THE IMPLEMENTATION OF HUMAN RIGHTS PRINCIPLES IN POST APARTHEID SOUTH AFRICA : THE QUESTION OF AN INTERNATIONAL STANDARD

by

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Introduction

Fifty years after the adoption of the Universal Declaration of Human Rights in 1948, both academics and non-academics alike still question the universality and validity of human rights principles. The questioning appears to have arisen in part from the persistent and gross violations of fundamental human rights in most part of the world.

Some anti-human rights activists are of the opinion that the Universal Declaration of Human Rights is a successful failure while human rights advocates are of the view that the declaration has achieved some level of success.

The reasons often advanced by the anti-human rights activists as evidence of the abysmal failure of the Universal Declaration of Human Rights revolve around the global increase in the constant violation of human rights and the degrading treatment of human beings in our society. These anti-human rights activists often attribute these violations to a wide and complex variety of factors and forces which include among others, economic conditions, structural social factors and political expediency.

According to Abdullahi Ahmed An Naim[1] lack or insufficiency of cultural legitimacy of human rights standard is one of the main underlying causes of violation of those human rights standards. His contention is that there is need to

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[1] Abdullahi Ahmed An-Naim, 'Towards a cross-cultural approach to defining international standards of Human rights : The meaning of cruel, inhuman or degrading treatment or punishment' in *Human Rights in Cross-Cultural Perspectives : A Quest for Consensus.* (1992) pp 19-33.

advance the universal legitimacy of human rights by addressing some of the difficulties facing cross-cultural analysis and by examining some of its specific implication. To the extent that the search for universal legitimacy of human rights through cross-cultural analysis and reinterpretation is accepted as a useful approach to enhancing the credibility and efficacy of an international standard. He argues further that after the above analysis, the remaining challenge is to develop the appropriate methodology for identifying and pursuing the standards goals. In the new constitution of South Africa, human rights principles have been entrenched under the Bill of Rights. As a matter of fact, the Bill of Rights was inscribed in the constitution to safeguard human rights principles. The Bill of Rights is described by the constitution itself as the "cornerstone of democracy in South Africa".

In view of the importance attached to human rights principles as embedded in the Bill of Rights of the South African Constitution, this paper attempts to examine critically those areas where South Africa has successfully implemented human rights in terms of the international standard. In the same vein, an attempts will be made to discuss those areas where it will be difficult to achieve the international standard. In considering the implementation of human rights principles, the first clause that comes to our mind is that of human dignity. With regards to human dignity, the Universal Declaration of Human Rights stipulates that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This is a very important clause mainly because it affects every society and also because inhuman treatment or punishment is prohibited by regional instruments, such as the European convention for the protection of Human Rights and Fundamental Freedoms, as well as under the international system of the United Nations.

However, for a full understanding of this clause and how it has been implemented in South Africa, it is necessary for us to review the clause as stipulated by the United Nations.

The meaning of The Clause in the United Nations Perspective

In terms of the Universal Declaration of Human Rights of 1948, the General Assembly proclaims this Universal Declaration as "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constant in mind, shall strive by teaching and education to promote respect for these rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of territories under their jurisdiction".

Article 5 of this declaration stipulates that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Both human rights treaties and customary international law prohibit torture and impose obligations on Governments to prevent and punish acts of torture[2]. The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as "any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

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[2] Universal Declaration of Human Rights, Article 5, ICCPR, Article 7; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). The discussion of Nigel Rodley, *Treatment of prisoners under International law*, (1987), pp 63-65. Oxford University Press.

consent or acquiescence of a public official or other person acting in official capacity[3]". Under this definition, State agents and individuals who are found to have dealt with other human beings in a manner that is inhuman are held liable for torture, cruel and degrading treatment.

Using the definition contained this Article as background, we now proceed to assess how the courts in South Africa have implemented this Article of the Universal Declaration of Human Rights. Chapter two of the South African Constitution deals with the Bill of Rights and Section 10 of the Bill of Rights deals with Human dignity. This section states that "Everyone has inherent dignity and the right to have their dignity respected and protected". The right to human dignity in this section can be regarded as one of the core constitutional rights since the Bill of Rights must be interpreted so as to promote the constitutional desire to create an open and democratic society which is functionally based on human dignity, equality and freedom.

The issue of Dignity and Punishment

In the case of *S v William*[4], five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a 'moderate correction' of a number of strokes with a light cane, was brought into convention. The issue in this case was whether the sentence of juvenile whipping, pursuant to be provisions of section 294 of the South African Criminal Procedure Act[5], is consistent with the provisions of the constitution of the Republic of South Africa

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[3] See the details in Article 1 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).

[4] S V William (1995)3 *South African Law Report*, 632 (cc).

[5] See Act 51 of 1977 (as amended). For convenience, this will be referred to simply as 'the Act'.

with regard to Chapter Two[6]. The applicants in this case are all males and they are juveniles. Three of them, namely, Williams, Koopman and Mampa, were each sentenced to suspended prison sentences in addition to the juvenile whipping. The remaining three were sentenced to juvenile whipping only.

The Provincial Division of the Supreme Court saw the matters in two ways : all the cases were subject to automatic review in terms of section 302(1)(a) of the Act because of the terms of imprisonment, albeit suspended, imposed on the applicants themselves.

In addition to this automatic review, Mr A P Dippenaar, who presided over the case involving Williams, requested that the sentence of strokes be subjected to special review in terms of Section 304(4) of the Act. He took this step because he doubted whether juvenile whipping was still permissible in the light of the new Constitution and in view of the decision in Ex Parte Attorney-General, Namibia : In recorporal Punishment By Organs of State[7]. Whether, as a matter of strict law, the magistrate was correct in deferring the execution of the whipping[8] is not an issue. He deserves to be commended for treating as a matter of priority an issue involving fundamental human rights and, in particular, the application of the provisions of Chapter 2 of the present constitution. A sentence of juvenile

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[6] See Chapter 2 (Bill of Rights) of the present constitution of South Africa, as amended on 11 October 1996 by the Constitutional Assembly.

[7] (1991) 3 *South African Law Report* 76 (NmS).

[8] In S V Pretorius (1987) 2 *South African Law Report* 250 (NC) it was held that, where a magistrate has, in terms of Section 294 of the Act, sentenced a juvenile offender to a whipping, and has conjoined a sentence which is subject to automatic review to the whipping, the magistrate does not have the jurisdiction to suspend the infliction of the whipping pending the result of the review. This case might ofcourse be distinguishable on the basis that what is at issue here, and what is sought to be reviewed, is the sentence of whipping.

whipping in terms of section 294 of the Act is not normally reviewable[9]; the whipping is therefore administered immediately after sentence is passed. There are countless instances in the past where courts sitting on appeal or review have had to set aside sentences imposed by trial courts because of irregularities ; where those offenders had been sentenced to a juvenile whipping, the punishment would almost invariably have been carried out already. Once a whipping has been administered, as in this William's case, any decision which this court comes to will make no practical difference to them for purposes of the present proceedings. Mindful of this, Mr Dippenaar who presided over the case ordered that the sentence of five strokes imposed by him on the applicant Williams should not be carried out until the issue, whether or not the punishment was consistent with the constitution, had been finally decided by the Constitutional Court. The case was therefore referred to the Constitutions Court.

The Constitutional Court held the provisions of Section 294 of the Criminal Procedure Act, which provide for juvenile whipping as a sentencing option, violated ss10 (human dignity) and 11(2) (cruel, inhuman and degrading punishment) and could not be saved by the operation of Section 33. The issue was to a large extent rendered academic since the state, which had originally argued that corporal punishment was constitutional, had subsequently accepted the unconstitutionality of this sentencing option. Argument on the issue was, however, presented in the Court[10].

Langa J, delivering the unanimous judgement of the constitutional court, referred to the growing consensus in the international community that judicial whipping

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[9] Cf Steve Pete "To smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children" (1998)3 *South African Journal on Human Rights* 443.

[10] (1995) 3 *South Africa Law Report* 632 (CC)(1995)3 *South African Criminal Report* 251 (4).

offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. In attempting to convince the court that juvenile whipping was a justified infringement of various rights, it was argued by the state that juvenile whipping had advantages for both the offender and the state, especially in the light of limited resources and the infrastructure for implementing the other sentencing options, and that it acted as a deterrent.

However, Langa, J., disagreed with this line of reasoning and the logic, by drawing our attention to other more enlightened sentencing options (such as correctional supervision and community service orders). He was of the opinion that no clear evidence had been advanced that juvenile whipping is a more effective deterrent than any other available forms of punishment. The provisions of Section 294 of the Criminal Procedures Act, therefore, impose limits on the rights contained in ss10 and 11(2) which are unreasonable, unjustifiable and unnecessary[11].

In this case the constitutional court held that the measures that assail the dignity and self-esteem of an individual will have to be justified ; there is no place for brutal and dehumanising treatment and punishment. The constitution has allocated the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society, as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one of such values ; acknowledging it includes an acceptance by society that even the vilest criminal remains a human being possessed of common human dignity. The above statement is a confirmation of the support on validation given

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[11] J. Burchell and J. Milton, *Principles of Criminal Law* (1997), pp 54-56.

by the South African Constitutional Court to the principles of Human Rights as clearly stated in Article 5 of the Universal Declaration of Human Rights.

In the case of *State vs. Makwanyane* [12] two appellants had been convicted in a Local Division on inter alia, four counts of murder and on each count they had been sentenced to death. They made an appeal against the convictions and sentences but the court on appeal held that there was no merit in the appeals against the convictions. As regards the death sentences it was contended on behalf of the appellants that the imposition of the death sentences was unconstitutional by virtue of the provisions of section 9 or section 11(2) in Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993, which came into effect on 27 April 1994. The court was of the opinion that the death sentences were in the circumstances of the case, the proper sentences and that it was possible that section 241(8) of the constitution authorised the court to confirm a death sentence even though it might be in conflict with the constitution : the court was however doubtful whether the Appellate Division had the power to interpret section 241(8), but, even if it did it would be better first to obtain the decision of the Constitutional Court concerning the validity of the death sentence[13]; and that was a question in respect of which, in terms of section 101(5), read with section 98(2), of the Constitution, only the Constitutional Court had jurisdiction. The court accordingly ordered that further consideration on the issue of death sentence must be referred to the Constitutional Court.

In the Constitutional Court, Chaskalson, P (President of the Constitutional Court) delivering the principal judgement of the Constitutional Court drew attention to

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[12] State v Makwanyane and others. 1995(2) *South African Criminal Report* 1(cc).

[13] Cf P M Maduna "The death penalty and Human Rights" (1995)11 *South African Journal on Human Rights* 193.

the fact that the death penalty is inherently cruel, inhuman and degrading punishment. He argues that the imposition of the death penalty was arbitrary and unequal in its operation and constituted an impairment of human dignity.

According to Chaskalson, P, section 277(1)a of the Criminal Procedure Act[14], which provided for the imposition of the death penalty for murder conflicted with section 11(2) which prohibits cruel, inhuman and degrading punishment and such infringement of section 11(2) was not justified in terms of section 33.

Separate judgements, all concurring with that of Chaskalson P, that capital punishment was unconstitutional, were delivered by all the other 10 Constitutional Court Justices[15]. Ackermann is of the view that life imprisonment may be the

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[14] Criminal Procedure Act 51 of 1977.

[15] For example, in Ackermann J's Judgement, in emphasising the inevitably arbitrary nature of the decision to impose the death penalty, held that it infringed both the right not to be subjected to cruel and inhuman punishment in section 11 and the right in section 9 and that such infringement could not be rescued by section 33. With regards to Didcott J's judgement, he argues that capital punishment violated section 9 and s11(2) and may even negate the essential content of section 9, but considered it prudent not to pronounce on whether the essential content of the right had been negated. He agreed with Chaskalson, P, that the question was not whether the death penalty had a deterrent effect, but whether its deterrent effect happens to be significantly greater than that of the alternative sentence available. In Kriegler J's judgement, he concluded that capital punishment was inconsistent with section 9 and located the right to life at the pinnacle of the constitutionally protected rights. In terms of Langa J's judgement, he emphasised the Concept of ubuntu as incorporating the protection of the right to life and dignity, also regarded the imposition of capital punishment as infringing on human rights to life. In Madala's judgement, he pointed out clearly that death penalty conflicted not only with the concept of ubuntu but also with Section 11. In Mohamed's judgement, he was of the view that the imposition of death penalty prima facie infringed the right to life, equality (58), dignity (510) and was cruel, inhuman and degrading. Mokgoro J, in delivering her judgement, regarded the imposition of capital punishment as an affront to the right to life and dignity and cruel, inhuman and degrading treatment. She regarded the imposition of the death penalty as violating the essential content of the right to life. O'Regan, J, in her judgement was of the view that the imposition of capital punishment constituted a breach of section 9, section 10 and section 11(2) of the Constitution. She placed the right to life in a paramount position and gave it a broad meaning which incorporated the

necessary trade-off for the abolition of capital punishment in order to protect society from seriously harmful conduct.

Generally speaking, it appears that all the 11 judges on the Constitutional Court in *State v Makwanyane*[16] agreed that the imposition of capital punishment unjustifiably infringed Section 11(2). Justices Ackermann, Didcott, Kriegler, Langa, Mohamed, Mokgoro, O'Regan and Sachs respectively held that death sentence unjustifiably infringed section 9 and section 10 of the new South African Constitution[17]

The Constitutional Court did well by holding firmly to the fact that death penalty is a gross violation of an individual's right to life. The decision of the Constitutional Court on this case is compatible with the International Standard on human dignity. As a matter of fact, the judgement is quite laudable in light of the Universal Declaration of Human Rights. In most civilised society, the death penalty is regarded as cruel, inhuman and degrading.

Historically, it can still be recalled that the main factor that motivated the entrenchment of Article 5 of the Universal Declaration of Human Rights was to prevent the re-occurrence of atrocities such as those committed in concentration

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right to dignity. In Sachs J's judgement, he placed emphasis on the right to life as well as the right to dignity. Like some of the other judges, he also emphasised the need to take into account the values of South African Society, in particular the idea of African Philosophy of ubuntu. With regard to Didcott J's judgement, he argues that capital punishment violated section 9 and S11(s) and may even renate the essential content of section 9, but considered it prudent not to pronounce on whether the essential content of the right had been negated. He agreed with Chaskalson P, that the question was not whether the death penalty had a deterrent effect, but whether its different effect happens to be significantly greater than that of the alternative sentence available.

[16] State v Makwanyane. 1995(2). *South African Criminal Report* 1(cc).

[17] J. Burchell and J Milton, op cit pp 49-56.

camps during the Second World War. Having discussed the implementation of Article 5 of the Universal Declaration of Human Rights in the context of South African Courts, we will now examine Article 17 of the Universal Declaration of Human Rights.

Article 17 states that :

i) Every one has right to own property alone as well as in association with others ;

ii) No one shall be arbitrarily deprived of his property.

The issue under assessment in this discussion is to find out the extent or otherwise to which South African Courts have been successful in implementing Article 17. Section 25 of the South African Bill of Rights includes the property clause. This clause protects individual rights to property and it embraces three broad categories of right claims, namely :

a) Claim to an immunity against uncompensated expropriation of private property by the State. This buttresses the fact that the State cannot lawfully take over property unless it pays for it.

b) Claim of right to hold property. This is supported by Article 17 of the Universal Declaration of Human Rights. "Everyone has the right to own property alone as well as in the association with others".

c) Claim to have property. The main argument here is that all people have a moral right to have at least enough property to enable them to live. It is state responsibility to at least provide minimum comfort for everybody.

Section 25 of the Bill of Rights shows that the Property Clause embraces the real rights recognized by the law of property, rights such as ownership, mineral rights, servitude etc. It includes the right to use something and exclude others from it, the rights to transfer something to another and the right to instruct another person not to use his property like a trade mark, on ideas and/or an invention (Intellectual property).

In this paper, we intend to examine the issue of intellectual property to evaluate how successful the courts in South Africa have protected the use of intellectual property to conform with the international standard.

One of the most recent court cases we shall examine is that *of Joburgers and Dax Prop cc vs. McDonald*[18]. The facts of this case are as follows : In South Africa, McDonald was the registered proprietor of various trademark among which are McDonald, Big Mac, and Golden Arches Devile (the "McDonald's trade marks"). These various trade marks were registered in 1968, 1974, 1979 and 1985. In 1993 Joburgers Drive Inn Restaurant (Pty) Limited (Joburgers) filed an application for the expungement of the above trade marks simply because at the time of registration, McDonald had no bona fide use thereof for the five years period proceeding the date of the application for expungement.

MacDonald vehemently opposed Joburgers application. Joburgers went further to indicate his interest in using the McDonald's trade marks. In view of this, McDonald immediately launched an urgent application in the Supreme Court against Joburgers for an injunction so as to stop Joburgers from using McDonald's trade marks. At this point in time, the Supreme Court was said to have granted a

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[18] See South African Trade Marks Act of 1993, page 12.

temporary injunction in favour of McDonald waiting for the outcome of the expungement application[19].

In 1994, Dax Prop cc (Dax) filed applications against McDonald's trade marks and brought an application before the Supreme Court for the expungement of the McDonald's trade marks on the same grounds as Joburgers. On the other hand, McDonald brought a counter-claim for trade mark infringement.

It is interesting to note the main defenses raised by McDonald in both cases. In the first defense, McDonald argued that at all material time relevant it always had a bona fide intention to use its trade marks in South Africa. In the second defense, McDonald relied on the Trade Marks Act no 62 of 1963 condoning the non-use of a trade mark where such non-use was due to special circumstances in the trade. McDonald made it clear that the American Anti Apartheid Legislation against South Africa amounted to such circumstances.

On 1st of May 1995, South Africa promulgated a new Trade Marks Act, No 194 of 1993. Section 35 of this Act makes a provision for the protection of "well known" foreign trade marks so as to help South Africa conform with article 6 bis of the Paris Convention (International Standard in Protection of individual property). In view of this article, McDonald brought a further application for an injunction against Joburgers and Dax Prop from using the trade marks of Macdonald for the fact that McDonald as a trade marks was a "well known" foreign trade mark in South Africa.

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[19] Cf A J van der Walt "Double property guarantees : A structural and comparative analysis" (1998)4 *South African Journal on Human Rights* 561.

Unfortunately the decision of Court a quo was not favourable to McDonald for various reasons advanced by the Court. One of such reasons was that McDonald did not prove to the satisfaction of the Court that its trade marks were "well known" in South Africa. In view of this judgement by Court a quo, McDonald appealed to the Appellate Division of the Supreme Court. The Appellate Division's interpretation of Section 35 (well known) was quite different from that of the court a quo. The Appellate Division pointed out that South Africa had followed the "hard line approach" in passing-off proceedings in which it was necessary to establish, in addition to a reputation, a good will in South Africa before a claim in respect of passing-off could be found. The court went further to buttress the fact that section 35 was enacted for the purpose of protecting foreign trade marks which had a reputation in South Africa but had not yet established a good will in South Africa by commencing business.

The second point emphasised by the Court was that section 35 remedied the fact that South African common law as set out above did not enable South Africa to meet its international obligation and at the same time conform with article 6 bis of the Paris Convention. These were the factors considered by the Appellate Division in interpreting the concept of "well known".

The Appellate court disagreed with the judgement of the court a quo after advancing its own reason and ruled in favour of McDonald. This final judgement by the Appellate Division removed the International Stigma that was already placed on South Africa that it does not respect Article 17 of the Universal Declaration of Human Rights in terms of both the rights for an individual to own property and not to be arbitrarily deprived of his/her property. In addition to this, this judgement of the Appellate Division finally put to rest the other international criticism that South Africa does not fulfil its obligations under Article 6 bis of the Paris Convention by not protecting "well known" international trade marks.

This final judgement of the Appellate Division confirms that South Africa courts have achieved some level of success in the implementation of Human Rights Principles in terms of the International Standards. From our discussions so far we have shown those situations where South African courts have achieved international standards in implementing Human Rights Principles. However, there are situations where it will be difficult to achieve international standards. These situations will now be the focus of the remaining part of this paper.

Situations where it will be difficult to achieve the International Standard

Article 27 of the International Covenant on Civil and Political Rights of 1966 supports the Universal Declaration of Human Rights and requires State respect for the culture and language of the people. Article 27 states as follows :

"In those states in which ethnic, religions or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". This Article 27 agrees with s30 and 31 of the Bill of Rights of the South African Constitution. s30 and 31 accords rights to members of cultural, linguistic and religious communities to participate in their culture, language and religions with other members of the community. In summary, s30 and 31 of the Bill of Rights of the South African Constitution provides as follows :

Section 30

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31(1)

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community :

a) to enjoy their culture, practice their religion and use their language ; and

b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

c) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Having summarized some of the issues in the Bill of Rights we will now examine the implementation of Human Rights Principles in light of the customary marriage of the people of South Africa which ofcourse is based on their cultural beliefs and values. Before customary marriage can be approved by the family members of the bride the bridewealth (lobolo) must be paid by the family members of the bridegroom. According to Schapera, L[20], the main function of the payment of lobolo is to transfer the reproductive power of a woman from her family to that of her husband. He argues that this fact is of considerable importance, for upon it rests the whole concept of legitimacy of the customary marriage.

Hollerman, F,D[21]. sees the payment of lobolo as an undertaking by a husband and his family to deliver a specified number of cattle or other compensation, which

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[20] L. Schapera, Tribal Legislation among the Tswana of the Bechuamaland Protectorate, *Monographs on Social Anthropology*. No 9 (1943).

[21] F D Hollerman. *The recognition of Bantu Customary Law in South Africa* (1955). Leiden University Press, pp35-47

will enable the husband to obtain a wife for their own procreation. He points out clearly that these obligations intended by the parties cannot therefore be regarded as fully achieved until the full amount of marriage compensation agreed upon has been delivered.

According to Bekker, J.C.[22], lobolo is the rock on which the customary marriage is founded. He argues that there is considerable justification for the view that lobolo contract has a greater binding force than a marriage at common law. From my personal observation, the principal aim of lobolo is to create a life long conjugal association. In view of the significance of the payment of lobolo before a customary marriage can be recognised, we decided to interview 70 female respondents about their opinions on the payment of lobolo in terms of human dignity. We solicited this information through the help of questionnaires and oral interviews.

The result of the interview shows that 60% of the respondents are of the view that the amount paid on 'lobolo' must be reduced, 33% are of the view that 'lobolo' must be abolished and 7% are of the view that it must be left intact. The general opinion of those respondents who felt it should be abolished was based on the fact that in the process of negotiation on how much 'lobolo' is to be paid on them, they are not only commodified at that point in time but it also affects their human dignity.

Let us assume in view of the above feelings of the respondents, the Government of South Africa decides to constitutionally abolished the payment of 'lobolo'. Partly because it affects human dignity and mainly because it is not compatible with the Universal Declaration of Human Rights in terms of Article 5. Then a problem

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[22] J C Bekker, *Customary Law in South Africa* (1989) Cape Town : Juta and Company.

arises with regards to section 15(3) of the South African Bill of Rights which provides that the legislature is not precluded from recognising certain marriages and systems of personal and family law. This confirms that any legislation to abolish 'lobolo' will be challenged on the basis of individual freedom to practice their beliefs system and the right of individual freedom of religion.

Section 30 of the South African Bill of Rights which deals with the language and culture precludes the legislature from abolishing the payment of 'lobolo'. This section states that "everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights".
Section 31(1) and (2) also precludes the legislature from abolishing the payment of 'lobolo'. This section clearly indicates that "persons belonging to a culturally religious and linguistic community may not be denied their rights, with other members of that community to enjoy their culture, practice their religion and use their language". From our research findings, 7% of the respondents who are in support of the payment of 'lobolo' have the constitutional rights to challenge any legislation promulgated to abolish 'lobolo'. As far as these respondents are concerned, the payment of lobolo is part of their culture and it should be left intact.

Apart from individuals challenging the abolishment of 'lobolo' the black communities at large can also challenge the legislature on the abolishment of 'lobolo'. The black communities would argue that the abolishment has denied them their rights to practice their culture, by paying particular attention to s31(1) and (2) of the constitution.

This particular problem has been identified recently by the South African Law Commission[23]. The Commission (SALC) made it clear that section 30 and 33 of the constitution allow individuals and groups the freedom to participate and pursue the culture of their choice. Implicit in this freedom is the duty on the State to recognise their cultural institutions. In view of this, the Commission's recommendation was that in order to remove the anomalies created by many years of discrimination, customary marriage must now be fully recognised and legalised. To do so will comply with Section 9, 15, 30 and 31 of the Constitution provisions which suggest that the same effect be given to African cultural institutions as to those of Western tradition. T.H. Bennett (1995)[24] argues that the State's duty to respect African cultural institutions is, at the same time, matched by its obligation to uphold human rights. He suggested that in formulating policy towards marriage, the state should pay much attention to Article 16 of the UN Declaration of Human Rights and Acts 10 and 23 of the International Convenants on Economic, Social and Cultural Rights and Civil and Political Rights[25]. This would enable the State to make standard and universal policy towards securing the right to marry and practice the culture of their choice.

Unfortunately, the new South African Constitution does not recognise customary marriage and its institutions like polygamy and yet section 15(3)(a) of the Bill of Rights of the Constitution does not prevent the legislature from recognising systems of personal and family law under any tradition. In this aspect, it can be argued that the South African constitution has not achieved international standard in terms of section 27 of the Universal Declaration of Human Rights which requires State respect for culture and language of the people.

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[23] SALC (1996) : *Report Project* 90 (22-23).

[24] T.W. Bennett, *Human Rights and African Customary Law* (1995), pp 28-33.

[25] Cf Anthony Costa "The Myth of Customary Law" (1998)14 *South African Journal on Human Rights* p.532.

There is urgent need for the South African Government to review and respect the culture of the people if it is to claim to have achieved an international standard in the implementation of the Universal Declaration of Human Rights.

It may still be recalled that section 30 of the Bill of Rights of South Africa states that everyone has the right to participate in the cultural life of his or her choice. This buttressed the fact that people have the right to practice customary marriage if they so desire and it must therefore be recognised and legalised. People often ask the question if this allows people to practice polygamy when this is considered as the culture of their choice. Ofcourse, yes, if this is the individual's choice. As far as we are concerned any attempt not to recognise customary marriage and its institutions amounts to not implementing Section 27 of the Universal Declaration of Human Rights. Some legal experts may argue that there are limitation clauses in which not all cultural values will be allowed. The question then arises to whose culture are we going to apply the limitation clause ? Is it African culture or the Western culture ?[26] this question cannot be answered easily and because of this, there is urgent need for the South African Government to investigate on how best this problem of cultural diversity can be resolved before fully achieving any international standard in the implementation of the Universal Declaration of Human Rights.

Conclusion

The problem of cultural diversity is quite an urgent issue that needs to be resolved. In view of this, an attempt will be made here to recommend some measures that can be taken to minimize the above problem.

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[26] Cf Anthony Costa. Ibid.

In the first place, I would suggest "internal negotiation settlement" between the different races of South Africa on their cultural differences. This process would involve reinterpretation and reconstruction of the different cultural values of the people. Racial group should come to a compromise on what they would accept among themselves. Culture itself is dynamic, it changes with the society. All the racial groups should be able to strike a balance and arrive at what suits the present situation if they are to achieve the International Standards in the implementation of Universal Human Rights. For one race or group of individuals to feel that their cultural values are superior to those of another is inhuman and a sweeping assumption.

This 'internal negotiation settlement' is likely to encourage good will, mutual respect, equality with each other's culture and at the same time create a positive relationship among this different races.

Finally, the ultimate goal of this 'internal negotiation settlement' is to agree on a body of beliefs to guide the action of the people. This is a necessary undertaking if an International Standard is to be achieved in the implementation of the Universal Human Rights Principles.