The Right to Gender Equality in the Zulu Community: Compatibility with the International Law Relating to Cultural Rights.

By

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Dedication

This dissertation is dedicated to all the women within the Zulu community especially my mother MaMbatha Mtshali and my sisters Nokuthula, Gabisile and Zanele.

Declaration

I, Gladness Ncamisile Mtshali, Registration No. 9704198, hereby declare that the dissertation entitled **"The Right to Gender Equality in the Zulu Community: Compatibility with the International Law on Cultural Rights"** is the result of my own investigation and research and that it has not been submitted in part or in full for any degree or to any other University.

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SIGNATURE DATE

Acknowledgements

The idea of doing research on cultural rights as they compare with the right to gender equality came to mind when I remembered the time I was still doing standard three at primary school. As I do not have a brother, my father wanted someone to accompany him to buy a cow and he had to ask neighbours to allow him to go with their sons. They were very reluctant and my father felt that they were undermining him because he did not have a son. That evening he told me that I will accompany him to buy the cow and that was final. My grandmother was totally against the idea, but my father was adamant that it is not my sex that was going to enable me to travel that distance and accomplish the task, but the person I was. Throughout our lives my father insisted that we had to grow as individuals and not according to what society requires of us but never to look down upon the way our society conducted their affairs and to try by all means to contribute towards the upliftment of our society. I grew with that in mind and however started to appreciate the way I was brought up within my culture.

I therefore wish to acknowledge some of the people who contributed in a number of ways towards this study. This is in no particular order and is not exhaustive of the people who contributed towards this dissertation:-

- First and foremost my parents Ndabakayise and Mantombi Mtshali for supporting and making sure that I am where I am despite all the odds.
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Summary

An individual's culture determines who that person is and the way in which they resolve conflicts they face in life. International jurisprudence recognises the right of an individual to enjoy his culture in community with the members of his cultural groups. The right to practice culture is further entrenched in the Constitution of the Republic of South Africa (Act 108 of 1996). Culture comprises of a number of customs and given the history of the African countries of having been colonised in the past, some of those customs are not in conformity with the Western ways of living. The question that arises from that is whether the non-conformity makes the African customs wrong?

This is the question that arises especially when the cultural practices are weighed against other rights within the human rights jurisprudence. The right to equality normally leads to the above question because African culture has been and is still viewed as promoting gender inequality amongst members of the cultural groups. Article 1 of the Universal Declaration of Human Rights provides that "all human beings are born free and equal in dignity and rights" and Section 9 of the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9 further provides that equality includes the full and equal enjoyment of rights. For the purposes of this research equality is two-fold in that it involves the right of women in the Zulu community to be treated as equal to their male counterparts and it further involves the right of cultural groups to enjoy their rights and to practice their culture in community with other members of their society.

A number of international instruments on human rights make provision for the right to equality. The problem is how to reconcile the right to equality of members of cultural groups when it comes to the recognition of their culture and the recognition of the right to gender equality of women within those cultural groups.

In the South African context there seems to be a conflict between the two. In the negotiations leading to a constitutional dispensation, traditional leaders raised the concern that the right to gender equality was against the African practice culture. The argument concerned the application of the right to gender equality in the cultural communities.

This study explores the right to practice culture and the right to gender equality. The two are explored in the context of the Zulu community and their cultural practices. These cultural practices are explored, objectively, taking into consideration the social benefits of the said practices. The study also considers the relevance of cultural practices in modern society. The first chapter is a brief overview of the reason for undertaking this research and a brief overview of the law as it relates to cultural rights and the right to gender equality. The second chapter attempts to define the word culture and goes further to discuss the right to practice culture as it is entrenched in international and national human rights instruments. Chapter two further contains a lengthy discussion of the wording of the provisions in international documents on the right to culture in comparison with that of the national constitution. The third chapter discusses the right to gender equality and the means by which the international law promotes and protects women's right to equality.

Chapter three deals with international human rights instruments and how each of them enhances the right to gender equality. It further deals with the obligations on member states to ensure that equality prevails and is enjoyed by the communities within the member states. Chapter four concentrates on the customs of the Zulu community. It discusses specific customs that have the potential of demeaning the status of women thus promoting gender inequality. The specific customs are discussed in the light of the benefit they have on the society and on their relevance to a changing society. The fifth chapter contains recommendations on the effective application and practice of the right to culture in line with the constitutional values and in conformity with the right to gender equality.

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CHAPTER ONE

INTRODUCTION

1. BACKGROUND

On 25 January 1994, the then president of South Africa, Mr Nelson Mandela signed the new Constitution of the Republic of South Africa proclaiming the new order founded on the values of equality. This meant amongst other things, that everyone is supposed to be equal before the law. It also meant the recognition of the equality between men and women and the equality of cultural, religious and linguistic groups. Eight years later the South African president, Mr Thabo Mbeki introduced the notion of *"Azibuy' emasisweni"*, which has been one of the most prominent terms used by South Africans after its introduction in the president's state address wherein he introduced the concept of African Renaissance which meant the rebirth or revival of Africanism. *Azibuy' emasisweni* is a Zulu phrase, which figuratively means 'to recover our culture' or 'going back to one's roots'. Going back to one's roots means one has to practice his or her indigenous culture. The practice of one's culture has however been made subject to constitutional scrutiny for inconsistencies with constitutional principles. Does this scrutiny allow for the development of culture or does it alienate certain groups to a point of disintegration because all their practices will be found flawed in one way or the other?

Africa is one of the continents that had the misfortune of being colonised by the Western countries. For centuries, it remained dominated by the Western powers, which in the process had Western values imposed on its people. The imposition of Western values on African people led to African values of life including cultural practices being put under the spotlight by the West for lack of conformity with their way of life. African culture, amongst other things, has come under the spotlight for not conforming to the Western way of life and this has led to many Africans moving away from their culture for fear of being labelled as backward or barbaric. The international community and the South African Constitution

however do recognise the need for the promotion of the cultural life of individual groups because of the recognition of cultural practice as an important tool for an individual group's self-determination.

In 1948, the United Nations adopted the Universal Declaration of Human Rights, which provides that:

> "Everyone has a right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[1]

The above provision led to Article 1 of the United Nations Educational, Scientific and Cultural Organization's Declaration of International Cultural Co-operation (hereinafter referred to as UNESCO)[2] which provides that "each culture has a dignity and value which must be respected and preserved."[3] This shows the international community's commitment to preserve and develop cultural rights. However, how does the international community address the misunderstanding created by colonisation, which left African communities with a belief that in order for what they do and believe in to be acceptable or to be regarded as right it has to conform to the Western standards? This belief is not consistent with Article 27 of the Universal Declaration of Human Rights, which provides that:

> "1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

According to Abdullahi Ahmed An-Na'im, every state has the responsibility to remove any inconsistency between international human rights law binding on it, on the one hand, and religious and customary laws operating within the territory of that state, on the other.[4] It would seem from An-Na'im's statement that states would have to enact their legislation in a way that allows all their citizens to be

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[1] Article 27.
[2] Adopted by the General Conference of UNESCO on November 1996.
[3] Article 1.
[4] A. A. An -Na'im "State Responsibility under International Human Rights Law to Change Religious and Customary Laws" in *Human Rights of Women -National and International*

diverse from others in line with the requirements of the democratic order (legal pluralism). This begs the question as to whether it will be possible for the South African legislature to cater for the wide variety of diverse groups that exist in South Africa, including the groups that were marginalised during the apartheid era.

Strydom has raised the question whether it is cultural or racial difference that forms the basis of diversity.[5] This question addresses the fact that in most cases there is a view that the prominent basis of diversity is race, whereas culture identifies one better than race does, which then means that culture is the basis of diversity. This indicates that when one's culture is suppressed to an extent that it loses value then the community practicing the said culture is deprived of their tool to be different from other groups, existing within the country's population.

To substantiate his point, Strydom quotes Claude Levi-Strauss in the article Race and History[6] who asks the question, "how do we explain the nature of diversity, is it with the situations which an ordinary person on the street is confronted with daily or the fact that the white man's civilisation has made the tremendous advances with which we are all familiar, while the civilisations of the coloured people have lagged behind"? This argument makes sense in cases where the youth of the previously designated groups believe that their indigenous culture is barbaric because they grew up in a community that does not practice their culture but conformed to the Western way of doing things because of the belief that theirs was inferior. Levi-Strauss explains diversity as being cultural and not racial, and as "a natural phenomenon resulting from the direct or indirect contacts between societies".

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perspective, 167.

[5] H. Strydom "The international and public law debate on cultural relativism and cultural identity: Origin and implications" (1996) 21 *South African Yearbook on International Law*, 14.

[6] C. Levi-Strauss *Race and History* (1952) 6.

The inequalities in cultures are not real inequalities but are based on a difference in focus, distorted by the observer's own culturally determined set of criteria.[7] One can derive from this statement that it is not that people are unequal but it is what a subjective observer who is prejudiced against the culture being observed believes is correct when comparing it with what a second person does or believes in, that leads to other people's culture being perceived as inferior to the other cultural practices. Levi-Strauss further denounces the idea that the various conditions in which different cultures are found are stages in a single line of development. He sees this as false evolutionism and calls it an attempt to wipe out the diversity of cultures while pretending to accord it full recognition.[8] In 1966, UNESCO included in its Declaration of the Principles of International Cultural Co-operation a recommendation that:

> "While promoting the enrichment of all cultures, member states shall respect the distinctive character of each."[9]

It is clear from the above that each culture should be judged on its own merits, considering the group's historical background and reasons behind the practice of the said culture.

The problem however arises when the cultural practices of a group are against the notion of equality in the status of males and females. A number of African customs are based on male superiority and women suffer many human rights abuses in the name of culture. The situation as it is does not accommodate culture as it used to be practised but there is a need for cultural practices to be looked at in line with human rights. This means that there has to be a limit to the practice of some customs so that they can accommodate gender equality. This is sometimes not easy to implement, as cultural practice is no longer based on the original customs (traditional cultural practice) but on the revolutionised version by individuals who use culture as a scapegoat when customs benefit their intentions.

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[7] Id at 11.

[8] Id at 13.

[9] Article 6.

2. EQUALITY IN THE SOUTH AFRICAN CONSTITUTION

For the purposes of this study, equality has to be looked at on two levels:-

(i) Equality of different cultural groups and

(ii) Gender equality within cultural groups (specifically the Zulu community)

The recognition of one's right to enjoy his or her culture in the South African Constitution,[10] shows the willingness by the government to promote every citizen's culture, thus showing that all cultural groups are equal before the law in South Africa. However, some people might regard scrutiny of their customs as demeaning the content thereof. This was highlighted in the Multi-Party Negotiating Process in which traditional leaders took a stand against subjecting African indigenous law to Chapter 3 of the Interim Constitution.[11] Traditional leaders voiced a concern that the equality clause (s8)[12] as it deals with gender equality in particular could uproot communal family life if applied indiscriminately in a traditional context.[13] The traditional leaders based their argument on the fact that in the African culture the community comes before the individual.

In the end of the negotiations it was decided that Chapter 3 be applied vertically only (to the state and its organs) but that a provision be made for a seepage effect on horizontal relationships. This led to the inclusion of the words "when interpreting any legislation, and when developing the common law or customary law, a tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[14] The inclusion of this provision is aimed at preventing the abuse of individual rights in the name of culture by members of the group. The contention by traditional leaders that customary law should not be subject to the Bill of Rights shows an ethnocentric attitude, that is, that one's culture is perfect. This contention is harmful as it does not allow for progression but aims at keeping

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[10] Act 108 of 1996 Section 31 (1) (a).
[11] The Bill of Rights which is now Chapter 2 in the Constitution of South Africa Act 108 of 1996.
[12] Section 9 in the 1996 Constitution.
[13] Du Plessis and Corder - *Understanding South Africa's Transitional Bill of Rights* (1994) 37.
[14] Section 39 (2) (b) Act 108 of1996.

things as they are even if they may cause harm to the development of culture.

The binding effect of Section 9 on cultural rights gives rise to a question whether the recognition of cultural rights is of any benefit to the cultural groups if the recognition is based on the severance of certain practices that those groups view as comprising the most important part of the tradition concerned. According to Devenish, individual rights should be supportive of the protection of group rights.[15] This means that members of cultural groups must work towards developing and promoting their culture instead of using it to abuse members of their group to benefit their intentions.

Devenish points out that the South African Bill of Rights embodies opposing normative commitments that inevitably give rise to the conflicting application of rights in that the recognition of culture could lead to recognition of specific customs that are in conflict with the right to gender equality.[16] He further states that there is no explicit hierarchy of rights, but symbolically and implicitly equality, as the first enumerated right, appears to enjoy a hierarchical advantage in relation to the other rights. The hierarchical placement of rights as it seems must however not exclude a process of balancing either of an ad hoc nature under the limitation clause, or a definitional one in terms of the scope of the given rights.[17]

The duty is on the person tasked with deciding the weight of both rights to dig deeper and understand the reasons behind certain customs which comprise one's culture, before declaring it as not in conformity with constitutional values. In the process of balancing rights, the courts fulfil a sociological and moral function. In so doing, their task is to "generously accommodate cultural liberty while ensuring that culture is not involved in a cheap excuse for every self indulgence."[18]

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[15] G. Devenish, *A Commentary on the South African Bill of rights* (1998) 2nd ed. 423.
[16] Ibid 424.
[17] Ibid.

As culture is classified as an individual right practised within a group, its recognition should benefit all the members of the cultural group concerned. The test whether culture is not used as an excuse for self indulgence could form a guideline for testing conformity of specific African customary practices with the constitution. However, this is not the case, as these practices also have to be weighed against the Western standard of life as the West usually prides itself on being in the frontline of gender equality.

International law has evolved to try to protect women from practices that discriminate against them on the basis of their sex. The preamble of the Convention on the Elimination of All Forms of Discrimination Against Women[19] (hereinafter referred to as the Women's Convention) states that the state parties to the Convention note that the Universal Declaration of Human Rights affirms the principle of inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.

The Convention is aimed at preventing and rooting out discrimination directed at women. For the purposes of the Women's Convention, the term "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[20] South Africa signed the Women's Convention. The South African legislature included Section 9 (4) in the South African Constitution, which deals specifically with discrimination as it occurs between individuals. This is the subsection, which can be used by the victims of gender-based discrimination as it occurs in their specific cultural

[18] Ibid.
[19] Adopted by the United Nations General Assembly on December 18, 1979.
[20] Article 1, Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

groups. Gender discrimination occurs in cultural and religious groups when the customs of those groups deny women because of their sex or gender, the right to develop and live their lives as equal citizens to their male counterparts. Traditionally, in the African culture, patriarchy and patrilineality did not necessarily spell inferiority for women. The power of African women was economically and ideologically derived from and connected to the importance accorded to motherhood.[21] Women were given deciding rights when it came to the running of the household and had the duty to see to the wellbeing of their children and all their family members. It would then be clear that the subordination of women to minority status came with Western civilisation.

3. OBJECTIVES OF THE STUDY

Having discussed the background of the right to practice culture as a human right and the discrepancies that occur in the practice of culture and being aware of the gender inequalities that are prevalent in cultural communities, the main objectives of this study are:

- To analyze the right to practice culture (cultural rights), its meaning and its importance to the personal development of the person within the cultural group;
- To give an overview of cultural practices of the Zulu community in order to ascertain whether the specific cultural practices promote gender inequality.

4. SIGNIFICANCE OF THE STUDY

There has been a great deal of research done on the right to gender equality and its compatibility with the right to practice culture. From all that research, it has transpired that the view held by most of the researchers is that culture promotes gender inequality. This research is an attempt to show that culture is not a lost

[21] G.J. van Niekerk *"Legal Pluralism - Introduction to Legal Pluralism in South Africa Part 1"* (2001).

cause if only it can be developed with time and practiced to achieve the purpose for which it was meant, bearing in mind individual human rights as entrenched in the Constitution. The research also intends to show that culture still has a role to play in the lives of the people practicing it and can contribute to community development. The intention is not only to show that certain Zulu customs violate the rights of women but to determine if the alleged violations are justified to ascertain whether the customs as infringing on constitutional rights of women.

5. CONCLUSION

The right to practice one's culture can be seen as promoting, amongst other things, the development of the community as members work as a unit to achieve the objectives of a group. The right has been theoretically recognised with its inclusion in international human rights instruments and in the South African Constitution but a great deal of work has to be done in removing stereotypes in dealing with customs in the African culture. The stereotypes have led to the individuals within cultural groups not wanting to be involved with their cultural practices because of being labelled as barbaric or out of date. This in turn marginalises the development of the culture of those specific groups, as their future generations will not have any knowledge of their culture because of the cultural groups' disintegration.

The Zulu community is one of the cultural groups which comprise the population of South Africa. Although one cannot precisely say that the Zulu community is a minority group as per the definition of the Convention on the Protection of Rights of Minorities, one can however say that their culture is on the verge of extinction because of being labelled as gender biased against women. This study aims at delving into the customs in the Zulu culture that have been or are regarded as perpetuating gender inequality.

CHAPTER TWO

CULTURAL RIGHTS IN INTERNATIONAL AND SOUTH AFRICAN LAW

1. INTRODUCTION

The right to culture as provided for in the South African Bill of Rights is to a large extent modelled on the international human rights instruments. It is however, laid out in a broader sense than in the international instruments as it includes a number of contexts in which culture can be seen to be prevalent. The protection of culture in international law has developed in two contexts. Some international conventions deal with the right to culture as it relates to arts and scientific progress, suggesting that these documents may have been concerned with "the rights of the consumers of cultural, artistic, and scientific creativity."[22]

For the purposes of this study, it is essential to define the word "culture" before getting into a discussion on the content of cultural rights. According to the *World Book Encyclopaedia*:

> "Culture is a term used by social scientists for a way of life. Every human society has a culture. Culture includes a society's arts, beliefs, customs, institutions, inventions, language, technology and values. A culture produces similar behaviour and thought among most people in a particular society."[23]

The definition further includes important characteristics of culture, which are:

(i) A culture satisfies human needs in particular ways;
(ii) A culture is acquired through learning;
(iii) A culture is based on the use of symbols; and
(iv) A culture consists of individual traits and groups of traits called patterns.

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[22] P. Sieghart, *The International Law of Human Rights* 2nd ed. (1984) 339.

[22] *World Book Encyclopaedia* (2000) volume 4, 1186.

Sir Edward Burnett Taylor, a British anthropologist defined culture as "that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of a society".[24] Taylor's definition of culture is relevant to social scientists. From his definition, culture consists of a learned way of acting, feeling and thinking rather than the biologically determined ways. This definition involves the important characteristics of culture. These are:

(i) Culture is acquired through a process of enculturation;

(ii) A person acquires culture as a member of a society. Social life would be impossible without the understanding and practices shared by all people; and

(iii) Culture is a complex whole composed of units known as cultural traits.

From Taylor's definition of culture, it becomes clear that culture forms one of the important building blocks in the life of a human being in that it is one form of interaction that a human being shares with individuals of the same cultural group. Cultural traits may be divided into material culture and non-material culture. Material culture consists of all the things that are made by the members of a society. Non-material culture refers to a society's behaviours and beliefs. This study focuses on specific cultural traits (non-material culture) in the Zulu community and the way they affect the right to gender equality.

Culture can be associated with aspects such as race, ethnicity, language and gender in regard to their importance in the development of human life. M. Lereis says the following about culture and its relationship to other relevant aspects:

> "Whereas race is strictly a question of heredity, culture is essentially one of tradition in the broadest sense, which includes the formal training of the young in a body of knowledge or a creed, the inheriting of customs or attitudes from previous generations... In other words, tradition in this sense covers provinces clearly unconnected with biological heredity ... As culture, then, comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only beliefs,

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[24] E. B. Taylor *Primitive Culture* 1871 18.

knowledge, sentiments and literature, but the language or other systems of symbols which are their vehicles. Other elements are the rules of kinship, methods of education, forms of government and all fashions followed in social relations."[25]

The above statement shows the importance of culture and the assimilation of the substance of culture to younger generations in the sustenance of the cultural group that practices the culture concerned. It shows that the basis behind the practice of culture is not only to promote diversity but also to mould the younger generation into living in a way that the senior members of the group consider as polite and beneficial to the wellbeing of the younger generation and the members of their cultural group. This is in line with Taylor's submission that culture includes capabilities and habits that one acquires as a member of a society.[26]

The importance of one's culture in one's personal development was recognised in the General Conference of the United Nations Educational, Scientific and Cultural Organisation[27] in its Declaration of Principles of International Cultural Co-operation, which states that:

"(1) Each culture has a dignity and value, which must be respected and preserved.

(2) Every people has the right and the duty to develop its culture.

(3) In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind."[28]

The abovementioned provision shows that no culture overrides the other when practiced within the ambit of the law and that over and above the right to practice culture; members of the cultural group have the duty to develop its culture.

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[25] M. Lereis *Race and Culture* (1951) 20-21 (cited in Fransesco Capotorti's definitive *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*).
[26] Taylor (note 24 above).
[27] Fourteenth Session on 4 November 1966.
[27] Article 1.

2. CULTURAL RIGHTS UNDER INTERNATIONAL LAW

A number of international instruments on human rights contain the rights of cultural groups to freely practise their culture but none of them contains a definition of the term "culture". This creates a problem, as a number of jurists tend to take the option of dealing with this right only as it deals with culture in the context of artistic works. Instruments that consider culture as it relates to community customs are, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the International Covenant on Civil and Political Rights.

The International Covenant on Civil and Political Rights provides that:

> "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 practise their own religion, or to use their own language".[29]

The wording of the abovementioned article can fit squarely in the context of the protection of the right to culture as it deals with communal life more than it refers to culture in an artistic context. Article 27 protects the rights of cultural groups in countries where they are minorities. This indicates that the number of members of the group does not matter and all that matters is that they be identifiable as a group practising culture as it differentiates them from the other groups that exist within the territory of the state.

The Universal Declaration on Human Rights provides that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement and its benefits".[30] Article 27 aims to regulate

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[29] Article 27.

[30] Article 27(1).

interaction between cultures in a multi-cultural community and it also provides for the protection of cultural pluralism. The primary meaning of this article is that every individual has the right to cultural freedom regardless of race, religion, gender or any such distinction. From Article 27 a notion of equality of cultures is implied (no culture is superior to the other). This right also shows that the diversity of cultures must be respected.

Hilton Staniland[31] submits that the right to culture in Article 27 secures the right to be different. It is also a classical negative right in that it imposes no positive duty on the state than to ensure that legislation must not infringe the right to culture. Staniland further states that the right to be culturally different cannot be an absolute right for certain cultural practices may be injurious to health and hygiene or result in discrimination or prejudice, or be objectionable for some other reasons. Objectionable cultural practices may be classified as those that are in conflict with other human rights.

The right to culture is also contained in the International Covenant on Economic, Social and Cultural Rights.[32] Article 15 of the Covenant provides that:

> "1. The State Parties to the present Covenant recognise the right of everyone:
>
> (a) to take part in cultural life;
>
> (b) to enjoy the benefits of scientific progress and its applications;
>
> (c) to benefit from the protection of the moral and material interests resulting from any scientific, literacy or artistic production of which he is the author."

This provision is nearly similar to that of the Universal Declaration of Human Rights except for the Declaration's non-inclusion of the protection of the "moral and material benefit" resulting from the culture. African culture is mostly based on what the community benefits out of the practise of a specific custom whereas Western culture is based on individual benefit. For example, the culture of

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[31] H. Staniland 'Right to culture' in Mike Robertson (ed) *Human Rights for South Africans* (1991) 200.

[32] (1967); 6 ILM 360.

virginity testing in the Zulu community is aimed at preventing teenage pregnancy and pre-marital sex. In this age and time, it can be said the custom will help curb the spread of AIDS. However, is the practice in line with the right to human dignity of the girls it is practised on?

On a regional level, the African Charter on Human and People's Rights in its preamble provides that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone. The member states are hence convinced that it is essential to pay attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality. Member states are further convinced that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[33] The African Charter brings a new dimension to the right to enjoy one's culture in that it associates it with the enjoyment of civil and political rights. The Charter makes the enjoyment of economic, social and cultural rights the basis of enjoying civil and political rights, which means that the state that denies its citizens the right to enjoy economic, social and cultural rights impliedly denies its citizens civil and political rights.

Article 29 of the African Charter imposes a duty on individuals to preserve "positive" African cultural values. African people believe in the development of the community above individual development and such development is realised by the collective effort of the members of the community. Adetoun O. Ilumoka states that the framing of the African Charter's provisions represents a significant shift away from the Western preoccupation with individual rights, and in a sense highlights the tension between individual rights and social duties.[34] The African Charter is different from other international human rights instruments in that it

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[33] Preamble of the African Charter on Human and People's Rights

[34] A. Ilumoka "African Women's Economic, Social, and Cultural Rights" in *Human Rights of Women - National and International Perspective*, (1994) 313.

also imposes duties on individuals over and above the duties imposed on member states. From the provisions of the Charter, it is clear that it does not make explicit provision for the individual right to enjoy culture but creates a duty on individuals in a cultural group to preserve their positive culture. This duty implies that the individuals must not use culture as a scapegoat to violate other people's human rights but they must try to portray the positive aspects of their culture.

3. CULTURAL RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION

The South African constitution[35] in section 31 provides that

> "Persons belonging to a cultural, religious or linguistic group may not be denied the right, with other members of that community-
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society"

This right, unlike others in the Bill of Rights is phrased negatively. According to De Waal, Currie and Erasmus, the negative phrasing means that, at a minimum, section 31 is a negative liberty.[36] Members of communities may freely engage in the practice of culture, language and religion without interference by the state or from any other source. The issues arising from this statement are whether the section 31 right is a right to be left alone to practice culture, language and religion, and further if such right requires only that such practices are tolerated, or that they further have to be supported.

The answers to these questions are a matter of interpretation. De Waal et al state that on the face of it, section 31 is phrased as if it is no more than a negative liberty, but constitutional interpretation requires one to look further than the phrasing. In *S v Makwanyane*[37] the court stated that "whilst paying due regard to

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[35] Act 108 of 1996.

[36] De Waal, I. Currie and Erasmus, *The Bill of Rights Handbook* (1999) 2nd ed. 425.

[37] 1995 (3) SA 391(CC).

the language that has been used, [an interpretation should be] 'generous' and 'purposive' and give expression to the underlying values of the Constitution".[38] The inclusion of section 31 is an indication of the willingness of the state to recognise cultural pluralism even where this requires positive measures to be taken by the state to ensure the survival and development of minority cultures where they are threatened by disintegration.

From the above, one can justifiably add that section 31 also requires the state to ensure that anything that can lead to the disintegration of minority cultural groups is done away with. This will also include prejudiced labelling of a culture as one that is against the promotion of human rights without going into the depths of that culture and finding justification to show that it is not a cheap excuse for every self-indulgence.

3.1 Enjoyment of culture in community with others

In the Zulu language there is a proverb that says *"umuntu ngumuntu ngabantu"*, which means that one is human because of the humanity of those around him. One can assume that the constitutional drafters had that in mind when they drafted the provision in section 31(1) as it recognises the right of an individual to practice culture in community with other members of the cultural group. This leaves the question: up to what extent the practice of custom will qualify as a mere exercise of one's cultural right in community with others before it is seen as promoting inequality between members of the cultural community or as dehumanising a portion of a specific cultural group on the basis of their sex or gender?

Culture, in terms of section 31 is understood as a source of identity, a means of distinguishing people on grounds of characteristics,[39] which include beliefs,

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[38] Ibid Para 9.

[39] M. Leiris *Race and Culture* (1958) 20-1, quoted in De Waal et al 427.

language, rules of kinship and methods of education or forms of social relations. Section 31 imposes a negative obligation on the state not to interfere in the cultural groups' activities as long as those activities are consistent with the Bill of Rights.

Section 31 of the South African Constitution is similar to Article 27 of the United Nations Declaration of Human Rights.[40] Both provisions highlight the fact that cultural rights are communal rights. Chaskalson et al state that the right of a member of a cultural or linguistic community cannot meaningfully be exercised alone.[41] They state further that the enjoyment of a culture and the use of a language presuppose the existence of a community of individuals with similar rights.[42] From this, one can conclude that an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture. Therefore, an individual's right of participation in cultural life will be impugned if his or her culture is not given the dignity it deserves.

3.2 Consistency of the practice of culture with provisions of the Bill of Rights

Section 31 (2) provides that the right contained in section 31(1) may not be exercised in a manner inconsistent with the provisions of the Bill of Rights. This provision serves to remind cultural communities that the recognition of their cultural rights is not aimed at giving them the right to violate the individual rights of its members and members of other cultural communities. Constitutional protection of the communal aspects of culture, religion and language has been phrased in the hope that they will not unjustifiably impinge on the field of individual rights.[43]

This indicates that the drafters of the constitution wished to recognise group rights on one hand and individual rights on the other, while making sure that the

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[40] Ibid at 1.

[41] M. Chaskalson et al *Constitutional Law of South Africa* (1998) 35-13.

[42] Ibid.

[43] De Waal et. al. 430.

bearers of such rights are not denied their rights unjustifiably. The question, which remains however, is whether that happens in practice and whether the people tasked with ascertaining if the rights involved are not impugned unjustifiably are not biased by the Western values, that is, whether they respect the distinctive character of the right concerned.

Cheadle et al state that section 31 introduces a countervailing value, in that it requires recognition of "the unique identity of the individual or group, their distinctiveness from everyone else."[44] They further argue that the rights contained in section 31 have a hybrid character in that on the one hand, they are like all the provisions of chapter 2, which include individual and not collective rights. On the other hand, however, section 31 introduces an inflexion in the text and structure of the Constitution by explicitly recognising collective interests. The provision therefore indicates that an individual can enjoy his or her culture but it is of no value if the members of his or her cultural group are not recognised for their distinct culture.

The rights protected under section 31 are not rights of all members of the political community created by the Constitution, but those of groups of individuals "belonging" to cultural, religious and linguistic sub-communities. The Human Rights Committee pointed out in its General Comment[45] that the phrase "belonging" indicates that the right is designed to protect "those who belong to a group and who share in a common culture, a religion and /or a language."

The word "belonging" in section 31 for the purposes of this study can be said to be in line with Sir Edward Burnett Taylor's definition of culture as it refers to the fact that a person acquires culture as a member of a society. The word "belonging" in section 31 connotes a bond that an individual shares with the

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[44] Supra.

[45] General Comment by the Human Rights Committee, Article 40, No 23(50) (26 April 1994) par.5.1.

members of a group. From this one can submit that section 31 recognises the existence of groups and communities over and above the national community, whose cultures and religions distinguish them from the rest of the community.

Section 31 can be read with Article 27 of the International Covenant on Civil and Political Rights[46] although the two provisions differ in that section 31 does not use the language of "minorities" as in Article 27 and instead it uses "communities". This is most applicable in the South African context in that prior to the Bill of Rights coming into existence and as a result of colonialism in Africa in general and apartheid in South Africa specifically, the cultural and religious rights of the majority groups were regarded as inferior to those of the colonisers who at the time and to date comprise the minority of the whole of the country's population.

The Bill of Rights eliminates the notion of minorities but affords cultural and religious rights even to those groups that comprise the minority of the population. This fits in well with the Constitution's emphasis on the right to equality.[47] Cheadle et al argue that under section 31, members of all cultural communities, irrespective of the size of these communities or of their location in the political process, are entitled to protection, even though the application of this principle may vary in the in light of the community's power or powerlessness.[48]

Section 31of the Constitution further differs from the Article 27 of the International Covenant on Civil and Political Rights in that it uses the wording "cultural community" in place of "ethnic groups" which is used in Article 27. The word "ethnic" means, "designating or of a group of people having common customs,

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[46] Article 27 provides that "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 members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their language."

[47] Section 9(1) and (3).

[48] Cheadle, Hayson & Davis *South African Constitutional Law: The Bill of Rights* (2002) 568.

characteristics, language etc."[49] The use of the word "ethnic" in the context of cultural rights can be construed to limiting cultural groups to ethnic groups (per the given definition of the word ethnic). Chaskalson et al[50] argue that the reason for the substitution of the word "ethnic" with the word "community" in the South African Constitution lies in the desire to avoid any association of the new constitutional order with the ethnic particularism of the apartheid ideology.

3.3. Who comprise "communities" for the purposes of cultural rights?

For the purposes of section 31 a community is a group of people who share customs (or cultural traits), religion and language. The right protected by section 31 is a right requiring communal enjoyment, relating to a practice, which is important for, or definitive of the culture, language or religion the community enjoys.[51] This interpretation suggests that the community itself, no matter how small, must be culturally, linguistically, or religiously distinctive.

A "community" for the purposes of section 31 should be an identifiable group, united by a common religion, language or culture that is self-consciously a community. Self-consciousness requires that the members of the group should identify themselves as part of the group, and they should be identifiable by other members as such.[52] Hilton Staniland argues that language, religion, social custom, beliefs, traditions, and a common history may all be employed to determine a cultural group.[53] Staniland further argues that the right to culture is best regarded as the right of an individual, without discrimination of any type, to freely participate in and develop further his or her culture. To sum this up one can submit that section 31 was designed to protect the rights of designated groups to practise their culture, religion and to use their language free from any undesirable

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[49] *Webster's New World Dictionary and Thesaurus* (2nd ed) 2002.

[50] M. Chaskalson et al *Constitutional Law of South Africa* (1998) 35-12.

[51] Cheadle et al at 570.

[52] De Waal, Currie and Erasmus, *The Bill of Rights Handbook* 2nd ed (1999) 423.

[53] H. Staniland 'Right to Culture' in M Robertson (ed) *Human Rights for South Africans* (1991) 200.

interference from the state or other groupings.

3.4. The impact of the negative wording of the cultural rights

As mentioned earlier the right to culture in section 31 is phrased negatively "may not be denied" in contrast with the usual positive phrasing in the Bill of Rights. This means that section 31 is a negative liberty. It was also mentioned that members of communities may freely engage in the practice of culture, language and religion without interference by the state or from any other source.[54] The inclusion of section 31 in the constitution indicates a commitment to the maintenance of cultural pluralism even where this requires positive measures to be taken by the state to ensure the survival and development of the designated communities where they are threatened by disintegration. Ian Currie comments that if sections 30 and 31 of the Constitution are:-

> "taken to require that due respect be paid to the laws, beliefs and way of life of people recognized as members of a distinct community, it must additionally require recognition of the legitimacy of appeals for the protection of that culture from the disintegrating effect of law reform conducted in the name of egalitarian principles. If so individual claims to equal citizenship (such as the claims to equality of women living under customary law) pull in the opposite direction to claims to the protection of distinct cultures (which, in the case of customary law, are to the effect that inequality is culturally ordained and therefore worthy of protection)"[55]

The Human Rights Committee has noted that:-

> "Although the rights protected under Article 27 (of the Covenant on Civil and Political Rights) are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of their group."[56]

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[54] De Waal, Erasmus and Currie, *Bill of Rights Handbook*, 2nd ed (1999) 425.

[55] Currie "Indigenous Law" M. Chaskalson et al (eds) *Constitutional Law of South Africa* (1998) 36.

[56] General Comment (11 above) para. 6.2.

This would mean that states have the duty to eliminate all unnecessary barriers which might hinder the individual's right to practice his or her culture or religion in community with other members of the group.

According to Sachs J "the central theme that runs through the development of international human rights law in relation to protection of minorities is that of preventing discrimination against disadvantaged and marginalised groups guaranteeing them full and factual equality and providing for remedial action to deal with the past discrimination."[57] From this statement it is clear that even though individuals have the right to practice their culture, the state needs to ensure that the groups to which those individuals belong are given room to develop themselves by ensuring that they do not face any form of unfair discrimination or unwelcome and unjustified judgement of their practices.

3.5. The qualification to the sections 30 and 31 rights.

Both sections 30 and 31 contain an internal limitation requiring the exercise of the rights in question to be consistent with the rest of the Bill of Rights. This is uncontroversial as the exercise of any right entails a concomitant obligation not to infringe the rights of others. These sections are, moreover, subject to the general limitation clause contained in section 36 of the Constitution, which requires measures limiting fundamental rights to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The section 30 limitation is contained in the provision itself in the form of the phrase "but no one exercising these rights may do so in a manner inconsistent with any of provision of the Bills of Rights." The limitation to section 31 also provides that the exercise of the right may not be in a manner inconsistent with

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[57] *In Ex Parte Gauteng Provincial Legislature in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill* 1995 1996 (3) SA 165 CC.

any provision of the Bill of Rights. Cheadle et al point out that constitutionalism affords a limited protection to sub-communities whose prescriptions and practices diverge from the dominant secular, liberal and democratic values of the wider society by creating "zones of freedom", spaces for autonomous action and self-governance and by limiting the application of a constitution to state action.[58] They (Cheadle et al) further point out that section 31 creates space for distinctive sub-communities to practice their own culture, free from state interference.[59] This may however raise questions such as to what extent the zone of freedom may be limited by the state, and who will form the dominant secular values according to whose standards the zone may be limited. The general feeling of the courts has been that individual rights prevail over group rights.

Section 36 of the Constitution contains the limitation clause to the rights contained in the Bill of Rights and it must be noted that the right to culture falls into the category of derogable rights. This means that the right to practice one's culture and the right to practice culture in community with others is limited to the extent that the limitation is reasonable and justifiable in an open and democratic society as already mentioned above. The impression that has been created over the years is that cultural and religious practices do not promote equality and individual human rights. In dealing with this perception, one will have to take a close look at the statement made by Justice Kriegler in his dissenting judgement in *Du Plesis v De Klerk*[60] in which the learned judge said:

> "Our past is not merely one of repressive use of state power. It is one of persistent, institutionalised subjugation and exploitation of a voiceless and defenceless majority by a determined and privileged minority."

This quotation serves to show that South Africans come from a past which was based on the norms of the minorities, who had the power, and their norms of life became the norms of what Cheadle and others would term "the dominant secular

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[58] Cheadle, Hayson & Davis *South African Constitutional Law: The Bill of Rights* (2002) 571.
[59] Ibid.

[60] 1996 (3) SA 850 (CC) 717.

view".[61]

It has been mentioned that the legislature moved away from the use of the word "minorities" and instead used the words "cultural, religious or linguistic communities". Cheadle at al argue that the change reflects "nervousness" in handling minority issues. They further argue that the use of the word "community" expands the ambit of section 31 and imposes no numerical qualification as a prerequisite to claiming the protection of section 31.[62] This shows that the legislature did bear in mind that not all cultural groups form minorities but cultural groups have had their rights impinged because of their "voiceless-ness" in the past. This would therefore mean that cultural and religious communities are given the rights in terms of sections 30 and 31 to practice their culture and/ or religion within the ambit of the constitution although the rights are limited in terms of what is reasonable in a democratic society.

4. CONCLUSION

One of the themes discussed in the consultation of lawyers from Africa, America, Asia, Australia and Europe held in the Faculty of Law at the University of Toronto in August 1992 was:

> "How can universal human rights be legitimized in radically different societies without succumbing to either homogenizing universalism or the paralysis of cultural relativism?"

Rhadika Coomaraswamy emphasized the need to avoid what she called the "orientalist trap" of dividing the world into two bipolar categories.[63] She argued that those in the West must guard against the idea that the West is progressive on women's rights and the East is backward and barbaric. Those in the East must be equally cautious not to subscribe to the reverse notion that accepts the East/ West distinction, but believes that the East is superior, more communal, and less

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[61] Cheadle et al (note 59 above).

[62] Ibid 568.

[63] R. Coomaraswamy "Women, Ethnicity, and the Discourse of Rights" in R. J. Cook (ed) *Human Rights for Women National and International Perspective* 41.

self-centred with no place for an "adversarial" concept of rights.[64] Coomaraswamy's argument is relevant for the whole of the African continent on the recognition of cultural rights of the African communities because as Africa was colonised by the Western, mainly European, countries it is likely that the culture practised will mainly be treated according to what is correct by Western standards, which will then lead to the "orientalist trap".[65]

In her argument, Coomaraswamy uses the presumption that, for human rights to be effective, they have to become a respected part of the culture and the traditions of a given society. She submits that in South Asia, the institution of law is generally viewed with deep suspicion and often hatred because it is seen as the central instrument employed by colonizing powers to replace indigenous cultural, religious, and social traditions with the mechanisms of the modern Western nation state. This submission would have been relevant in the South African context prior to the introduction of the Bill of Rights. The inclusion of the rights of cultural, religious and linguistic communities in the constitution helped to eliminate the fears that the constitutional rights were aimed at propagating the Western ideology to replace indigenous cultural, religious, and social traditions. This right however, has to be protected by the people who enjoy it by being involved in the process of the development of their culture. Development of the culture helps in preventing deconstruction of culture because of irreconcilable conflicts with the constitutional values.

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[64] Ibid.

[64] Ibid.

CHAPTER THREE

THE RIGHT TO GENDER EQUALITY IN INTERNATIONAL AND SOUTH AFRICAN LAW

1. INTRODUCTION

Human beings differ from one another in a number of different ways and this causes equality to be debated over a number of aspects involving interaction between different people. Gender refers to the economic, social and cultural attributes and opportunities associated with being male or female.[66] Gender is associated with sex but it differs from sex in that gender is social and cultural rather than biological. Its attributes differ from society to society, change from time to time and are often shaped by the economy, culture and beliefs.[67] The debate on gender equality has been raging on and because of the difference in circumstances which women face in their spheres of life, it is difficult to come out with what exactly women need. In order to be able to ascertain what is entailed by gender equality, a discussion of the concept of equality is essential.

2. THE MEANING OF THE "RIGHT TO EQUALITY"

Section 9 of the South African constitution provides that:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience,

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[66] Unit for Gender Research in Law Unisa *Women and the Law in South Africa-Empowerment through Enlightenment* (1998) 197.

[67] Ibid.

belief, culture, language and birth.

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

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The South African Constitution emphasizes the right to equality and the right to human dignity as the basis of a democratic society.[68] The problem with the right to equality however, is that there is no yardstick for judging who should be equal to whom. The concept of cultural and religious diversity does not make this determination any easier because all groups have some things that distinguish them from the whole society and persons of those groups have been granted the right to live according to what they believe in.[69] Pierre De Vos argues that the right to equality can be interpreted in a myriad of different ways, and any investigation into the nature and scope of such right will invariably produce far more questions than answers.[70] Some of the questions that may arise include:

- Against which individual, group or other yardstick should the position of the affected subjects be measured to determine whether equality has been attained or not?
- What is the relationship between the right to equality and the right not to be discriminated against? Are these two concepts merely two sides of one coin or should they be viewed as two distinct concepts with distinct fields of operation?[71]

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[68] Section 1(a) of the Constitution Act 108 of 1996 proclaims that 'human dignity, the achievement of equality and advancement of human rights and freedoms' to be values on which the Republic of South Africa is founded.

[69] Section 31(1) of the South African Constitution.

[70] P. De Vos "Substantive equality after Grootboom: the emergence of social and economic context as a guiding value in equality jurisprudence" *Equality Law: Reflections from South Africa and elsewhere* (2001) 54.

[71] D. Rae *Equalities* (1981) 72.

These questions might be asked when one deals with the right of individuals belonging to cultural groups to practice their culture as compared to the right of women within those cultural groups to gender equality. Does equality as envisaged by those women mean equality with males in their cultural groups or equality with a typical South African man who was never a victim of being treated as a sub-citizen because of the policies of the apartheid regime?

There are two approaches to dealing with the right to equality: the formal approach and the substantive approach. The formal approach to equality normally demands the equal treatment of individuals regardless of their circumstances. It presupposes that all persons are equal bearers of rights within a just social order. According to this view inequality is an aberration that can be eliminated by extending the same "neutral" norm or standards.[72] This approach treats people in the same way despite their past and present positioning in the society. The substantive approach to equality on the other hand views equality as encompassing an approach to analysis or evaluation of the impugned conduct or law. It requires the courts to have regard to the context of the alleged violation, including its social and historical context, and its relationship to systematic and structural forms of domination within a society, with a view to remedying disadvantage and subjugation.[73] A substantive equality approach permits and reveals the justifications for positive steps to be taken to redress patterns of disadvantage. In the context of the right to gender equality within cultural groups, the justification of a custom versus the effect on the right to inherent dignity of the

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[72] P, De Vos "Substantive equality after Grootboom: the emergence of social and economic context as a guiding value in the equality jurisprudence" Equality Law- Reflections from South Africa and Elsewhere (2001) 59.

[73] S. Cowen "Can dignity guide South Africa's equality jurisprudence?" (2000) 17 *South Africa Journal on Human Rights* 37.

affected woman must be the guiding factors, rather than how the other groups conduct themselves, as that comparative approach goes against the promotion of cultural diversity.

Despite all the technicalities associated with the right to equality, it can be said that it is the right enjoyed by an individual based on being human despite any other attributes that distinguish them from other human beings. However, denial of the right to equality based on the requirements of a certain right does not amount to unfair discrimination.

3. THE MEANING OF THE RIGHT TO GENDER EQUALITY

Gender equality, or equality between women and men, means the equal utilization by women and men of socially valued goods, opportunities, resources and rewards.[74] The stumbling block in the realization of the objective of ensuring gender equality is that what is valued amongst societies differs from one society to the other. The International Labour Organisation (ILO) defines gender as referring to the social differences and relations between men and women, which are learned, vary widely among societies and cultures, and change over time.[75] The term 'gender' does not replace the term sex, which refers exclusively to biological differences between men and women. The term gender is used to analyse the roles, responsibilities, constraints, opportunities and needs of women and men in all areas in any given social context. Gender roles are learned behaviours in a given society, community or other social group. They condition activities, tasks and responsibilities perceived as male or female. Gender roles are affected by age, race, class, ethnicity and religion, and by the geographical, economic and political environment.[76]

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[74] Unit for Gender Research in Law *Women and the Law in South Africa-Empowerment through Enlightenment* (1998) 198.

[75] ABC Of Women Worker's Rights and Gender Equality, ILO, Geneva, (2000) 47-48.

[76] ABC Of Women Worker's Rights and Gender Equality, ILO, Geneva, (2000) 47-48.

Gender equality or equality between men and women, entails the concept that all human beings, both men and women, are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. Gender equality means that the different behaviour, aspirations and needs of women and men are considered, valued and favoured equally. It does not mean that women and men have become the same, but that their rights, responsibilities and opportunities will not depend on whether they are born female or male. Gender equity means fairness of treatment for women and men, according to their respective needs. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities.

In the Fourth World Conference on Women[77] it was proposed that gender mainstreaming is a key strategy to reducing inequalities between women and men. Gender mainstreaming, known also as mainstreaming a gender perspective, is "the process of assessing the implications for women and men of any planned action including legislation, policies, and programmes, in any area and at all levels."[78] This proposal can be regarded as a call to all governments and other actors to promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes, so that before decisions are taken, an analysis is made of the effects on women and men respectively. What this proposal stands for is the creation of gender sensitive policies that benefit both groups equally to ensure development. In the context of this study, that will mean the downside of culture has to be judged using the policies to ascertain the gender sensitivity of the specific cultural practices, thus avoiding the judging of cultural practices based on the Western way of thinking. The proposal by the World Conference is in line with Article 5(a) of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), which provides that

[77] Held in Beijing, 1995.

[78]The UN Fourth World Conference on Women "Action for equality, development and peace" http://www.un.org/women watch/daw .

state parties shall take appropriate measures:

> To modify the social 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 of men and women.

Although the Article 5(a) requirement of the CEDAW does not specifically mention cultural practice as one of the things which has to be modified, the term "social cultural patterns" includes the practice of culture and thus covers the prejudices that women in cultural groups face. Anthony Giddens argues that although the roles of men and women differ from culture to culture, there is no known instance of a society in which females are more powerful than males.[79] Giddens' argument supports the submission that gender inequality must be dealt with in the context of the right to dignity of the affected person rather than on how other groups within the society conduct themselves.

4. INTERNATIONAL LAW PROVISIONS ON THE RIGHT TO GENDER EQUALITY

Provisions on gender equality are contained in several international human rights instruments, including the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All forms of Discrimination against Women and the African Charter on Human and People's Rights.

4.1 The Universal Declaration of Human Rights

Article 1 of the Declaration provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The wording of this Article is to the effect that everyone is entitled to similar rights based on their humanity, irrespective of their sex or gender. Article 2 of the Declaration furthers

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[79] A. Giddens *Sociology* (4th ed) 2002 112.

the Article 1 provision by prohibiting discrimination on any ground.[80] Although there is no express mention of discrimination based on gender in Article 2, the prohibition of discrimination based on sex covers gender based discrimination.

4.2 The International Covenant on Civil and Political Rights

Civil and political rights are the basis of one's enjoyment of citizenship based on the said rights. The denial of civil and political rights to an individual on whatever basis, including gender, annuls the purpose of the granting of human rights to the said individual. Article 26 of the Covenant provides that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Covenant makes mention of the right to equal protection of the law and prohibits discrimination based on, amongst other things, gender and social origin, which can be understood to imply cultural belief and practice.

4.3 The International Covenant on Economic, Social and Cultural Rights

The preamble to this Covenant, states that the rights entrenched in it derive from the inherent dignity of the human person. It is further recognized that in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights. The realization that conditions are to be created whereby everyone will enjoy their rights goes to show that a mere entrenchment of rights in human rights instruments does not achieve anything in a society that does not recognize the importance of the

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[80] It provides that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

entrenched rights. The right to gender equality or the right not to be discriminated against on the basis of gender will not be of any value if the bearers of the said right are not informed or educated of the availability of the right.

Article 2 (2) of the Covenant provides that:

> "The state parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This provision mentions a number of grounds on which discrimination is prohibited. However, gender is not specifically mentioned as one of those grounds although one might assume it would be included in "other status". The Covenant, however has a further provision dealing with equality in the enjoyment of rights entrenched in it. Article 3 of the Covenant provides that the states undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. This Article requires the states to ensure that both men and women enjoy the rights entrenched in the Covenant without any inhibition because of their gender.

4.4 The Convention on the Elimination of All Forms of Discrimination against Women

The preamble to this Convention notes the concern that despite the various instruments by the international community, extensive discrimination against women continues to exist. The Convention goes a bit further than the other instruments discussed in that it defines the term "discrimination against women".[81] The definition deals with all the aspects of life in which inequalities might occur. In the Zulu community, for instance, it has been argued that many

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

inequalities occur in the marriage relationship.[82] The definition in the Convention also focuses on the denial of the enjoyment of rights in the marriage. The definition protects women in all aspects of life. The Convention therefore is aimed at the recognition of women as equal citizens and not as minors as some cultural and religious practices dictate.

As mentioned earlier, Article 5(a) of the Convention obliges the states to modify the patterns of conduct of women and men to achieve the elimination of prejudices 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 of men and women. The Convention is based on the notion of the promotion of the equal development of all sexes, not suppressed by the stereotyping of roles of either group. This is against a number of stereotypes existing against women for example as reflected in the Zulu saying that "*indawo yomfazi isexhibeni*", which literally means that the place of a woman is in the kitchen. The said phrase is based on the stereotype that a man has to work and a woman is passive and waits on the man to provide. This stereotype discriminates against women in that it inhibits their potential to work and contribute to their upkeep and to the economy of their respective countries.

The Convention creates obligations for state parties to ensure that the rights contained therein, particularly Articles 5 and 6 are respected. Article 2 of the Convention is an undertaking by member states to the Convention. It requires that:

> "State Parties condemn discrimination against women in all its forms, agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:
> (a) To embody the principle of the equality of men and women in their national Constitutions or other appropriate legislation if not yet incorporated therein,

[82] T.R. Nhlapho "The African Family and Women's Rights: Friends and Foes?" 1991 *Acta Juridica,* 135, T.W. Bennett "The Compatibility of African Customary Law and Human Rights" 1991 *Acta Juridica*, 18.

and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women."

Rebecca J. Cook argues that Article 2 generally requires state parties "to ensure" compliance by the governments' organs with the Convention and "to take all appropriate measures" to effect "the elimination of discrimination in all its forms" by "any person, organization or enterprise" or "to modify or abolish existing laws, regulations, customs and practices."[83] The five requirements submitted by Cook,[84] form the basis of Article 2 and compliance with the Convention in fulfilling the undertaking. However, it is not as easy as that, because governments have responsibilities to promote harmony and development within the communities that voted them into power. They also have the duty to promote equality amongst groups that exist within their territory. While governments might condemn discrimination of women, taking steps to act in accordance with the

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[83] Rebecca J. Cook 'State Accountability under the Women's Convention' in *Human Rights of Women: National and International Perspective'* (1994) 230.

[84] (i) To ensure by government organs;
(ii) To take all appropriate measures to effect;
(iii) The elimination of discrimination in all its forms by
(iv) Any person, organization or enterprise or;
(v) To modify or abolish existing laws, regulations, customs and practices.

condemnation might be difficult.

Article 2(f) deals with the modification or abolition of customs and practices which constitute discrimination against women. The option of abolition seems extreme in democratic societies where the right to practice culture is one of the entrenched rights in national legislation. The option of modifying is viable in that it allows state parties to deal with the concerned customs and practices in order to determine their non-conformity with the international standards of women's human rights. Article 2(f) and Article 5(a) strongly reinforce the commitment to eliminate all forms of discrimination, since many pervasive forms of discrimination against women rest not on law but on legally tolerated customs and practices of national institutions.

4.5 The African Charter on Human and People's Rights

The African Charter is a regional instrument for the protection and promotion of human rights in Africa. Article 2 of the Charter 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, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

This provision is similar to those of the other human rights instruments and like all those instruments it does not include gender as a ground in terms of which discrimination is prohibited, but one can again assume that it is included as prohibition of distinction based on sex. The Charter has the objective of ensuring that all people enjoy human rights.

The Charter encapsulates the principles contained in the Convention for the Elimination of All Forms of Discrimination Against Women in its provision for the protection of the rights of women. Article 18 (3) of the Charter provides that:

> "The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international declarations and Conventions"

Chaloka Beyani makes four observations with regard to Article 18(3).[85] Firstly, the article lays a gender-specific obligation upon states in Africa to eliminate discrimination against women, and not merely on grounds of sex as such. Secondly, the language employed admits of no exception in requiring states to eliminate any discrimination against women. Thirdly, it distinctly acknowledges the existence of the rights of women and children, and recognizes the necessity for the protection of those rights by the state. Fourthly, it incorporates the application within the African Charter, of international standards protecting the rights of women and children as stipulated in international conventions and declarations. Article 18(3) therefore is specific on the protection of the human rights of women and their recognition as equal citizens entitled to rights. The Article however does not make explicit reference to the rights of women as they are affected by the customs of the groups they belong to.

It can be seen from the above discussion that the international instruments on human rights go a long way in recognizing the rights of women, especially the Convention on the Elimination of all Forms of Discrimination Against Women which goes further and requires state parties to implement "appropriate measures" to eliminate discrimination against women in customary practices.[86] The existence of these international human rights instruments and the inclusion of women's rights specifically show the international communities' commitment to promote the rights of women.

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[85] C. Beyani "Towards a More Effective Guarantee in the African Human Rights System" in *Human Rights of Women: National and International Perspective* (1994) 285 at 290.

[86] Article 5.

5. SOUTH AFRICAN JURISPRUDENCE ON THE RIGHT TO GENDER EQUALITY

Section 9 of the South African Constitution[87] contains the equality clause.[88] Section 9 (2) explains what the right to equality contains and the steps that have to be taken in order to promote the achievement of equality for the categories of persons that have been disadvantaged by unfair discrimination. Section 9(3) provides for the grounds upon which a person must not be discriminated. It further prohibits unfair discrimination by state organs against individuals. This indicates that equality applies vertically (in a state, individual relationship). Section 9 (4) prohibits discrimination as it occurs between individuals (horizontal application of the Bill of Rights). The provision of section 9(4) of the Constitution is in line with Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women in that the enactment of legislation is an appropriate measure to eliminate discrimination. The provision of section 9 (5) shows that discrimination is fair unless it can be established that discrimination is unfair. This means that the person alleging unfair discrimination has to prove that the discrimination is unfair on the grounds set out in section 9(3).

The courts have further dealt with the right to equality in a number of spheres

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[87] Act 108 of 1996.

[88] Section 9 states that; (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

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

(4)No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

National legislation must be enacted to prevent or prohibit unfair discrimination.

(5)Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

especially in the field of labour law, but they have yet to consider claims brought by black women within their cultural groups. The Constitutional Court in *President of South Africa and Another v Hugo*[89] tried to assert its commitment to the jurisprudence of substantive equality in which the primary objective is to asses the impact of the measure of ensuring equality and avoiding treating different groups identically. The Court expressed the view that:

> "We need, therefore, to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon the identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether the overall impact is one which furthers the constitutional goal of equality or not. A classification, which is unfair in one context, may not be necessarily unfair in a different context."[90]

This view of the Court shows that the inclusion of the equality clause in the Constitution is not aimed at eliminating difference but at eliminating practices that promote unfair discrimination after the consideration of such practices in the context in which they occurred. One can assume from this view that the existence of gender inequality within cultural groups will be decided based on the observation of the specific customs and the context in which they occur, as judgment based on general observations will amount to discrimination of the specific cultural group based on culture. The view shows that equal treatment is not compatible with differential treatment, which is:

> "warranted as long as it is based on differences in the personal qualities or merits of people relative to a relevant object or purpose... Differential treatment based on personal qualities (or merits) unrelated to a relevant purpose is unjust, and therefore discriminatory"[91]

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[89] 1997 (6) BCLR 708 (CC).

[90] Ibid para.4.1.

[91] L. M. Du Plessis "Justice through Equality" quoted in Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 141.

In conformity with section 9(2) of the Constitution, the legislature passed the Promotion of Equality and Prevention of Unfair Discrimination Act.[92] The preamble of the Act provides that it endeavours to facilitate transition to a democratic society, united in diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom. The objects of the Act include giving effect to the "letter and spirit" of the Constitution, in particular:-

> "(i) the equal enjoyment of all rights and freedoms by every person;
> (ii) the promotion of equality;
> (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
> (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution'
> (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution and section 12 of this Act."[93]

The Promotion of Equality and Prevention of Unfair Discrimination Act goes further than the other instruments discussed herein in that it gives a definition of "equality" as envisaged by the Act. The Act defines equality to include the full enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and equality in terms of outcomes. The Act binds the state and all persons. This means that it applies in both the public and the private domain. The Act's application in the private domain shows that it even applies to women who face discrimination based on gender amongst cultural groups, which is perpetuated by the practice of certain customs. The provisions of the Act show that women who feel prejudiced by the operation of culture can approach the Equality Court and lodge a complaint of unfair discrimination. The Act provides women with a tool to challenge the law's reluctance to penetrate the

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[92] Act 4 of 2000.

[93] Section 2 (a) and (b) of the Promotion of Equality Prevention of Unfair Discrimination Act.

public/private law divide.[94]

The Promotion of Equality and Prevention of Unfair Discrimination Act further define "discrimination" as:

> "Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-
>
> (a) imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunity or advantages from,
>
> any person on one or more of the prohibited grounds."[95]

It has to be noted that the Act prohibits "unfair" discrimination and not all types of discrimination. This means that the determination of unfairness is the foundation for declaring the conduct as amounting to discrimination in terms of the Act. The Act also prohibits indirect discrimination, which is discrimination involving a policy, rule, practice or situation, which is prima facie neutral and appears to apply equally to all persons affected, but has the effect of discriminating against a person or group of persons identified by a prohibited ground.

Section 5 of the Act provides that the Act binds the State and all persons and that if there is any conflict relating to the matter dealt with in the Act and the provision of any other law, other than the Constitution or an Act of parliament expressly amending the Act, the provisions of the Act will prevail. Section 5 implies that the Act is the yardstick for the promotion of equality and prevention of unfair discrimination and any practices emanating from the provisions of the Act can only be limited by the Constitution and/ or legislation enacted for that purpose.

Section 8 of the Act deals with the prohibition of discrimination based on gender. Section 8(c) prohibits the use of any system that prevents women from inheriting

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[94] S. Liebenberg and M. O'Sullivan "South Africa's new equality legislation: A tool for advancing women's socio-economic equality" in Saras Jagwanath and Evanche Kalula *Equality Law: Reflections from South Africa and Elsewhere* ed (2001) pp 77.

[95] Section 1 (viii) of the Equality Act .

family property. One of the main criticisms laid against customary law has been the discrimination against women in so far as succession to family estates is concerned. This exists in most African customs under which women are given a sub-human status and are treated as minors. Section 8(d) prohibits practices that impair the dignity of women and undermine equality between women and men.[96] Section 8(d) goes further to include the preservation of one's dignity as a requirement for a democratic society. This provision is in line with sections 9 and 10 of the Constitution and is consistent with the preamble of the Constitution, which declares equality and human dignity as foundations of a democratic society.

Section 8 is, among other things, aimed at modifying customs and practices, which constitute discrimination against women, and it represents South Africa's fulfilment of the obligations set out in CEDAW. The above discussion shows that the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act protect members of cultural groups from practices that are discriminatory or that undermine their dignity and wellbeing. The question however, is how the courts will deal with the situation in light of the right to culture. The Constitution requires that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[97] This provision encapsulates the considerations of culture. Courts have to deal with the questions of cultural practices in a way that allows for their development within the ambit of the Bill of Rights, thus ensuring that members of the cultural groups enjoy their constitutional rights as contained in sections 30 and 31 of the Constitution.

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[96] Section 8 (d) provides that "Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including-

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child".

[97] Section39 (2) Act 108 of 1996

Charles Dlamini argues that although culture is often viewed as a group right or collective right, it does not necessarily mean that the group itself is the bearer of the right. It is better to regard the individual as the bearer of this right.[98] This argument shows that only the individuals within the cultural group can decide if they want to relinquish their rights if such rights amount to discrimination against some members of the group. The individual so affected can approach the Equality Court and lodge a complaint of unfair discrimination based on a prohibited ground as it occurs within the cultural group.

A further initiative by the South African legislature to promote gender equality was the promulgation of the Commission on Gender Equality Act,[99] which is the founding Act for the Commission on Gender Equality. The Act gives the Commission on gender equality the function to foster understanding of matters pertaining to the promotion of equality and the role and activities of the Commission.[100] It also mandates the Commission to evaluate any system of personal and family law or custom and any system of indigenous law, customs and practices.[101] The Commission has the duty to listen to and assist women whose rights are affected by the practices that are discriminatory to them, based on their gender.

6. CONCLUSION

Section 9 (2) of the South African Constitution provides for the full and equal enjoyment of all rights and freedoms. The phrase "full and equal enjoyment of all rights and freedoms" can be interpreted to mean that the bearers of the rights are entitled to enjoy them fully and equally with other holders of the same rights. In the same provision, the Constitution further proposes that to achieve equality, legislative and other measures designed to protect or advance persons or

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[98] C. Dlamini 'Culture, Education, and Religion' in Rights and Constitutionalism: *The New South African Legal Order* Van Wyk, Dugard, De Villiers and Davis (eds) (1994) 580.

[99] Act 39 of 1996.

[100] Section 11(b).

[101] Section 11 (c) (ii) and (iii).

categories of persons, disadvantaged by unfair discrimination may be taken. Developing the right to practice culture falls within the context of taking other measures to ensure full enjoyment of the right that is entrenched in section 31. However in the same breath cultural practices can be regarded as culprits in promoting gender based discrimination. Thus the rate at which they promote discrimination may determine whether the custom has to be developed or abolished.

Devenish points out that the broad and socially contextual concept of equality is also reflected in the Canadian judgement by Wilson J in *Andrews v Law Society of British Columbia*[102] who held that the constitutional right to equality is "designed to protect those groups who suffer social, political and legal disadvantage in our society".[103] The enactment of the Equality Act and the Commission on Gender Equality Act is in line with the requirement in section 9(4) that national legislation must be enacted to prevent or prohibit unfair discrimination and it provides the framework for "the protection of those groups who suffer the social, political and legal disadvantage in our society". Devenish further points out that the principle of equality applies horizontally as well as vertically.[104] In the context of this study, the vertical application relates to the way in which governments view cultural groups in relation to their rights to practice their culture and the horizontal application relates to how women are unfairly treated or discriminated against by their male counterparts in the name of culture.

The purpose of this study is to ascertain how specific customs affect women and whether the specific customs have the effect of dehumanizing women. This leads to the need for the discussion of specific Zulu customs and the way they affect the rights of women in order to determine whether they unfairly discriminate against women and whether there is a moral and legal justification for the practice of the specific customs.

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[102] (1989) 1 SCR 143.

[103] G. Devenish "*Commentary on the South African Bill of Rights* (1999) 41.

CHAPTER FOUR

ZULU CUSTOMS AS THEY RELATE TO THE RIGHTS OF WOMEN

1. INTRODUCTION

The Zulu community is mostly located in the KwaZulu Natal province of South Africa although members of the Zulu cultural group are all over South Africa. IsiZulu is one of the official languages in South Africa and statistics show that it is one of the largest ethnic groups in the Republic.[105] The Zulu community prides itself on a number of things including the promotion of its culture and its dissemination it among other people. There have been many writings on the culture of the Zulu people and surprisingly enough, few of them are written by the members of the Zulu community. Zulu customs like many others have their benefits. However, it seems most of the writings concentrate on their dark side, which attracts more criticism than constructive opinions.

Before we discuss the Zulu customs that have an effect on women's rights, it must be noted that there are similarities among all cultural groups in the way that women are perceived and expected to behave. Cross-cultural psychologists have dealt with pan-cultural gender similarities and they have formulated terms such as cultural etics and cultural emics. They define cultural etics as those aspects that are universal in gender orientation or ways in which otherwise different cultures tend to be similar concerning gender in all societies, whereas emics are seen as those with characteristics that are unique to a specific culture.[106] According to the cross-cultural psychologists, there are four gender etics, which are:

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[104] Ibid.

[105] Census in brief - Report no. 03-02-03(2001) 14.

[106] S. M. Burn *"The Social Psychology Of Gender"*, (1996) 37.

- A division of labour based on sex (gender roles);
- Beliefs or stereotypes regarding how females and males are different (gender stereotypes);
- The differential socialization of male and female children; and
- The lower power and status of females.[107]

The purpose of this chapter is to discuss gender emics and etics, as they exist in the Zulu cultural practices. The chapter focuses on the moral benefits of those etics and emics and the extent to which they conflict with other human rights as entrenched in the human rights instruments for the benefit of women. A court or tribunal faced with a conflict relating to the practice of culture may be required by the provisions of section 31 of the Constitution to consider the impact of the proposed customary law reform on the "cultural life of the communities observing the law".[108] The discussion in this chapter will therefore amongst other things, concentrate on the customs of virginity testing, payment of lobolo, marital power, inheritance rights of women and mourning, as they are practiced in the Zulu community. The discussion will further look at the impact of the above mentioned customs on women's right to equality and the moral benefits, if any, of the said customs. The impact of the customs will be discussed in the context of the test set out in the Promotion of Equality and Prevention of Unfair Discrimination Act[109]

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[107] Ibid.

[108] Iain Currie "The future of customary law: lessons from the lobolo debate" *Acta Juridica* 1994 at 160.

[109] Section 14 (2) and (3) provide that:

"2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection 2(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of

although the list of factors cannot be said to be conclusive of all situations that a court may have to take into consideration.

2. VIRGINITY TESTING

Section 6(d) of the Promotion of Equality and Prevention of Unfair Discrimination Act prohibits discrimination based on gender and practices that undermine the equality between men and women. It also prohibits practices that undermine the dignity and wellbeing of the girl child. This section was meant to outlaw discrimination against females. This provision of the Promotion of Equality and Prevention of Unfair Discrimination Act can be weighed against the provision of the African Charter on Human and Peoples Rights, which provides that individuals have the duty to preserve and strengthen positive African cultural values and to contribute to the promotion of the moral wellbeing of society.[110]

Most African cultures regard women as mothers of the nation and from an early age, a girl child is groomed for the role of being a mother. Virginity testing is a custom wherein maidens are checked to see if they are still virgins and it is aimed at ensuring that they do not involve themselves in sexual activities which might lead to pregnancy before marriage. The custom is based on the notion that a girl child is supposed to bring her father herds of cattle (lobolo) and therefore has to

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disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systematic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive measures and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to:-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

[110] Article 29 (7).

keep her virginity until marriage so that the father or the male relative responsible for the upbringing of that child will get the full amount of lobolo he requires from the prospective bridegroom. On the face of it, the practice of virginity testing seems to be intended to benefit men and it can be argued that it is discriminatory in that only girl children are tested for virginity and there has never been any means tried to enforce chastity among males. That was the one of the arguments that were raised by the participants in the conference organized by the Commission on Gender Equality in June 2000.[111]

The custom of virginity testing was revived in the spirit of African renaissance. The main reason behind its revival was the need to decrease the rate of teenage pregnancies and sexually transmitted disease amongst the youth. Those who advocate the practice of the custom of virginity testing argue that they are using the African culture to try and reduce the rate of teenage pregnancies and prevent the spread of HIV/AIDS.[112] Another argument is that the custom makes girl children feel proud about who they are and the fact that they have abstained from engaging in sexual activities up to a certain age. Phyllis Zungu argues that virginity testing plays a positive role in identifying cases and incidences of child sexual abuse.[113] In as much as this view is held as true by those who argue for the practice of virginity testing, those that are against the practice argue that the public declaration of the girl's virginity exposes them to abuse by men who believe that having sex with a virgin cures AIDS.

Those that argue against the custom of virginity testing believe that it invades the right to privacy of the children concerned. They further argue that the children

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[111] See Commission on Gender Equality:- Consultative Conference on Virginity Testing:- Richards Bay, 12-14 June 2000 at http://www.cge.org.za/backend/downloads/vt.pdf.

[112] Suzanne Leclerc-Madlala "Protecting girlhood? Virginity revivals in the era of AIDS" *Gendering Childhood*. Agenda 56 (2003) 20.

[113] P. Zungu "Culture and virginity testing": *Report on Consultative Conference on Virginity Testing Commission on Gender Equality* (2000).

have a right to equal treatment and non-discrimination. The Commission on Equality and the Youth Commission have led the campaign against virginity testing. Their campaign is based on the belief that virginity testing is unfair to girls, and discriminatory. They further base their argument on the following:-

- The custom places an unfair burden on girls and women in that it encourages the myth and untruth that it is women and girls who are to blame for "bringing HIV/AIDS into the family". They argue that the view that virginity testing halts the spread of HIV/AIDS does not take into account the role of men and boys in spreading the disease because of the way that culture encourages them to have multiple partners.
- The custom promotes unfair discrimination between virgins and non-virgins. They argue that blaming the girls who have lost their virginity denies them the right to choose when to lose their virginity. The practice also does not take into account how the girls lost their virginity as surveys have shown that three to four girls are molested before the age of sixteen.
- There is gender bias in that only girls are tested and that reinforces the subservient position of girls and the extra responsibility they are expected to carry, even though they lack the status and power in a partnership.[114]

Although the views on virginity testing might differ in a number of ways, there are some arguments that have been raised that are not true and do not represent what happens in reality. Although the view that public proclamation of virginity exposes the girl so proclaimed to sexual abuse is somehow true, this does not necessarily justify the elimination of the whole custom of virginity testing. Using that as a ground would have the same effect as the suggestion that women must cover their bodies to protect themselves from being raped, which is not an absolute solution to the problem. The view that the custom unfairly discriminates between non-virgins and virgins is true in that in some communities once it is found that the girl has lost her virginity she becomes an outcast and a disgrace to

[114] Noreen Ramsden, of the Children's Rights Centre in Durban, "Respect will prove more effective" *ChildrenFIRST* October/ November (2000) 15.

the community. In some communities however, when the testers find that the girl is no longer a virgin they try and find out the reason that led to the loss of virginity which could be regarded as another objective behind the practise of the custom. In most cases, they are able to expose incestuous molestations and help stop the cycle of child abuse.

The issue of the violation of the children's right to privacy raises concern because the right to privacy is one of the rights entrenched in the Bill of Rights. The violation of this right is unconstitutional and therefore the whole practice is unfair. The participants in the Consultative Conference on Virginity Testing[115] dealt with the issue of consent to testing as it affects the right to privacy. They made the following recommendations:-

(i) Virginity testing could be carried out on condition that it was voluntary.

(ii) No force or coercion must be used on the children, who must be provided with enough information to enable them to make the choice themselves.

The participants further clarified the issue of consent to virginity testing. They concluded that:-

(i) Parents cannot consent to something that violates the rights of their children. In South Africa a child of fourteen years can be tested for HIV without the consent of the parent. For a child under fourteen, parents can give consent to that which is lawful.

(ii) The child must be given a full explanation about virginity testing before undergoing it.

(iii) Virginity testing conforms to section 12(2) (c) for treatment to be done with informed consent.

The exercise of the custom is in line with the provisions of Article 29(7) of the African Charter in that it contributes to the moral wellbeing of the society. Another

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[115] Ibid at 108.

factor that the people who use the argument of invasion of privacy overlook is that the practice is not simply about testing whether a girl is a virgin or not, but it also includes giving advice to young girls on how to behave responsibly.

Another argument against virginity testing is that it discriminates against non-virgins. This argument is not true in that the people who are in charge of conducting the tests do include non-virgins in their groups. The intention of doing so is to instil confidence in them so that they do not feel as outcasts in society. It is done to prevent those non-virgins from further involving themselves in sexual activities to such an extent that they fall pregnant. This helps in decreasing the levels of extra-marital pregnancies.

3. ILOBOLO

Section 3 of the Recognition of Customary Marriages Act[116] deals with the requirements for a valid customary marriage. Section 3 (1) (b) provides that:-

> Marriage must be negotiated and entered into or celebrated in accordance with customary law.

Payment of ilobolo is part of negotiating the marriage in accordance with customary law. The debate on the payment of ilobolo and the impact thereof on the rights of married women have been prominent in the struggle for gender equality. Ilobolo is the tendering of cattle in exchange for a wife; and the dictionary definition is that it means bride price.[117] It is the requirement for a marriage to be regarded as legitimate in the African societies. Early missionaries, administrators and anthropologists defined ilobolo as "payment" by the groom to the bride's parents. This definition is wrong as ilobolo involves negotiations and tendering of cattle to show the intention of both families to be related. Their definition that the early missionaries and anthropologists led them to conclude that lobolo has the effect of reducing the woman to a slave. Although this conclusion might not be absolutely true, the belief in the Zulu community that

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[116] Act 120 of 1998.
[117] *Oxford Concise English Dictionary* (1990).

when a man has a number of wives it shows how powerful he is, might make the missionaries conclusion seem true. That is because the respect will be given to that man because he has resources to pay ilobolo for many wives thus making women objects to show the power that man wields. The purpose of this study is to ascertain whether the practice of the payment of ilobolo is in conflict with the human rights provisions as they relate to women. In order to ascertain that one has to consider whether the practice constitutes discrimination against women, using the test set out in the Convention on the Elimination of All Forms of Discrimination against Women which is whether the practice is "incompatible with human dignity and with the welfare of the family and society, prevents their participation, on equal terms with men"?

The idea behind the initiation of the practice of paying of ilobolo in the Zulu community was to create a bond between the two families as in the Zulu community marriage is for creating more than the spousal relationship, it is also about creating a bond between the two families. A further justification for ilobolo was that it shows that the groom would be able to maintain his wife and was committed to her. In the past the price for lobolo was usually not fixed but there was an amount of cattle that could not to be exceeded. That supported the notion that the women's parents were not asking for the payment of lobolo as a form of compensation for bringing their daughter up. The man could pay what he could afford.

Things have changed however in recent years because of urbanization and the use of money instead of cattle. Some parents are now using the custom of ilobolo to benefit from having a girl child, which in turn makes men feel that because they paid a large amount of ilobolo that gives them rights to do as they please with their wives. Paying exorbitant amounts of money as ilobolo leads to the impoverishment of the male partner and thus affects the subsequent happiness of the marriage.[118] The disadvantage of lobolo therefore is that the demand of

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[118] C.R.M Dlamini "The Juridical analysis and critical evaluation of ilobolo in the changing Zulu

exorbitant amounts tends to delay or discourage marriage. The solution to that is moderation in the monies demanded as lobolo. A further disadvantage of lobolo is that the bride-to-be, is not involved in the negotiations and neither is her mother. That is unfair especially in situations where the mother is a single parent and her male relatives have to be involved, whereas in most cases they were never involved in the upbringing of the child.

Ilobolo is one requirement that legitimizes marriage in the Zulu community so its abandonment on grounds that it promotes unfair discrimination will amount to infringing the Zulu people's right to cultural practice. However the consideration that now parents see a bargain in having girl children makes the practice to objectify women to money-making objects which is against the constitutional principles. This makes the practice unconstitutional and as such can only be rectified by revisiting the custom and ensuring that it is practiced in its original sense and with constructive intentions.

4. MARITAL POWER

The Matrimonial Property Act[119] abolished marital power with regard to the person and property of the wife for all marriages. In terms of the Act, the husband does not have any power over the wife's person and property, and she is in no way restricted regarding the conclusion of contracts and litigation.[120] The situation in the Zulu community is different from what the Act requires in that women are still regarded as minors to their husbands. The man is the head of the family and has the right to take all decisions. The situation in the olden days was that the wife was put in charge of running the household and the husband rarely interfered with that. The Zulu name given to a wife is *"inkosikazi"*, which means that she is a king *(inkosi)* but more than an ordinary king *(kazi).* The situation changed in the 1800's with the arrival of missionaries. And even as recently as 1980 Lord Denning an English judge, wrote:

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society" (HSRC) Co-operative Research Programme on marriage and family life (2002) 12.

[119] Act 88 of 1984, Section 11.

[120] Section 12.

> "No matter how you may dispute and argue, you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and rear children..... He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds...."[121]

This is an indication of how women came to be viewed after conformity of people to the Western way of life. The situation now is that the wife has less say in the marriage and cannot own any property as all of it belongs to the husband. It has been that based on the Code of Zulu Law, women in KwaZulu -Natal are regarded as majors with full legal capacity to enter into contracts and to institute an action in court.[122] This submission is not what is applicable in practice. Therefore the legislation referred to is only good on paper and does not benefit the people it is aimed to accommodate.

The children born in a marriage belong to the husband and on dissolution of the marriage they are in most cases given to the husband. The situation as it relates to marital power in the Zulu community largely promotes unfair discrimination against women and there is no justification for that. The existence of marital power in marriages within the Zulu community is against the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act[123] and the international instruments on the rights of women.

5. POLYGAMY

Customary marriages are polygamous in nature. That means the husband is permitted to take more than one wife. The word "polygamy" is often used to describe this situation but strictly speaking, this is incorrect because polygamy permits both sexes to have more than one spouse. "Polygyny" permits men to have more that one wife.[124] In Zulu custom, a man is allowed to marry as many

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[121] Denning *"The Due Process of the Law"* (1980) 194.

[122] Unit for Gender Research in Law Unisa *"Women and the Law in South Africa- Empowerment through Enlightenment"* (1998) 19.

[123] Act 4 of 2000.

[124] D.S.P. Cronje' and J. Heaton *South African Family Law* (1999) 221.

women as he wants. The only limit to the number of wives a man can marry is his desires and his ability to pay ilobolo for, and maintain, a further wife.[125] In the early days, this led to parents organizing bridegrooms for their daughters when they believed that the man was wealthy and would be able to pay lobolo and maintain their daughter. Bekker and Coertze submit that there are two systems of polygamy, one is the simple system and the other is the complex or house system.[126] They argue that under the simple system, a man has one main or great wife, the first wife he marries. All subsequent wives are subordinate or subsidiary to her and each successive wife is immediately subordinate to her predecessor.

The complex system involves the polygamist having two or more wives and allocating them a status depending on when he marries them. The first wife is named the great wife *(indlunkulu)*, the second wife is the right hand wife *(iqadi),* and the third wife is named the left hand wife *(ikhohlo).* The wives are given status publicly on the date of the wedding. The wives establish separate households and have separate properties which are controlled by the kraal head. To each of his main wives, a family kraal head may affiliate any other of his wife to the house from whose property her lobolo was paid.[127] The Code of Zulu Law defines affiliation as "the attachment of one or more junior houses to a senior or superior wife either the *indlunkulu*, the *ikhohlo* or the *iqadi* for the purpose of providing against the failure of an heir in such senior or superior house."[128] Affiliation is used in cases when the senior wife of a specified house cannot have children. In those cases the senior wife has a choice of the affiliate to her house, mainly because cattle to pay lobolo will be derived from her household.

The first criticism against polygamy is that only men can have multiple partners

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[125] Section 57(2) Code of Zulu Law.

[126] J.C. Bekker and J.J. Coertze, *"Seymour's Customary Law in Southern Africa"* (1982) 130.

[127] Section 1(1).

[128] T. W. Bennett *"Customary Law in South Africa"* (2004) 337.

whereas women cannot. Those who support the practice argue that polygamy is justifiable as there are more women than men so; marrying more than one wife balances the scale. This justification limits the status of women to objects of men's gratification. Polygamy is further unfair because it places women at risk of contracting sexually transmitted diseases because they share the husband with multiple other partners. The practice of affiliating wives to the household because one wife is barren makes it look like marriage in the Zulu community is only based on the childbearing abilities of women. The custom of polygamy violates women's rights to human dignity because they are only used by men to show how powerful they are by the number of wives they are able to pay lobolo for. It is also likely to give rise to animosity amongst women in the household because the status given to each wife either gives her power or demeans her status as compared to that of the other wives in the household.

6. INHERITANCE RIGHTS

The right to inherit property in the Zulu community excludes women. Bennett submits that the guiding principle is always primogeniture in the male line.[129] Upon the death of the family head the eldest son of the deceased is the ideal candidate to inherit to the exclusion of all the other descendants of the deceased. If the eldest son cannot inherit his descendants will inherit and if his male descendant cannot inherit, the grandson of the ideal candidate will inherit. In the event of failure of any male issue in the eldest son's line, succession passes to the second son and his male descendants. If the deceased has no male offspring, his father inherits as the only heir and if the father predeceased the deceased the heir is sought among the father's male descendants related to him through the male line. Failing all the legible descendants, the paternal male issues of the deceased inherit to the exclusion of the deceased's widow or daughters.[130]

Chief Justice Langa argues that the exclusion of women from heirship and

[129] T.W. Bennett "*Customary Law in South Africa*" (2004) 337.
[130] T.W. Bennett "*Customary Law in South Africa*" (2004) 337.

consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.[131] The system of primogeniture was justifiable and practical in the olden days when extended families were still prominent. Modernisation has changed the situation in that families are no longer structured and organised along traditional lines, nuclear families having now replaced extended families. The application of the customary law rules of succession is not in line with the changing circumstances of the communities they apply to.

The South African Law Reform Commission (the Law Commission) has described the hardships that the application of customary rules of succession causes to widows in a society with changed circumstances.[132] The Law Commission has cited three reasons for such hardships:

(a) the fact that social conditions frequently do not make "living with the heir" a realistic or even a tolerable proposition;

(b) the fact, frequently pointed out by the courts, that the African woman "does not have a right of ownership" and

(c) the prerequisite of a "good working relationship with the heir" for the effectiveness of "widow's right to maintenance."

The Law Commission concludes that:

> "Unfortunately, circumstances do not favour this relationship. Widows are all too often kept on at the deceased's homestead on sufferance or they are simply evicted. They then face the prospect of having to rear their children with no support from the deceased's family."

Chief Justice Langa points out in *Bhe v Magistrate Khayelitsha & Others*[133] that the basis of the constitutional challenge to the official customary law of

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[131] *Bhe v Magistrate, Khayelitsha & Others* 2004 (4) BCLR 27 (C) para. 78.
[132] The South African Law Reform Commission, "*The Harmonisation of Common Law and Indigenous Law: Succession in Customary Law*" Issue Paper 12, Project 90 (April 1998) 6-9.

succession is that it (the rule of primogeniture) precludes (a) widows from inheriting as the intestate heirs of their late husbands;[134] (b) daughters from inheriting from their parents;[135] (c) younger sons from inheriting from their parents and (d) extra-marital children from inheriting from their fathers.[136] The conclusion reached by the court was that the exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under the constitutional order.[137]

The principle of primogeniture also violates the right of women to human dignity as guaranteed by the constitution[138] as it somehow implies that women are not fit or competent to own or administer property. This situation subjects women to a status of perpetual minority, placing them under the control of male heirs, by virtue of their sex and gender. The principle of primogeniture prevents all female children from inheriting and it discriminates against them too. The justification for the rule of primogeniture is that it keeps the property of the family within the family cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.

7. MOURNING

The custom of mourning involves abstaining from doing some things and avoiding certain places as a sign of showing grief for the death in the family. For the purposes of this study, the discussion of the custom of mourning will be confined to the extent to which the custom limits the rights of women who are made to mourn the death of their husbands in a way that people now view as being customary to the Zulu community. The mourning period begins at death; it is strictest until burial. In the olden days, the husband or wife used to mourn for

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[133] 2004 (4) BCLR 27 (C) para. 88
[134] *Makholiso and Others v Makholiso and Others* 1997 (4) (TkS) 519 E
[135] *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); [2000] 3 All SA 219(A)
[136] *Bhe v Magistrate, Khayelitsha & Others*, 2004 (4) BCLR 27 (C) para. 88.
[137] Ibid para 91.

two years. Reggie Khumalo, an expert in Zulu customs discussed the method that was used in the olden days by people who were mourning.[139] He says that in the olden days women used a certain breed of grass that was plaited and tied around the neck of the widow for the period of two years in case of the death of the husband and six months in the case of a child. The plaiting of the grass was meant as a symbol to prevent further deaths in the family.[140]

In the Zulu community, as mentioned earlier, this custom is still observed although the requirements have been made easy especially when it comes to men mourning for their wives. During the mourning period, the widow has to wear certain clothing specified and made especially for mourning and in cases of widowers an armband is used to show that they are mourning. The clothing identifies a widow in that it is normally one colour and of the length that the family feels is suitable for the mourner. There are many rules associated with mourning that affect or limit the freedom of the mourner. During the period of mourning the wife has to stay away from places where there are many people, she has to conduct herself in a way fit for a mourner.

The practice of mourning might have been valid in the olden days because people depended on farming for sustenance and now people have to work to earn money to live. In the olden days, it was men who worked to support their families and now everyone has to earn money to make a living. The plight of mourning women is further aggravated by the fact that they do not have inheritance rights so during the time they are mourning they have no income and they have to rely on the heir of the husband's estate. The custom of mourning therefore inhibits the ability of the woman mourner's participation in equal terms with men as required by CEDAW[141], in that during the mourning period widows cannot practice their trades as their male counterparts. This is more so because

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[138] Section 10.
[139] *Isolezwe*, 14 December 2004. The article was entitled "*Kleza ugwansile: Ukuzila kufike nenkolo yaseNtshonalanga.*"
[140] Ibid.
[141] Article 2(c).

women cannot move around with their mourning attire whereas men can do as they please.

The custom has no validity because it does not serve any moral purpose nor does it have any benefit to the people practicing it. The custom of mourning is one of those that might be regarded as a "cheap excuse for every self indulgence."[142] No one has come up with a proper justification for the custom of mourning and it seems to have no place in the modern days as it affects the ability of people concerned to contribute effectively to the economy. Mourning as it occurs prior to the funeral is justifiable as it shows respect to the dead but the continuation after burial has no justification.

8. CONCLUSION

There are reasons why customs exist and those reasons are based on what the community believes will promote respect and ties within members of the community. However, customs somehow become irrelevant because of the change in the way of life of the people practicing that custom. It would then seem that cultural relativists do not help in the development of their culture by insisting on doing things as they were done prior to the change in circumstances. There are some customs that have evolved so much that they have lost their original meaning. An example of that is the custom of paying ilobolo, which in its inception was aimed to develop the relations between the families of the prospective spouses and has now been transformed into a money-making scheme by the parents of prospective wives. This situation can only be addressed by going back to the way the custom was originally practiced.

T.R Nhlapho submits that African women are expected to become wives at some stage in their lives and as wives they are required to be, first and foremost, mothers. It is only in a minority of cases that issues of womanhood are relevant in

[142] G. Devenish "*A Commentary on the South African Bill of Rights*" (1998) 2nd ed. 423.

isolation from those of wifehood (or widowhood) and motherhood. It can be said, as wives African women do not enjoy a great deal of freedom of choice.[143] This situation seems to apply to all races but is prominent in the African culture because it promotes family life more than individuality. The situation explained by Nhlapho is what cross-cultural psychologists regard as a gender etic. All the women in one way or the other are expected to be one of the things Nhlapho mentions the only difference being the way that those stages are experienced and expressed in different ways in different cultural or religious groups.

From the above discussion of individual customs it becomes clear that some customs have run out of time and the continued practice of such violates women's rights to gender equality and human dignity. Examples of such are the exercise of marital power, polygamy and mourning (as it is practiced now). Some customs have evolved to an extent that their original purpose has been lost and they have to be done away with or be regulated in terms of the original purpose behind their practice. An example of such a custom is the payment of ilobolo. One can then conclude that culture leaves a lot of room for gender inequalities.

[143] T.R. Nhlapho "The African family and women's rights: Friends and foes?" *Acta Juridica (*1991) 48.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

1. INTRODUCTION

International law makes provisions for both the right to gender equality and the right to practice culture. Cultural rights are based on the appreciation of differences that exist between cultural groups amongst a specific country's population. This means giving the different cultural groups the right to practice their culture without undue interference from anyone. However in a democratic society like South Africa all rights are limited to be in line with the constitutional values which include equality and human dignity. It is clear that a conflict can exist between the right to gender equality and the right to practice culture because of the fact that most African cultural practices promote patriarchy and disregard the right of individuals to equal status within the cultural community.

Gender identity is a social construction, whose rationale is related to the biological difference between the sexes. The way in which gender identity is formed reflects the particular needs and the world view of each society. Culture and gender are intertwined, interdependent, and mutually defining to a certain extent.[144] Women have been and are still viewed as "guardians of culture" and in that way they are expected to sustain the existence of culture by disseminating it to their children. This duty given to women makes them stick to practicing culture even if it may be harmful to their health or wellbeing. This can be viewed as being what cross cultural psychologists call etics[145] in that in a majority of societies, even Western women are the ones expected to disseminate culturally correct behaviour to their children.

The right to practice culture is essential in the realisation to the right to self

[144] S. Dawit and A. Busia "Thinking about culture: some programme pointers" *Women and Culture,* (1995) 8.
[145] S. M. Burn "*The Social Psychology of Gender*" (1996) 37.

determination of groups that exist within the Republic. It is important that culture has to be viewed in its entirety to avoid ruling out specific cultures as being contrary to constitutional values on the basis of the fact that they promote gender inequality as it is clear that some customs infringe on women's rights to equality. The international community through treaties recognizes both the individual's right to practice culture in community with members of his or her cultural community and the right to equality. The right to equality can be classified as a cornerstone of any democratic society. The right however is not clear cut as there is no yardstick of who is equal or upon whose standards is equality achieved. In a country like South Africa, which has a diverse society and a history of apartheid where people were discriminated on the basis of their colour and race, it is difficult to come up with a clear answer as to whose standards one must consider as equal.

Gender equality is a further hurdle in the struggle for equality as women in general are struggling to be regarded as equal to men. Amongst the women, there are also class and racial differences. That further complicates the issues of equality. The promotion of human rights and democracy requires recognition of diversity and the distinct features of each diverse group. The international law jurisprudence on human rights has been developed to accommodate and promote human rights values. It has to be noted however that the indigenous communities including the Zulu community base their lives more on a communal system, whereas the human rights system is based on individual rights. This somehow leads to conflict as jurists want to test customs on the basis of the human rights system rather than on the basis of what the specific custom was aimed to achieve within the specific society. In a Constitutional Court decision, Chief Justice Langa notes that customary law has been distorted in a manner that emphasises its patriarchal features and minimises its communitarian features.[146] The judge refers to T.R. Nhlapo and quotes:

> "Although African law and custom had a patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many

cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young"[147]

From the above it is clear that customary law has not been given a chance to develop on its own, but it has been distorted to accommodate to an extent that even members of the cultural groups feel that they do not have to practice culture because the system is not on par with the way of life people live in this age. This is further exacerbated by some of the members of the cultural groups who use culture and customs as a way to infringe on the constitutional rights of other members of the group. The most important issue now is whether culture still has any significance in the democratic society and if that is the case how do the cultural groups and the whole society deal with the discrepancies within the system of customary law.

2. RECOMMENDATIONS

The Convention on the Elimination of all Forms of Discrimination Against Women provides that state parties have an obligation to pursue by all appropriate means a policy of eliminating discrimination against women and undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.[148] This requirement creates a burden on state parties to the Convention especially in democratic countries who purport to promote the notion of diversity. The said states have to apply the cultural relativism theory in attempting to modify or abolish existing customs which they feel are not conversant with the international human rights provisions. State parties therefore should make it a point that they consider the moral benefit of the said custom and in the context of the community that practices it.

It is clear that persons belonging to cultural groups have the right to practice their

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[146] *Bhe v Magistrate Khayelitsha & Others*, 2004 (4) BCLR 27 (C) para 89.
[147] T.R. Nhlapho "African customary law and the interim constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective"* (1995) 162.
[148] Article 2 (f).

culture in community with members of their cultural groups. However there is no remedy for members of the cultural groups who fall victims to the misuse of culture as an "excuse for self-indulgence". It follows therefore that as times change to customs have to be modified to suite the needs and the lifestyle of people without losing its moral fibre. People belonging to cultural groups have to be informed of their rights and the ambit in which they have to practice those rights. This would help in resolving the misunderstanding that occurs when in comes to conflicting rights. In *Mabena v Letsoalo*[149] the presiding judge voiced his views on culture and said:

> "I am of the view that if there be such a custom and I do not so find, whereby a person is discriminated against solely upon the ground of sex that custom has out-lived its usefulness and is at present not in conformity with public policy. Our customs if they are to survive the test of time must change with the times."

This observation gives members of cultural groups an obligation to ensure that their customs change and are in line with the whole system.

The development of culture is in the hands of both the legislature and the cultural groups practicing the culture to ensure that it is properly developed and in line with the constitutional values. Section 8 (3) (a) and (b) dealing with the application of the Bill of Rights specifies that in order to give effect to the right in the Bill, the courts must apply, or if necessary develop the common law to the extent that legislation does not affect that right and may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).[150] Customs need to be brought in line with the provisions of the Bill of Rights and if they cannot be able to develop that could mean they have to be discarded. The conclusion to discard a specific custom can only be taken after it has been decided that there is no way that the specific custom can be developed and it does not have any relevance to the community that is practicing it but it is only used as an excuse for self indulgence.

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[149] 1998 (2) SA 1086 T.

3. CONCLUSION

The individual's personality is realised through his culture therefore respect for individual differences entails a respect for cultural differences. It is clear from the above discussion of specific customs that the Zulu culture does infringe on the right of women to gender equality and that situation has to be rectified in a way that would develop culture in line with the constitutional values. Although there has been no technique for evaluation of cultures that has been devised standards and values are relative to the culture from which they derive. It is therefore clear that in evaluating culture the observer has to bear in mind the values, benefits and extent to which the specific custom observed benefits or impinges on the rights of the members of the group. This will make the development of a specific culture possible and to the benefit of the members of the group concerned.

[150] Act 108 of 1996

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