999) 58 *Legal Assistance Centre of Namibia*.

<sup>320</sup> Strategy Conference for 'The Legal Network for Women's Property and Inheritance Rights' 2009 Conference Report.

<sup>321</sup> Strategy Conference for 'The Legal Network for Women's Property and Inheritance Rights' 2009 Conference Report.

women in registered marriages.<sup>322</sup> Therefore, this is discriminatory to women in unregistered marriages (most women married under customary law's marriages are unregistered) because they are left at a disadvantage when their marriages are dissolved. This Act fails to comply with Article 2 of CEDAW and Article 2(1) of the African Protocol which proscribe discrimination.

Furthermore, the Deceased Persons Family Maintenance Act provides the surviving spouse and children with the right to occupy the matrimonial home pending the final winding up of the estate. This is a response to the incidence of property grabbing that saw widows and children being evicted from their homes.<sup>323</sup> Section 10 of the Act deals with the protection of a deceased person's family and property and provides that:

*'notwithstanding any law, including customary law, to the contrary, when any person dies, any surviving spouse or child of such person shall, subject to section eleven, have the following rights-<sup>324</sup> the right to occupy any immovable property which the deceased had the immediately before the death of the deceased;<sup>325</sup> the right to use any household goods and effects, implements, tools, vehicles or other things which immediately before the death of the deceased the surviving spouse or child was using in relation to such immovable property;<sup>326</sup> the right to use and employ any animals which immediately before the death of the deceased were depastured or kept on such immovable property;<sup>327</sup> to an extent that is reasonable for the support of such surviving spouse or child, the right*

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<sup>322</sup> Strategy Conference for 'The Legal Network for Women's Property and Inheritance Rights' 2009 Conference Report.

<sup>323</sup> Makoni C 'Country section: Zimbabwe' available at [http://www.unafei.or.jp/English/pdf/RS\\_NO69\\_17PA\\_Muronda.pdf](http://www.unafei.or.jp/English/pdf/RS_NO69_17PA_Muronda.pdf) (accessed 9 October 2014).

<sup>324</sup> Section 10 (1) Deceased Persons Family Maintenance Act.

<sup>325</sup> Section 10 (1) (a) Deceased Persons Family Maintenance Act.

<sup>326</sup> Section 10 (1) (b) Deceased Persons Family Maintenance Act.

<sup>327</sup> Section 10 (1) (c) Deceased Persons Family Maintenance Act.

*to any crops which immediately before the death of the deceased were growing or being produced on such immovable property.*<sup>328</sup>

This provision emphasises that customary rules of succession cannot be used as a justification to deprive the surviving spouse and dependents of their right to benefit from the deceased's eState. This provision can be commended for implementing the international law norm which provides that in areas where customary law conflicts with gender equality norms, gender equality must take priority.

The Act makes it a criminal offence for anyone to grab property upon death and evict surviving spouses and children. They have a right to stay on the property, and use movable property such as the furniture and cars, as well as to even reap and sell crops. These rights end when the eState has been fully administered.<sup>329</sup> According to the Act, where the deceased, whatever his race, dies testate his or her property will be distributed in accordance with his or her will subject only to the rights of his or her dependents to claim maintenance from the estate in terms of *sections 7 and 8*.<sup>330</sup> On the other hand, where he or she dies intestate the distribution of the estate will take place in accordance with customary law or general law, whichever is applicable to the case. If the case is governed by customary law, which is the case with respect to most Africans, the surviving spouse will retain whatever property he or she owned in his or her own right and the property of the deceased will be inherited by his or her heirs.<sup>331</sup> This provision is in conflict with Article 21(1) of the African Protocol which stipulates that a widow has a right to an equitable share in

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<sup>328</sup> Section 10 (1) (d) Deceased Persons Family Maintenance Act.

<sup>329</sup> WLSA newsletter 'Property and inheritance rights' (2011) (1)1 3.

<sup>330</sup> Section 7 and section 8 of the Deceased Person Family Maintenance Act States that

<sup>331</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009) 65.n becomes a widow she shall have the right to an equitable share of her husband's property.

the inheritance of her husband's property. The Act violates regional law standards because it makes provision for a deceased's heirs to be the only people who are entitled to inherit from the deceased's estate but it fails to recognise a widow's right to inherit the property that she owned in her own right.<sup>332</sup> Of paramount importance to note is that the initial Act did not take cognizance of the widow as a recipient of maintenance but the deceased's children, which was against customary practice that, although a widow could not be heir, she had a right to claim maintenance from the estate of her deceased husband.<sup>333</sup>

In 1987 the Act was amended so as to broaden the definition of dependent and to protect spouses from immediate property deprivation on the death of a spouse. This was a major victory as far as uplifting the welfare of women at statutory law as they would under African customary law. Section 8B of that Act makes it an offence for anyone to deprive a surviving spouse or child of any rights he/she may have had in immovable or movable property or livestock of her or his deceased spouse or parent.<sup>334</sup> The amendment is in line with Article 21(1) of the African Protocol.

#### **4.2.4 Administration of Estates Amendment Act [Chapter 6:07] (1997)**

This Act applies to estates that are governed by customary law; it applies in cases where a person died intestate. This piece of legislation was introduced by the government of Zimbabwe in 1994 to make inheritance laws more favourable to widows.<sup>335</sup> Its aim is to address the problems faced

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<sup>332</sup> See Article 21(1) African Protocol.

<sup>333</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009) 65.

<sup>334</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009) 66.

<sup>335</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009) 74.

in inheriting property under Zimbabwe's customary laws and providing a solution particularly amongst the problem arising from multiple marriages.<sup>336</sup>

The Act recognises the surviving spouses and children as the major beneficiaries of the deceased; the Act also recognizes spouses in a polygamous marriage.<sup>337</sup> This Act changed the customary position that allowed a heir to inherit immovable property; the current position is that a heir now only inherits the deceased's name and traditional items such as the walking stick.<sup>338</sup> Prior to the amendment, the customary heir to a man's property in most cases was the eldest son as discussed in Chapter three under the principle of male primogeniture. With the amendment, there is no single heir but the property is shared between the widow and the children. Where the immovable property on which the widow lived was owned by the deceased and there is one widow, she is entitled to inherit that property.<sup>339</sup> In addition, the Act can be applauded for changing the customary law position by allowing women and girls to inherit from the estates of their deceased husbands and fathers. Where the immovable property on which the widow lived was owned by the deceased and there is one widow, she is entitled to inherit that property.<sup>340</sup> This Act has done away with the discriminatory customary rule of male primogeniture therefore it conforms to Article 2 of CEDAW and Article 2 of the African Banjul which proscribe discrimination on the

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<sup>336</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009) 74.

<sup>337</sup> Strategy Conference 'The Legal Network for Women's Property and Inheritance Rights' (2009) 16 Conference Report.

<sup>338</sup> Strategy Conference 'The Legal Network for Women's Property and Inheritance Rights' (2009) 16 Conference Report.

<sup>339</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009)74.

<sup>340</sup> Gwarinda Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009)74.

grounds of culture and sex. Therefore, this Act is welcome in addressing traditional cultural practices such as male primogeniture which often lead to property grabbing.

Having regard to the two types of registered marriages in Zimbabwe, namely monogamous marriages under the Marriage Act and polygamous marriages under the Customary Marriages Act, marriages solemnized under the Marriage Act result in relations governed by Roman Dutch Law.<sup>341</sup> Marriages solemnized under Customary Marriages Act as well as unregistered marriages, which are contracted in accordance with custom result in the estates of the spouses being administered in terms of Part IIIA of the Administration of Estates Amendment Act of 1997.<sup>342</sup> For widows in polygamous marriages the position is that if a man registered his first marriage in terms of the Marriages Act any subsequent customary union results in the second widow not being recognized as a spouse. In addition to this, if the man's first marriage was an unregistered customary union and any subsequent marriage was registered in terms of the Marriage Act, both widows are recognized as surviving spouses. Furthermore, if a man's first marriage was solemnized in terms of the Customary Marriages Act and the man subsequently contracted a 'monogamous' marriage both widows are recognized as surviving spouses.<sup>343</sup> The Act does not comply with Article 6(c) of the African Protocol which discourages polygamy as a form of marriage but encourages monogamy.

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<sup>341</sup> Gwarinda TA 'A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe' (unpublished LLM thesis, University of Fort Hare, 2009)75.

<sup>342</sup> Part IIIA Administration of Estates Amendment Act.

<sup>343</sup> Administration of Estates Amendment Act.

One of the shortcomings of the Act is that it is silent on communal land, although it protects women's property rights. Unless a woman is inherited by her late husband's brother or uncle she may be evicted from communal land.

#### **4.2.5 Deceased Estates Succession Act Chapter 6:02**

This Act applies to persons who die without a will. The primary beneficiary is the surviving spouse and the children. The surviving spouse is entitled to the house, household goods and contents and the remainder of the property is shared with the children.<sup>344</sup> Section 4 provides that the entitlement of the surviving spouse in terms of section 3 to the household goods and effects of his or her deceased spouse shall not apply in relation to any property which devolved upon the deceased spouse by inheritance from the estate of an ancestor and which has peculiar sentimental value to any other person or persons who, but for section 3, would have been entitled upon intestacy of the deceased spouse to some interest in such property.<sup>345</sup>

Section 3 of the Act outlines the different instances where the surviving spouse is allowed to inherit from the deceased's intestate estate. Section 3 states that subject to section 4, the surviving spouse of every person who, on or after the 1st April, 1977, dies either wholly or partly intestate is declared to be an intestate heir of the deceased spouse if the spouses were married in community of property.<sup>346</sup> In terms of this section again, if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall be entitled to receive from the free residue of the joint estate, as his or her sole property, the household goods

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<sup>344</sup> Section 3 Deceased Estates Succession Act.

<sup>345</sup> Section 4 Deceased Estates Succession Act.

<sup>346</sup> Section 3 (a) Deceased Estates Succession Act.



and effects in such estate;<sup>347</sup> succeed in respect of the remaining free residue of the deceased spouse's share of the joint estate to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed the specified amount, whichever is the greater. This provision shows Zimbabwe's compliance with Article 21(1) of the African Protocol which entitles a widow to have an equitable share in the inheritance of her husband's property.

On the other hand, if the spouses were married out of community of property and the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse of such person shall be entitled to receive from the free residue of the deceased spouse's estate, as his or her sole property, the household goods and effects in such estate;<sup>348</sup> succeed in respect of the remaining free residue of the deceased spouse's estate to the extent of a child's share or to so much as does not exceed the specified amount, whichever is the greater.<sup>349</sup>

In addition to this, if the spouses were married in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or sister, whether of the full or half blood, who is entitled so to succeed, the surviving spouse shall<sup>350</sup> be entitled to receive from the free residue of the joint estate or the deceased spouse's estate, as the case may be, as his or her sole property, the household goods and effects in such estate;<sup>351</sup> succeed in respect of the remaining free residue of the deceased spouse's share of the joint estate or the deceased spouse's estate, as the case may be, to the extent

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<sup>347</sup> Section 3 (a) (i) Deceased Estates Succession Act.

<sup>348</sup> Section 3 (b) (i) Deceased Estates Succession Act.

<sup>349</sup> Section 3 (b) (ii) Deceased Estates Succession Act.

<sup>350</sup> Section 3 (c) Deceased Estates Succession Act.

<sup>351</sup> Section 3 (c) (i) Deceased Estates Succession Act.

of a half share or to so much as does not exceed the specified amount, whichever is the greater.<sup>352</sup>

Section 3A of this Act provides that:

*'the surviving spouse of every person who, on or after the 1st November, 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death;<sup>353</sup> and the household goods and effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph where such house, premises, goods and effects form part of the deceased person's estate.'<sup>354</sup>*

The above discussion of the different provisions of this Act show Zimbabwe's compliance with Article 21(1) of the African Protocol which entitles a widow to have an equitable share in the inheritance of her husband's property.

#### **4.2.6 Legal Age of Majority Act No. 15 of 1982**

The effect of this Act is important to adequately understand its legal implications on the status of women. In terms of section 3(1) of the Act;

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<sup>352</sup> Section 3 (c) (ii) Deceased Estates Succession Act.

<sup>353</sup> Section 3A (a) Deceased Estates Succession Act.

<sup>354</sup> Section 3A (b) Deceased Estates Succession Act.

*'on and after 10 December 1982, a person shall attain the legal age of majority on attaining eighteen years of age'<sup>355</sup> and this section shall apply for the purpose of any law and, including customary law and, in the absence of a definition or any indication of a contrary intention for the construction of 'full age', 'major', 'majority', 'minor', 'minority' and similar expressions in any enactment, whether passed or made before, on or after 10 December;<sup>356</sup> and any deed, will or other instrument of whatever nature made on or after that date.'*<sup>357</sup>

The Act found application in the case of *Chihowa v Mangwende*<sup>358</sup> where it was held that, at customary law, it is the eldest male adult who becomes heir to his deceased father's intestate estate. The eldest female adult does not enjoy a similar right at customary law. However, in this case the court ruled that an eldest child, regardless of gender, inherits his or her deceased father's estate by virtue of the Legal Age of Majority Act. The Court remarked that, '[t]he legislature by enacting the Legal Age of Majority Act, made women, who in African law and custom were perpetual minors, majors and therefore equal to men who attain or attained the age of eighteen years before the Act came into force acquire capacity. That capacity entitles them to be appointed intestate heiresses. All that the courts are required to do is to give effect to the intention of the legislature.

The legal significance of the Act under the protection of human rights of women against traditional cultural practices that lead to gender-based violence is that it gives women the right to

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<sup>355</sup> Section 3 (1) Legal Age of Majority Act.

<sup>356</sup> Section 3 (1) (a) Legal Age of Majority Act.

<sup>357</sup> Section 3 (1) (b) Legal Age of Majority Act.

<sup>358</sup> *Chihowa v Mangwende* 1987 (1) ZLR 228.

be treated as adults and to challenge men on an equal legal footing<sup>359</sup> which is in line with Article 21(1) of the African Banjul and CEDAW which proscribes discrimination on the grounds of sex and culture.

#### **4.2.7 Domestic Violence Act (DVA) 2006**

Prior to the establishment of the Domestic Violence Act (DVA), there had not been any law in Zimbabwe that dealt specifically with domestic violence in general and violence against women in particular.<sup>360</sup> The purpose of the Act is to prevent violence and protect victims of domestic violence.<sup>361</sup>

The DVA defines domestic violence 'as any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to the complainant by a respondent'.<sup>362</sup> It also considers intimidation; harassment; damage of property, and entering into complainant's place without consent, where the parties do not share the same residence, as forms of domestic violence.<sup>363</sup> In addition to this, the Act classifies abuse derived from any cultural or customary rites or practices that discriminate or degrade women such as forced virginity tests, female genital mutilation, forced wife inheritance, and other such practices as domestic violence.<sup>364</sup> This piece of legislation complies with international and regional law by recognising that wife inheritance violates the human rights of women. Therefore the Act is in line with

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<sup>359</sup> Legal Assistance Centre of Namibia 'Proposals for Law Reform on the Recognition of Customary Marriages' (1999) 59.

<sup>360</sup> Makahamadze *et al* 'Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act' (2011) *Journal of Interpersonal Violence* xx(x) 10.

<sup>361</sup> Osirim, M. J 'Crisis in the State and the family: Violence against women in Zimbabwe' (2003) 7 (2 &3) *African Studies Quarterly* 19.

<sup>362</sup> Section 3 (1) Domestic Violence Act.

<sup>363</sup> Section 3 (1) (a-h) of the Domestic Violence Act.

<sup>364</sup> See Section 3 (1) (l) (i-vii) Domestic Violence Act.

Article 2 of CEDAW and Article 2(1) of the African Protocol which prohibit discrimination on grounds of sex and culture.

To show commitment to the implementation of the Act, the Government, through the Ministry of Women's Affairs, established the Domestic Violence Committee, which oversees the enforcement of the Act. The Ministry also appointed an eight-member Anti-Domestic Violence Council, which would review cases of domestic violence, disseminate information on domestic violence, and promote research and services delivery in domestic violence cases.<sup>365</sup>

Since legal instruments cannot act on their own and need people to put life into them, this makes the role of police central to the successful implementation of the Domestic Violence Act. However, it has been observed that police officers are reluctant to assist women who report cases of domestic violence because they argued that cases involving domestic violence cannot be successfully prosecuted.<sup>366</sup> One challenge cited by the police officer was that women who made charges of domestic violence often subsequently withdrew their cases. Since police performance is judged on the basis of cases that are laid and then prosecuted, the police details become reluctant to invest time and energy in issues involving domestic violence because of fear that women would withdraw charges, leaving them with an unprosecuted case. This meant that the

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<sup>365</sup> Makahamadze *et al* 'Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act' (2011) *Journal of Interpersonal Violence* xx(x) 11.

<sup>366</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 11.

police officers' hands are tied when it comes to the implementation of domestic violence at a local level in rural areas.<sup>367</sup>

Women who are survivors of domestic violence stated that police officers are the weakest link in so far as the enforcement of the law is concerned.<sup>368</sup> Police corruption was mentioned as one of the factors that is seriously compromising the work of police officers because they are only eager to investigate cases after having been bribed. Since most women in rural areas are poor, they cannot afford to give the officers the bribes that they would have demanded before dockets can be opened.<sup>369</sup>

Another factor that makes it difficult to enforce the DVA is the dual legal system that obtains in the rural areas whereby customary and general laws operate side by side. Zimbabwe's hybrid legal system where customary law operates alongside civil laws puts women in a disadvantaged position.<sup>370</sup> It was observed by Chuma and Chazovachii that while the civil law is used for crimes committed in the public sphere, in many cases however customary law remains strong for matters relating to the private sphere where traditional cultural practices that negatively affect

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<sup>367</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 11.

<sup>368</sup> Makahamadze *et al al* 'Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act' (2011) 27(4) *Journal of Interpersonal Violence* 716.

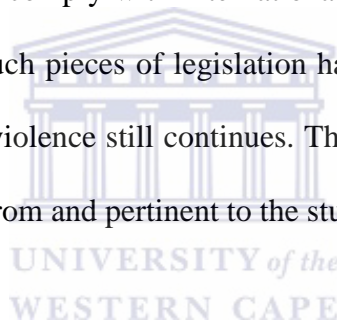
<sup>369</sup> Makahamadze *et al al* 'Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act' (2011) 27(4) *Journal of Interpersonal Violence* 716.

<sup>370</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 10. See also <sup>370</sup> Makahamadze *et al al* 'Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act' (2011) 27(4) *Journal of Interpersonal Violence* 717.

women and girls are observed and supported.<sup>371</sup> The customary law has a negative influence on domestic violence as it tends to perpetuate and entrench unequal gender relations which breed violence against women.<sup>372</sup> The realities of domestic violence under customary law are not recognized hence jeopardising the opportunities of women to seek legal recourse in traditional courts. To compound the situation, the customary law places men as heads of the households and breadwinners resulting in women being economically dependent on their husbands or partners.<sup>373</sup>

### 4.3 CONCLUSION

In a nutshell, it is clear that most pieces of legislation enacted by Zimbabwe to protect women from gender-based violence partly comply with international and regional law. However, it has been observed that even though such pieces of legislation have been enacted to protect women from gender-based violence such violence still continues. The next chapter presents conclusions and recommendations emanating from and pertinent to the study.



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<sup>371</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 10.

<sup>372</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 10.

<sup>373</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 11.

## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 CONCLUSIONS

The aim of the study was to assess Zimbabwe's legal response to gender-based violence that can be to traditional cultural practices. First, most traditional cultural practices in Zimbabwe are discriminatory towards women and girls; the study has therefore shown the link between gender-based violence and traditional cultural practices. Second, it has been shown that the recognition of the right to culture by international and regional instruments is subject to non-violation of human rights. Third, the mini-thesis has also established that in complying with its international obligations on the protection of women from gender-based violence linked to traditional cultural practices, Zimbabwe has enacted a plethora of legislation.

More importantly, the study has also proven that despite these legal initiatives, gender-based violence linked to traditional cultural practices still continues. This mini-thesis has, among other factors, highlighted the following as shortfalls in legislations passed to address this problem: poor enforcement of these laws; Zimbabwe's hybrid legal system where customary law operates in conjunction with civil laws; weak wording of some pieces of legislation, such as legislation that deals with marriage rights for women married under customary law; and that most women, especially those in rural areas are not fully equipped with the knowledge of the different pieces of legislation that have been put in place to protect them from such violence.<sup>374</sup> It is for these reasons that suggested recommendations are made in the section to follow.

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<sup>374</sup> Chuma M & Chazovachii B 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe' (2012) 3(3.4) *International Journal of Politics and Good Governance* 15.



## 5.2 RECOMMENDATIONS

- From the discussion it is clear that Zimbabwe's marriage laws are not consistent because women married under customary law are not afforded the same protection that women married under civil law receive. For instance, women under unregistered customary marriages are not afforded protection with regards to issues of inheritance and guardianship of children. These are still regulated in terms of customary law which is discriminatory.<sup>375</sup> Therefore, all legal marriages in the country should be unified under a single legislative framework.<sup>376</sup> This will prevent inconsistencies in the adjudication of property inheritance disputes. In addition, it is suggested that existing legislation for protecting the property rights of Zimbabwean women married under customary law need to be revised and strengthened to help prevent the plight of widows on the death of the heights.
- CEDAW and the African Protocol require States to enact and effectively implement appropriate legislative or other regulatory measures in order to protect women from violence that is caused by traditional cultural practices. 'Law reform is, of itself, of little significance unless it is accompanied by other non-legal measures such as holding campaigns and workshops to educate women on their rights and raise awareness on the pieces of legislation that are available to protect them from gender-based violence'.

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<sup>375</sup> See para 4.2.2 Customary Marriages Act section 3(1).

<sup>376</sup> However, some scholars like Rautenbach C 'South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition' (2008) 12.1 *Electronic Journal of Comparative Law* 6 have argued that unification can present a technical problem, but was of the opinion that one has to find "an alternative new law which reconciles and unifies the old",

- CEDAW obliges state parties to submit to the Secretary-General a report on the legislative, judicial, administrative or other measures that they have adopted to implement the Convention within a year after its entry into force and then at least every four years thereafter or whenever the Committee on the Elimination of Discrimination against Women (CEDAW) so requests. However, Zimbabwe has been inconsistent in submitting its reports. Zimbabwe submitted its first periodic report in 1998, which was reviewed at the 36th session of the CEDAW in 2006 and submitted again in 2012.<sup>377</sup> Therefore, there must be strict reporting system so that the monitoring bodies, for example CEDAW Committee, ensure that the laws that are intended to protect women in Zimbabwe from gender-based violence are successfully regulated and enforced.
- The CEDAW Optional Protocol is the body that monitors states parties' compliance with CEDAW. Its function is to receive and consider complaints from individuals or groups within its jurisdiction.<sup>378</sup> Zimbabwe has not signed or ratified CEDAW's Optional Protocol which would enable individuals to have direct complaint mechanism to this monitoring body. It is, therefore, recommended that it must do so in order to allow individuals to lay their complaints in cases where Zimbabwe fails to protect them from gender-based violence.

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<sup>377</sup> Southern Africa Gender Protocol Alliance: Zimbabwe submits CEDAW report available at <http://www.genderlinks.org.za/Article/zimbabwe-submits-cedaw-report-2012-03-11> (accessed 25 November 2014).

<sup>378</sup> 'United Nations Entity for Gender Equality and the Empowerment of Women: Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women' available at <http://www.un.org/womenwatch/daw/cedaw/protocol/> (accessed 25 November 2014).

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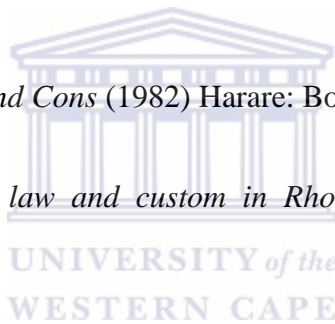
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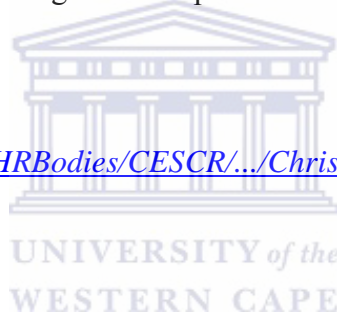
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